MUTUAL COOPERATION AND CRIMINAL EFFICIENCY UNDER REGULATION (EU) 2018/1805 FOR THE MUTUAL RECOGNITION OF FREEZING AND CONFISCATION MEASURES

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ABSTRACT

The present work is concentrated on the analysis of Regulation n. 2018/1805 and the "problems" created or the solutions that he tried to give in the internal regulations in the field of criminal cooperation and efficiency to the system of mutual recognition and collaboration between EU member states in the procedural criminal sector

Keywords: Regulation n. 2018/1805; mutual cooperation; criminal efficiency; european criminal law; freezing and confiscation measures.

COOPERAÇÃO MÚTUA E EFICIÊNCIA PENAL, AO ABRIGO DO REGULAMENTO (UE) 2018/1805, PARA O RECONHECIMENTO MÚTUO DE MEDIDAS DE CONGELAMENTO E CONFISCO

RESUMO

O presente trabalho está concentrado na análise do Regulamento n. 2018/1805 e os "problemas" criados ou as soluções que ele tentou fornecer nos regulamentos internos no campo da cooperação e eficiência criminais ao sistema de reconhecimento mútuo e colaboração entre os Estados membros da UE no setor penal processual

Palavras-chave: Regulamento n. 2018/1805 cooperação mútua; eficiência penal; direito penal europeu; medidas de congelamento e confisco.

1 INTRODUCTION

The principle of mutual recognition of decisions by judicial authorities of EU member states, codified in art. 82, § 1 TFEU[1] with respect to "any kind of judgment and judicial decision" (paragraph 2 letter a), was first adopted in the conclusions of the historic Tampere European Council of 15-16 October 1999, rising to one of the "cornerstones" of the area of freedom, security and justice:

> "criminals must find no ways of exploiting differences in the judicial systems of member states and no hiding place for (…) the proceeds of crime within the Union"[2].

The mutual recognition, and therefore the direct "circulation" between the judicial authorities of the judicial measures, marks the abandonment of the conventional assistance system, based on the slow and cumbersome rogatory mechanism, and is based on mutual trust between the member states, thus presupposing respect for the principles of the rule of law[3]. This principle is already extended in the Tampere conclusions also to the provisions for seizure and confiscation

> ("the principle of mutual recognition should also be applied (…), in particular to those which would enable competent authorities (…) to seize assets which are easily movable")[4].

Precisely to implement this principle, the European Parliament and the Council of the European Union have adopted the Regulation for the mutual recognition of all types of seizure and confiscation orders issued in the context of a proceeding in criminal matters, including the provisions of extended confiscation, confiscation of third parties and, in particular, confiscation

[1]U. BECKER, J. SCHWARZE, A. HATJE, J. SCHOO, EU-Kommentar, ed. Nomos, Baden-Baden, 2019.
[2]A. HARTKAMP, C. SIBURGH, W. DEVROE, Cases, materials and text on European Union law and private law, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 282ss.
[3]V. MITSILEGAS, The constitutional implications of mutual recognition in criminal matters in the EU, in Common Market Law Review, 43, 2006, pp. 1277-1311. M. BORGERS, Mutual recognition and the European Court of Justice: the meaning of consistent interpretation and autonomous and uniform interpretation of Union law for the development of the principle of mutual recognition in criminal matters, in European Journal of Crime, Criminal Law and Criminal Justice, 18(2) 2010, pp. 99-114.
[4]For more details see: A. HARTKAMP, C. SIBURGH, W. DEVROE, Cases, materials and text on European Union law and private law, op. cit., K. LENAERTS, I. MASELIS, K. GUTMAN, European Union procedural law, Oxford University Press, Oxford, 2014, pp. 133ss. M. WIERZBOWSKI, A. GUBRYNOWICZ, International investment law for the 21st century, Oxford University Press, Oxford, 2015. A.H. TÜRK, Judicial review in European Union law, Edward Elgar Publishers, Cheltenham, 2010. L. WOODS, P. WATSON, Steiner & Woods European Union law, Oxford University Press, Oxford, 2017, pp. 37ss C. BARNARD, S. PEERS, European Union law, Oxford University Press, Oxford, 2017, pp. 788ss.E. BERRY, M.Y. HOMEWOOD, B. BOGUSZ, Complete European Union law. Texts, cases and materials, Oxford University Press, Oxford, 2013. G. CONWAY, European Union law, ed. Routledge, London & New York, 2015. F. NICOLA, B. DAVIES, European Union law stories, Cambridge University Press, Cambridge, 2017. J. USHERWOOD, S. PINDER, The European Union. A very short introduction, Oxford University Press, Oxford, 2018. J.L. DA CRUZ VILAÇA, European Union law and integration. Twenty years of judicial application of European Union law, Hart Publishing, Oxford & Oregon, Portland, 2014. T.H. FOLSOM, Principles of European Union law, including Brexit, West Academic, Minnesota, 2017, pp. 278ss. R. GEIGER, D.E. KHAN, M. KOTZUR, EUV/AEUV, C.H. Beck, München, 2016. M. DECHEVA, Recht der europäischen Union, ed. Nomos, Baden-Baden, 2018.

without conviction on 17 October 2018[5]. The proposal was presented on 21 December 2016 and amended in December 2017. The original version provided for the mutual recognition of the provisions enacted in a criminal proceeding, in the latest version in a "proceeding in criminal matters"[6].

The adoption of this Regulation represents a doubly significant event, because the principle of mutual recognition is affirmed in this sensitive sector, following the path already traced by the Framework Decision n. 783/2006/JHA[7] and also because the mutual recognition is imposed with a legislative provision directly applicable as a regulation, adopted with the ordinary legislative procedure on the basis of art. 82, par. 1 TFEU[8]. It is specified in recital n. 13 the cardinal principle of mutual recognition according to which

> "although such measures may not exist in the legal system of a member state, the member state concerned should be able to recognize and implement such measures issued by another member state".

In approving the Directive n. 42/2014 aimed at pursuing the harmonization of confiscation measures, the Parliament and the Council had, in fact, invited the European Commission (EC) to a further analysis effort

> "to present a legislative proposal on mutual recognition of freezing and confiscation orders at the earliest possible opportunity" (...), as well as to identify a model of actio in rem shared in respect of common traditions: "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"[9].

With the Regulation in question, the path of mutual recognition was chosen, independently of the harmonization.

In the second direction, however, as stated in art. 41

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[5]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, PE/38/2018/REV/1, OJ L 303, 28.11.2018, p. 1-38.
[6]Commission Staff Working paper accompanying document to the Proposal for a Directive of the European Parliament and the Council of the freezing and confiscation for proceeds of crime in the European Union, SWD(2012) 31 final.
[7]Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation order, OJ L 328, 24.11.2006, p. 59-78. For further analysis see: C. KING, C. WALKER, J. GURULÉ, The Palgrave handbook of criminal and terrorism financing law, ed. Springer, Berlin, 2018, pp. 410ss.
[8]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, OJ L 127, 29.4.2014, p. 39–50. C. BARNARD, S. PEERS, European Union law, op. cit., pp. 589ss.
[9]L. KLIMEK, Mutual recognition of judicial decisions in european criminal law, ed. Springer, Berlin, 2016. S. MIETTINEN, Criminal law and policy in the European Union, ed. Routledge, London & New York, 2013.

> "this Regulation is binding in its entirety and directly applicable in member states in accordance with the Treaties".

As shown in recital n. 11

> "to ensure the effectiveness of mutual recognition of freezing and confiscation orders, the rules on recognition and enforcement of such provisions should be established by a legally binding and directly applicable Union act".

The United Kingdom has notified that it wishes to participate in the adoption and application of this Regulation pursuant to art. 3 and 4 bis of Protocol 21 on the position of the United Kingdom and Ireland with respect to the area of freedom, security and justice annexed to TEU and TFEU. On the other hand, pursuant to art. 1, 2 and 4 bis of the same protocol, Ireland does not take part in its adoption, it is not bound to it or subject to its application (save the communication of changes "at any time" pursuant to article 4, prot. 21); the same situation for Denmark pursuant to art. 1 and 2 of protocol 22[10].

2 DIRECTIVE 2014/42/EU AS A HARMONIZATION INSTRUMENT

With regard to confiscation, Directive 2014/42/EU provides for minimum standards in order to achieve harmonization in this area through the introduction of instruments of direct and valuable confiscation (article 4), towards third parties (article 6), of extended confiscation (on the basis of a "reinforced civil law" test standard pursuant to article 5 and recital 21), while providing for confiscation without conviction only in case of escape and illness when, in any case, an in personam procedure has been started

> "and the proceeding could have ended with a criminal conviction if the suspect or defendant could have been processed".

Directive's ultimate purpose, which is based, in fact, on art. 82, § 2, as well as on art. 83, § 1 TFEU[11], is to pursue "the adoption of minimum standards" to approximate

> "the regimes of member states on freezing and confiscation of assets, thus fostering mutual trust and effective cross-border cooperation"

[10]F. NICOLA, B. DAVIES, European Union law stories, op. cit.,
[11]R. SCHÜTZE, T. TRIDIMAS, Oxford principles of European Union Law, Oxford University Press, Oxford, 2018.

(recital no. 5): The intent of the Directive through harmonization should promote the mutual recognition of confiscation measures, which was governed by Framework Decision n. 783/2006/JHA.

Directive n. 42/2014 also intervened in the field of freezing. Article 7 regulates the "freezing" that must be included in the notion of seizure, as a provisional measure to be taken in view of the possible subsequent confiscation; highlighting the close link between freezing and confiscation (recital 27). Reference is made to the same art. 7 to the need to introduce a specific regulation for the correct management of "frozen" assets in order to guarantee their conservation, a problem that will be accentuated following the entry into force of Regulation, especially where the object of confiscation will be represented by a company, with respect to which the continuation of economic activity should be guaranteed if it is a viable economic reality, capable of being on the market in conditions of legality. This problem is less widespread in other jurisdictions where it is difficult to seize and then confiscate companies[12] because of the reluctance of public prosecutors to confiscate companies that are active and able to guarantee work and produce profit, but difficult to manage once seized and confiscated.

The Directive allows the "competent authorities" to adopt the freezing without demanding that it be pronounced or the confirmation of provisions of the competent authorities by the judicial authority itself. The Directive is satisfied with guarantees to contemplate the mere possibility of confirmation by the judicial authority, but not the obligation (article 8 (4)). Without prejudice to the fact that in recital no. 31 and in art. 8 n. 3 it is envisaged in guarantee terms a continuous verification of the requirements that justify the freezing (seizure), as well as the delimitation of its duration.

The Directive has been implemented by 25 countries: extending the scope of the mandatory confiscation of profits and the instruments of the crime, also in light of the broad notion of profit provided for by the Directive (as happened in the Austrian legal system that extended the confiscation pursuant to § 19 to StGB also to the surrogates)[13]; or with forms of extended confiscation (already introduced in different systems, such as the decomposed Spanish extension pursuant to article 127 bis of criminal code introduced by the Organic Law 5/2010, article 12 series of law 306/92 into Italian law now 240 bis of criminal code following the introduction of

[12]A.M. MAUGERI, Italian Strategies against the infiltration of the criminal organisation in the economy, in P. C. VAN DUYNE, T. STRÉMY, J.H. HARVEY, G.A. ANTONOPOULOS, K. VON LAMPE (a cura di), The Janus-faces of cross-border-crime Europe, Eleven Publishing, The Hague, 2018.
[13]A. SCHÖNKE, H. SCHRÖDER, StGB Kommentar, C.H. Beck, Münich, 2019, pp. 1187ss

Legislative Decree No. 21/2018, or the German Erweiterter Verfall pursuant to § 73 d StGB now Erweiterter Einziehung ex §73 StGB, following the adoption of "the Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung" dal 13.04.2017, BGBl. I S. 872, in implementation of the Directive; or, as for example it happened in France, extending the scope of application of the general confiscation of property, a form of confiscation not provided for by the Directive, but known in this system in the context of the fight against serious criminal phenomena such as, lastly, the arms trafficking (article 222-66 introduced by article 26 of LOI No. 2016-731 du 3 juin 2016); o introducing also the confiscation without condemnation, at least in the hypothesis of escape and illness as happened in the Austrian system (§ 445), or beyond the hypotheses foreseen in the Directive in case of death of the offender, of extinction of the crime, of lack of responsibility as occurred in the Spanish legal system (el decomiso sin sentencia, article 127 ter of criminal code, Ley organica 1/201512).

Harmonization should be a precondition for mutual recognition, not least because several member states have not limited their application to Eurocrimes.

3 LEGAL BASIS AND SCOPE OF REGULATION (REFERRAL)

The use of a Regulation directly applicable in member states pursuant to art. 288 TFEU is a choice inspired by the need for appreciable efficiency, representing the only instrument which, removed from the acceptance by member States, entails an immediate and uniform application[14]. Regarding the legal basis under consideration[15], it seems appropriate to remember that some perplexity arises about the fact that we end up thus giving a direct competence in matters of criminal procedure to European legislator, even if only for the purpose of vertical cooperation; a choice that assumes a strong political value considering the impact in terms of criminal policy of the Regulation under examination and the effect of dragging mutual recognition on substantive issues, apart from the fears in terms of protection of fundamental rights[16] to which EU legislator seeks to respond in the direction of harmonization of the guarantees of criminal proceedings in member

[14]C. BARNARD, S. PEERS, European Union law, op. cit., pp. 788ss.
[15]G. GIUDICELLI-DELAGE, S. MANACORDA (a cura di), L'intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne, LGDG, Paris, 2005. S. HUFNAGEL, C. MCCARTNEY, Trust in international police and justice cooperation, Hart Publishing, Oxford & Oregon, Portland, 2017.
[16]Environment which "involves the recognition and execution of court decisions", "enabling the enjoyment of fundamental Community law rights",V. MITSILEGAS, The constitutional implications of mutual recognition in criminal matters in the EU, op. cit.,

states, through numerous directives recently adopted and referred to in recital no. 18 of the current draft Regulation requires respect. In any case, the perplexities considered or in any case the audacity of the choice made in the adoption of this Regulation seems to be very clear to the European legislator if he feels the need to specify in recital n. 53 that

> "the legal form of this act should not constitute a precedent for the future legal acts of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters[17]. The choice of legal form of future Union legal acts should be carefully assessed on a case-by-case basis, taking into account, among other factors, the effectiveness of the legal act and the principles of proportionality and subsidiarity"[18].

This clarification is declined after having stressed that this Regulation is adopted in full compliance with the principle of European (Community) subsidiarity, in the sense that, as underlined in recital n. 51, this intervention is inspired by this principle enshrined in article 5 TEU because

> “the objective of this Regulation, namely mutual recognition and enforcement of freezing and confiscation orders, cannot be achieved in sufficient measure by member states but, due to its scale and effects, it can be better achieved at Union level”;

without prejudice to the fact that

> “this Regulation is limited to what is necessary to achieve this objective, in compliance with the principle of proportionality as set out in the same article” (recital 51).

Regulation should cover all crimes, on the contrary with what is explicitly stated in recital n. 14, from the Directive 42/2014 which refers only to serious transnational crimes, the so-called “Eurocrimes” (the ten serious crimes indicated in article 83, paragraph 1) insofar as it is based on art. 83 TFEU (even if the Directive is also based on article 82, paragraph 2, as well as on article 83, § 1, and article 3 extends the definition of crime to the criminal offense envisaged

> “by others legal instruments if the latter specifically provide that this Directive applies to the offenses harmonized in them”).

It is stated in the recital in question that the offenses covered by this Regulation should not therefore be limited to particularly serious crime which has a transnational dimension, since article 82 TFEU does not impose such a limitation for measures which define rules and procedures to

[17]D. LIAKOPOULOS, Recognition and enforcement of foreign sentences in European Union context: The italian and german private international law cases, in International and European Union Legal Matters-working paper series, 2010.
[18]D. HELENIUS, Mutual recognition in criminal matters and the principle of proportionality. Effective proportionality or proportionate effectiveness?, in New Journal of European Criminal Law, 5 (3), 2014, pp. 352ss.

ensure recognition of mutual judgments in criminal matters. Article 3 of the Regulation contains the list of serious crimes punished by imprisonment of a maximum duration of at least three years, for which the verification of the double criminality of the facts is not required, borrowing a choice for the first time adopted by the European legislator with art. 2, § 2, of the Framework Decision n. 2002/584/JHA of the European Arrest Warrant[19] and this list is the same as that foreseen in other instruments on mutual recognition (thirty-two types of offense), to which is added the offense specified in point (y) of the list, included following the introduction of common minimum standards for the fight against fraud and counterfeiting of non-cash means of payment. In the case of offenses not included in the list, recognition may be refused if the alleged crime is not a criminal offense in the state that must execute the provision (article 3, paragraph 2) on the principle of double criminality (while the Framework Decision 783/2006/JHA presupposes the so-called "double confiscability")[20].

4 MUTUAL RECOGNITION OF SEIZURE ORDERS

Directive No. 2014/41/EU in its general framework, appears largely loyal to the approach followed by the EU legislator[21]. However, the Investigation European Order in criminal matters (IEO) does not apply to seizure for confiscation purposes, which therefore remains governed by Framework Decision 2003/577/JHA[22] pursuant to art. 39 will be replaced by the Regulation in question for those member states bound by it as of 19 December 2020.

Regulation, while admitting as foreseen in Directive 42/2014, that the seizure order (freezing) may be ordered by a non-judicial authority, and in particular article 8 a) ii)

> "another competent authority designated as such by the issuing state and having jurisdiction in the criminal sphere to order the freezing of assets or to carry out a freezing order in accordance with national law",

[19]L. KLIMEK, European Arrest Warrant, ed. Springer, Berlin, 2014, pp. 174ss.
[20]That is to say that the facts giving rise to the same constitute a crime that, according to the legislation of the executing State, allows confiscation, regardless of the constituent elements or the qualification of the same under the legislation of the issuing State (ex art. 6, § 3).
[21]The European Criminal Investigation Order thus substitutes, in the scope of the Directive, the instrument of international letters rogatory, recently redesigned by Legislative Decree 3 October 2017, no. 149, amending Book XI of the Code of Criminal Procedure, as well as the Brussels Convention of 2000 on Mutual Legal Assistance in Criminal Matters between the States of the Union: the latter remains applicable in relations with Denmark and Ireland, which they did not adhere to the directive.
[22]Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45-55. For more details see: C. VERMEULEN, Essential texts on international and european criminal law, ed. Maklu, The Hague, 2017.

in any case it claims that

> "before being transmitted to the enforcement authority, the provision of freezing it is validated by a court or a public prosecutor in the issuing state".

In the same terms it is pronounced recital no. 22 of Regulation[23]. It is not required, however, as it would have been desirable in terms of guarantees, that any seizure pronounced by the public prosecutor is validated by the judge.

Regulation includes the conditions for the issue and transmission of a freezing provision provided for in art. 6 of Directive 2014/41/EU, so as to apply the same conditions both to freezing for probative purposes and to that for the purpose of confiscation. Furthermore, in order to simplify the procedure with respect to Framework Decision 2003/577/JHA, the issuance of freezing provision should take place using a standard model and no longer a "certificate" accompanying the national decision to be executed.

5 MUTUAL RECOGNITION OF CONFISCATION ORDERS

The Framework Decision 783/2006/JHA allows the mutual recognition not only of measures for direct confiscation of the instruments and proceeds of the crime, but also of the provisions of extended confiscation (provided for in article 3 of the Framework Decision 212/2005/JHA[24], then replaced by article 5 of Directive 42/2014), and admits, in writer's opinion, the mutual recognition of confiscation orders without conviction, although not providing it as mandatory, as it allows to oppose the refusal (art 8 (2), G) where the confiscation order has been taken in circumstances where the confiscation of property has been ordered under the provisions relating to the extended confiscation powers referred to in article 2 (d), point iv)

> "that is, confiscation under other provisions relating to the extended confiscation powers provided for by the legislation of the issuing state";

in short, it is accepted, even if it is not compulsorily imposed, the mutual recognition of

[23]In some cases, a freezing order may be issued by an authority designated by the issuing State that has jurisdiction in the criminal sphere to issue or enforce the freezing order in accordance with national law other than a court or tribunal, a court or a public prosecutor. In such cases, the freezing order should be validated by a court, a court or a public prosecutor before being transmitted to the executing authority".

[24]N. FOSTER, European Union law directions, Oxford University Press, Oxford, 2016. A. THIES, International trade disputes and Europan Union liability, Cambridge University press, Cambridge, 2013. D.A.O. EDWARD, R. LANE, Edward and Lane on European Union law, Edward Elgar Publishers, Cheltenham, 2013.

measures taken with the additional confiscation powers, which could be adopted by member states under Framework Decision 212/2005 and can be adopted under Directive 42/2014, further than those expressly provided for by the two instruments (which impose "at least" the adoption of the extended confiscation powers expressly indicated, but do not prejudice the adoption of further powers).

In practice, however, a rather narrow interpretation of the Framework Decision 783/2006/JHA[25] has been established on the basis of which it would not allow the mutual recognition of the confiscation measures contemplated by the same Directive 42/2014, as emerges from the impact study carried out from the EC in preparation of the Proposal in examination (Inception Impact Assessment). It is true that for the purposes of cooperation in this matter, the 1990 Strasbourg Convention continued to be used for the laundering, research, seizure and confiscation of the proceeds of crime (or bilateral agreements), which allows cooperation also in relation confiscation orders without conviction, as specified in the Explanatory Report, provided that the proceedings are conducted by the judicial authority and are of a criminal nature, in the sense of involving instruments or proceeds of crime.

6 (FOLLOWS) REGULATION WILL REPLACE THE FRAMEWORK DECISION 783/2006/JHA

Also in relation to confiscation (article 2 (8) b), it is specified in Regulation that a "specific issuing authority" can be considered as a "specific authority" designated as such by the issuing state and which is competent in criminal matters to perform a confiscation order, but it is specified that the provision must be "issued by a court in accordance with national law".

In relation to the object of confiscation covered by the principle of mutual recognition, it should be noted that the Regulation includes, unfortunately, not only the proceeds of the crime and their equivalent value, in whole or in part (article 2, a)), but also the tools and above all also "the value of such instrumental good", which as highlighted elsewhere assumes a punitive purpose and not that interdictory character that should be the ablation tool's and which poses problems of constitutionality, where the relative confiscation is applied in violation of the principle of

[25]Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, p. 59-78. K. LIGETI, M. SIMONATO, Chasing criminal money Asset recovery in the European Union, Hart Publishing, Oxford & Oregon, Portland, 2017, pp. 132ss.

proportion and guilt as a fundamental criterion of commensurate sentence. Among other things, in the concept of instrumental goods we also include the good destined to be used, so we could even consider that this form of confiscation is also based on the presumption of illicit destination in Swiss or Austrian law, in particular in the fight against organized crime and terrorist crime (article 72 StGB, § 20b öStGB)[26].

The definition of the notion of income coincides with the broad definition provided by Directive n. 42/2014, the comments of which are referred to (article 2, no. 4

> “"income": any economic advantage derived, directly or indirectly, from offenses, consisting of any asset and including subsequent reinvestments or transformations of direct proceeds and any economic advantage assessable").

Interesting to highlight that pursuant to art. 18, n. 5

> “if the issuing authority has issued a confiscation order, but not a freezing order, the executing authority may, as part of the measures referred to in paragraph 1” (ie the “measures necessary for its execution at same as a national confiscation order issued by an authority of the executing state”) to decide to freeze the assets concerned on its own initiative, in accordance with its national law, with a view to the subsequent enforcement of the confiscation order”.

This provision fits well into the debate concerning the possibility of pronouncing a confiscation order in the absence of a prior seizure order, essentially providing that if the prior execution condemnation sine qua non of confiscation is considered in the executing state, it will be possible to proceed with the seizure even in the absence of a request from the issuing state.

7 PROCEEDINGS IN CRIMINAL MATTERS

Pursuant to art. 1 of the original Regulation Proposal, the mutual recognition of confiscation orders was imposed only in relation to all the measures taken in the context of a criminal procedure ("within the framework of criminal proceedings"), while in the approved version it is required only that these are cases in "criminal matters", while continuing to specify that they cannot be administrative or civil proceedings.

It is certainly referred to the confiscation orders without conviction that can be enacted in a criminal proceeding beyond the limits established by Directive 2014/42/EU (hypothesis of flight

[26]S. EVERS, Verhältnis des Vermögensnachteils bei der Untreue zum Vermögenschaden beim Betrug, C.F. Müller, Heidelberg, 2018, pp. 282ss.

and illness), ie, as specified in the Explanatory Memorandum, following the death of the owner, in the case of immunity, prescription, and in cases where the offender cannot be identified or if the criminal court can confiscate property in the absence of conviction when the court is convinced that such assets have an illicit origin, as a result of crimes. Already in relation to the original more restrictive version of the proposal, the Explanatory Memorandum makes reference to hypotheses of actio in rem pure, as when the offender cannot be identified, provided that the confiscation was always a "measure imposed by a court following proceedings in relation to a criminal offense"; this last expression was to be interpreted not in the restrictive sense envisaged by the Directive, namely the hypothesis in which a criminal trial has begun but cannot be pronounced condemnation, but precisely as a hypothesis of real actio in rem, of a procedure autonomous in relation to assets related to a crime.

In particular, the Italian representation has requested an extension of the scope of Regulation also in relation to confiscation orders without conviction pronounced in a civil or administrative procedure, recalling the notion of "criminal matter" adopted in Directive 2011/99 of the 13.12.2011[27] on the Order of European Protection of Victims (to allow the recognition of protection orders of victims of crime taken by a judicial authority not only criminal, but also civil or administrative).

Following the agreement of 8 December 2017, the Board amended art. 1.1 of EC proposal, extending the scope of application of the principle of mutual recognition from the mere sector of freezing and confiscation measures disposed "in the context of a criminal proceeding" to that much wider than the disposed provisions "in the framework of a proceeding in criminal matters" (proceeding in criminal matter). Recital (13) of the Proposal states that the Regulation should apply to all freezing and confiscation orders issued in the context of criminal proceedings (the term "criminal action" is used in the proposal of the 2017 version), with the warning that proceedings in criminal matters is an autonomous concept of EU law, rather it is specified in the final version of EU Law Regulation interpreted by the European Court of Human Rights (ECtHR), without prejudice to ECtHR jurisprudence; this reference seems appropriate also because the adoption of a Regulation in a more direct and immediate manner will call into question the Court of Justice of the European Union (CJEU) pursuant to art. 267 TFEU as an interpreter in its original capacity, intended to resolve the interpretative doubts of member states in its application. Always based on

[27]Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ L 338, 21.12.2011, p. 2-18.

recital n. 13 the term "proceeding in criminal matters"

> "therefore contemplates all types of freezing provisions and confiscation orders issued as a result of proceedings related to a crime and not only the measures that fall within the scope of application of Directive 2014/42/EU. It also covers other types of measures issued in the absence of a final conviction"[28].

In the definitions referred to in art. 2 is specified at number 2) which is considered "confiscation order": a final sanction or measure imposed by a court pursuant to a proceeding related to a crime, which results in the permanent deprivation of an asset of a natural person or law, while in the proposal reference was made to "a proceeding for a crime".

With this change, then, as it emerges in recital (13) and as it emerges in the press release of 8 December 2017 on the orientation reached by the Council on the proposed regulation, it is proposed, among other things, to ensure that mutual recognition covers a wide range of seizures, including those taken without conviction and including certain systems of preventive confiscation, provided there is a link with a crime.

We continue, however, to exclude mutual recognition for measures "issued in the framework of a civil or administrative procedure", as established in art. 1 of Regulation; category in which the measures of expropriation of goods not connected to crimes are certainly included. Although we can highlight a slight but significant difference in language between the version of recital n. 13 in the proposed Regulation and in the final version, as soon as it was approved: the proposal states:

> "the freezing measures and the confiscation orders issued in civil or administrative proceedings are excluded from the scope of this Regulation"; in the final version "freezing and confiscation orders issued in civil or administrative proceedings should be excluded from the scope of this Regulation".

In reality, the underlying problem that remains is to establish what is meant by proceeding in criminal matters, that is, if any procedure aimed at applying forms of confiscation of proceeds or instruments of the crime can be included, regardless of the internal qualification of the procedure in question and from the relevant legislation used in member states. In particular, within the category of hybrid measures that characterize the adoption of expanded forms of confiscation and

[28]A. KACZOROWSKA-IRELAND, European Union law, Routledge, London & New York, 2016. F. MARTUCCI, Droit de l'Union europèenne, LGDG, Paris, 2017. M. POIARES MADURO, M. WIND, The transformation of Europe: Twenty-five years on, Cambridge University Press, Cambridge, 2017, pp. 321ss. A. MANGAS MARTÍN, Tratado de la Uniòn Europea, Tratado de Funcionamiento, ed. Marcial Pons, Madrid, 2018.

without conviction, there are procedures defined by the internal "civil" or "administrative" legislator or intended for the adoption of forms of confiscation included "in the civil or administrative matters", but which fall perfectly within the definition of "proceedings related to a crime" as they relate to the profits or instruments of offense, such as the proceeding to apply the British civil recovery or, even if Ireland does not comply with the Regulation, the Irish civil forfeiture.

In any case, the manifest will of the United Kingdom to comply with the Regulation leads to the view that the British Government considers that the confiscation under the Proceeds of Crime Act (POCA) 2002, the form of enlarged confiscation falls within the scope of Regulation following a conviction pronounced on the basis of a presumption of illicit origin of goods obtained in the six years preceding the commission of the offense and on the basis of presumptions of a criminal lifestyle (based on conviction), and a standard of civil proof of origin illicit assets (lower than the reinforced civil code required by article 5 and recital 21 of Directive no. 42/2014) but also civil recovery, again governed by POCA 2002. Civil recovery does not only imply a condemnation, but is pronounced by the civil judicial authority (the High Court, or in Scotland the Court of Session) in a proceeding conducted with civil law rules and a standard of civil law test:

> "the court or sheriff must decide on a balance of probabilities whether it is proved a) that any matters alleged to constitute unlawful conduct have occured")[29];

however, this proceeding refers to assets considered by the Court of illegal origin as the proceeds of crime ("property which is, or represents, property obtained through unlawful conduct"). Moreover, as is the 120talian case in the application of prevention confiscation, it is envisaged that it is possible to begin the civil procedure following an acquittal in criminal court, as reiterated in R (Director of Assets Recovery Agency) v. Taher case[30], precisely in consideration of the different standard of test; the supreme court, as stated in the Serious Organized Crime Agency v. Hymans[31], states that an acquittal in criminal trial does not definitively establish that the defendant has not committed the offense, but only proves that the tests were insufficient to satisfy the required burden of proof; even death prevents the proceeding in rem against the assets of allegedly illicit origin, as stated in Serious Organized Crime Agency v. Lundon case[32], or the

[29]U. BECKER, J. SCHWARZE, A. HATJE, J. SCHOO, EU-Kommentar, op. cit.,
[30][2006] EWHC 3406 (Admin).
[31][2011] EWHC 3332 (QB). J. COUCHT, The limits of asset confiscation. On the legitimacy of extended application of criminal law, Hart Publishing, Oxford & Oregon, Portland, 2017.
[32][2010] EWHC 353 (QB).

conclusion and injustice of criminal trial due to the abuse of trial, as established in R(Director of Asset Recovery Agency) v. E case[33]. This is the kind of hybrid procedure in which we witness "the use of public law powers, by the state, in civil courts"[34] and on which compliance with the guarantee principles of criminal matters, also in light of the European Convention on Human Rights (ECHR). The supreme court, however, believes that it is not a criminal sanction, but having "restitutionary nature"[35] because it does not have the right to hold the proceeds of crime, and therefore the principle of non-retroactivity does not apply; or, above all, as reiterated in Gale v. Serious Organized Crime Agency case[36], resuming the Walsh v. Director Asset Recovery Agency[37], it is believed that the use of the standard of civil proof of a balance of probabilities, in civil recovery proceeding in order to ascertain the illicit conduct does not violate the presumption of innocence ex art. 6, par. 2, ECHR[38].

On the other hand, Ireland did not join the Regulation probably fearing to have to adopt penalties in the proceeding for the adoption of civil forfeiture, introduced with the Proceeds of Crime Act 1996 and the Criminal Assets Bureau Act 1996 ("CAB"), which allow the initiation of a procedure for the application of confiscation, without the need to ascertain a crime, provided there is "belief evidence" or reasonable grounds for suspecting that a person is the owner or possesses goods obtained directly or indirectly from criminal activities; this presumption can be refuted by the recipient of the measure because he is responsible for proving the legitimacy of his assets, with a substantial inversion of the burden of proof[39].

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[33]C. KING, Using civil processes in pursuit of criminal law objectives: A case study of non-conviction based asset forfeiture, in International Journal of Evidence and Proof, 16 (3), 2012, pp. 338ss.

[34]R (Director of Assets Recovery Agency) v. ASHTON [2006] EWHC 1064 (Admin). For further details see: L. CAMPBELL, Organised crime and the law: A comparative analysis, Hart Publishing, Oxford & Oregon, Portland, 2013, pp. 214ss. D.C. ORMEROD, K. LAIRD, B. HOGAN, Smith and Hogan's criminal law, Hart Publishing, Oxford & Oregon, Portland, 2015.

[35][2011] UKSC 49. V. BERMINGHAM, C. BRENNAN, Tort law directions, Oxford University Press, Oxford, 2018.

[36][2005] NICA 6. A.M. MCALINDEN, C. DWYER, Criminal justice in transition. The Northern Ireland context, Hart Publishing, Oxford & Oregon, Portland, 2015.

[37]C. KING, Civil forfeiture and article 6 of the ECHR, in Legal Studies, 34 (3), 2014, pp. 371-394. B.A. HAMILTON, Comparative evaluation of unexplained wealth orders, Washington, DC: Department of Justice, January 2012, pp. 148-134.

[38]D. LIAKOPOULOS, Der Beitritt der Europäischen Union zur EMRK: Jurisprudenz und kriminelle Profile, in Juris Gradibus-working paper, 20.

[39]Banco Ambrosiano SPA v Ansbacher & Co. Ltd [1987] ILRM 669; Masterfoods Ltd v HB Ice Cream Ltd [1993] ILRM 145; for the civil forfeiture nordamericano Gale v Serious Organised Crime Agency [2011] UKSC 49. See, L. BOUCHL, Civil/asset forfeiture and the presumption of innocence under Article 6(2) ECHR, in New Journal of European Criminal Law, 5 (2), 2014, pp. 222ss. M. M. SIMONATO, Directive 2014/42/EU and non-conviction based confiscation: A step forward on asset recovery?, in New Journal of European Criminal Law, 6 (2), 2015, pp. 225ss. C. KING, Using civil processes in pursuit of criminal law objectives: A case study of non-conviction based asset forfeiture, op. cit,. pp. 360ss. in relation to the British civil recovery that advocates compliance with the presumption of innocence and the adoption of the standard of criminal evidence, cites the jurisprudence of the Supreme Court which admits that the more serious the allegation in civil proceedings the more the judge must be astute in demanding the full proof O'Keeffe v Ferris [1997] 2 ILRM 161-168; as well as the precedents in which the jurisprudence has substantially demanded the respect of the penal standard, where punitive civil penalties are applied Bater v Bater [1951–52] P 35; Hornal v Neuberger Products Ltd [1957] 1 QB 247; LJ in Hornal v Neuberger Products Ltd [1957] 1 QB 247 at 258; R v Home Secretary, ex p. Khawaja [1984] 1 AC 74 at 112–14; CJ in Georgopoulus v Beaumont Hospital Board [1998] 3 IR 132. For more details see: R.

Thus, in this proceeding, it is not so much the use of relative evidence and the greater use of documentary evidence that is contested, but above all the violation of respect for the presumption of innocence due to the reversal of the burden of proof and of the adoption of the standard of civil law. The Irish supreme court, however, believes that the 1996 Act does not violate the constitutional prohibition against retroactive application of the sentence (article 7 ECHR), because the acquisition of assets obtained through the crime was illegal before the entry into force of such an act and does not become illegal because of him; there has been no unjust inversion of the burden of proof as the recipient of the measure has the possibility of refuting the presumption of illegal origin of the goods; the act does not violate the prohibition of self-incrimination as the evidence obtained in civil procedure cannot be used in a subsequent criminal trial; the act does not violate the right to private property since the state has a legitimate interest in the removal of illicit proceeds; the proceedings for confiscation under the 1996 act are not criminal but civil[40].

Returning to Regulation, some perplexity raises the fact that recital no. 13 states that

> "the proceeding in criminal matters may also include criminal investigations carried out by the police and other law enforcement agencies";

it is not considered that Regulation can refer to forms of freezing and confiscation not adopted in a judicial proceeding but in the investigation phase, because this does not seem absolutely acceptable in a rule of law representing already the seizure, and the more confiscation, the form of limitation of a citizen's right, such as the right of property guaranteed by art. 1 of ICHR Protocol and art. 17 of the Charter of Fundamental Rights of the European Union (CFREU)[41]. Among other things, the definition of confiscation contained in art. 2, n. 2 of Regulation refers to a measure taken by a judicial authority and also the freezing pursuant to art. 2, n. 8, ii) even if not adopted by the judicial authority, to be transmitted, it must be validated by a court or a public prosecutor in the issuing state, as examined (the problem remains that the validation of the public ministry is considered sufficient in the absence of judicial control).

PATTENDEN, The risk of non-persuasion in civil trials: The case against a floating standard of proof, in Common Jaw Quarterly, 7, 1988, pp. 220ss. M. REDMAYNE, Standards of proof in civil litigation, in The Modern Law Review, 62(2), 1996, pp. 167ss. A. KEANE, P. MCKEOWN, The modern law of evidence, Oxford University Press, Oxford, 2018, pp. 114ss.

[40]Gilligan v. Ireland, Attorney General, Criminal Asset Bureau and others, Murphy v. G.M., PB, PC Ltd, [2001] IESC 92.

[41]X. GROUSSOT, G.T. PETURSSON, The EU Charter of the Fundamental Rights five years on. The emergence of a new constitutional framework?, in S. DE VRIES, U. BERNITS, S. WEATHERILL, The EU Charter of Fundamental Rights as a binding instrument. Five years old and growing, Oxford University Press, Oxford, 2015. S.I. SÁNCHEZ, The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental Right, in Common Market Law Review, 49 (5), 2012, pp. 1566ss. T. TRIDIMAS, Fundamental rights, general principles of EU law and the Charter, in Cambridge Yearbook of European Legal Studies, 16 (3), 2014, pp. 364ss. H. VON DER GROEBEN, J. SCHWARZE, A. HATJE, Europäisches Unionsrecht, ed. Nomos, Baden-Baden, 2015, pp. 820ss

The definition of the object of confiscation seems to be not coordinated with the change in definition of the reference procedure adopted with the 2017 reform and implemented in the final version of Regulation, where the proceeds and instruments of the crime are included, not only where they can be confiscation by virtue of "one of the confiscation powers provided for in Directive 2014/42/EU" (letter c), but also

> "d) subject to confiscation under other provisions relating to the powers of confiscation in the absence of a final conviction provided for by the legislation of the issuing state following a proceeding for a crime".

This expression of "proceeding for a crime" and not "connected to a crime" is rather ambiguous, even if we do not speak of a criminal trial; not to contrast with art. 1 that allows the mutual recognition of confiscation orders taken "in a proceeding in criminal matters" and with the same art. 2 where in defining the concept of confiscation refers to a provision taken in a "proceeding related to a crime", the expression "following a proceeding for a crime" should refer to the final conviction and not to the confiscation order, or simply it must be interpreted as a mere proceeding connected to a crime and not aimed at ascertaining the crime. Moreover, in English version this problem does not arise because the most correct expression of "proceeding in relation to a criminal offense" is used both in the definition of confiscation and in the definition of the object[42].

In the accompanying report to the original Regulation proposal, an example is given by the German law draft now in force aimed at implementing Directive 2014/42/EU, which provides for "autonomous" confiscation which allows an asset to be confiscated in the absence of conviction if, on the basis of all the circumstances of the case, the court is convinced that the asset is the result of crime and the person receiving the confiscation order cannot be prosecuted or condemned for that crime. In reality, in German legal system a form of autonomous confiscation, such as that at the base of the model of confiscation without condemnation called for by Regulation, was already partly foreseen. With the reform law on the subject (previously mentioned, Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung vom 13.04.2017, BGBl. I S. 872) in the implementation of Directive 42/2014, an extension of possibilities for autonomously applying the confiscation, as will be discussed below, and further discipline has been introduced in the field of terrorism and organized crime, introducing a legal mechanism allowing for the application of confiscation without condemnation of assets of suspected criminal origin, regardless of the

[42]"subject to confiscation under any other provisions relating to powers of confiscation, including confiscation without a final conviction, under the law of the issuing State, following proceedings in relation to a criminal offence".

evidence of a specific crime, § 76a, lett. 4, StGB[43].

8 PROCEEDINGS IN CRIMINAL MATTERS IN THE LIGHT OF ECTHR JURISPRUDENCE

The notion of proceeding in criminal matters, as connected with a crime, accepted in Regulation, recalls the notion of procedure also in re accepted by the Explanatory Report of the 1990 Strasbourg Convention which includes any proceedings carried out by a judicial authority and which criminal nature, in the sense of covering instruments or proceeds of crime.

On the contrary, it does not seem possible to refer to the notion of criminal matter of ECtHR and to the relative criteria for establishing the criminal nature of a procedure and a measure, because apart from the not always completely consistent and unequivocal use of these criteria in the same jurisprudence of ECtHR, the latter has always substantially excluded the traceability of the proceedings for the application of forms of confiscation without condemnation from the confiscation of prevention to the English civil recovery or other forms of civil forfeiture.

The autonomous notion of "criminal matter", to which the guarantees provided for by ECHR apply, is founded by ECtHR on the parameters developed starting from Engel v. Netherlands sentence of 8 June 1976[44]: the official formal qualification or determination of the membership order[45]; the "nature" of infringement with particular reference to its forms of typification and the procedure adopted; the nature of sanction and degree of severity of the sanction[46], considered as the sole criterion in Engel case[47]. The sub-criteria adopted to establish the nature of proceeding are not so significant because ECtHR limits itself to claiming that the procedure is applied by a public authority on the basis of the enforcement powers conferred by the

[43]A. KEANE, P. MCKEOWN, The modern law of evidence, op. cit.,
[44]ECtHR, Albert et le Compte v. Belgium of 10 February 1982, par. 16. Öztürk v. Germany, par. 18, and 50; Lutz, Englert and Nölkenbockhoff v. Germany of 25 August 1987; Weber v. Switzerland of 22 May 1990; Demicoli v. Malte of 27 August 1991; Funke of 25 February 1993; par. 30; Benham v. Royaume-Uni of 10 June 1996; Padin Gestoso v. Spain of 8 December 1998; J.B. v. Switzerland of 3 May 2001; Ezeh and Connors v. the United Kingdom of 9 October 2003, par. 91. For further details see: B. RAINEY, W. WICKS, C. OVEY, Jacbos, White and Ovey: The European Convention on Human Rights, Oxford University Press, Oxford, 2017. J.P. COSTA, La Cour europèenne des droits de l'homme. Des juges pour la libertè, ed. Dalloz, Paris. 2017. F. TIMMERMANS, Fundamental rights protection in Europe before and after accession of the European Union to the European Convention on Human Rights, in Liber amicorum Pieter Van Dijk, M. Van Roosmalen and others (eds.), Intersentia, Antwerp, Oxford, 2013, pp. 225ss
[45]ECtHR, Ezeh and Connors of 9 October 2003, par. 91. D. HARRIS, M. O'BOYLE, C. WARBRICK, Law of the European Convention on Human rights, Oxford University Press, Oxford, 2014, pp. 372ss.
[46]ECtHR, Weber v. Switzerland of 22 May 1990, parr. 17-18; Albert et le Compte v. Beligum, op. cit., par. 16.
[47]W.A. SHABAS (a cura di), Art. 1 Protection of Property, The European convention on human rights: A commentary, Oxford University Press, Oxford, 2015.

law and on the basis of an infringement (nature of the infringement) based on a general precept addressed to all citizens (more meaningful the reference to the circumstance that the magistrate can exercise the power to convert the pecuniary sanction into a custodial sanction only if it establishes guilt, ie the voluntary refusal to pay or the guilty negligence)[48]. In any case, it is a broad concept of "criminal matter" including all the measures afflicting, which pursue general and special prevention purposes; is the punitive administrative offense, as expressly stated in relation to the Ordnungswidrigkeiten of German legal system[49] or in relation to the Verwaltungsstrafverfahren of the Austrian legal system[50], or the procedure for the imposition of a fine is included in the notion of criminal matters for the crime of tax evasion, as in AP, MP and T.P. v. Switzerland case and in J.B. v. Switzerland case[51], or disciplinary sanctions when such sanctions merit the guarantees inherent to the criminal procedure[52], or, again, the proceedings for the recovery of an unpaid community charge, considered by the English "civil in nature" law[53] or the German custodial security measure "the Sicherungsverwahnung" (§ 66 StGB)[54].

Despite this broad notion, ECtHR does not include forms of confiscation without condemnation in the concept of criminal matters[55].

In particular, ECtHR expresses a general orientation of particular favor towards forms of confiscation without conviction, not only because it is always confirmed the substantial compatibility with the principles of ECHR by subtracting these measures from the principles of criminal matters, but as it is highlighted a more general supranational orientation favorable to the recognition of the validity of the use of civil forfeiture as a strategy of criminal policy against serious criminal phenomena:

> "having regard to such international legal mechanisms as the 2005 United Nations Convention against Corruption, the Financial Action Task Force's (FATF)

[48]ECtHR, Benham v. United Kingdom of 10 June 1996.
[49]ECtHR, Oztürk of 21 February 1984.
[50]ECtHR, Palaoro v. Austria of 23 October 1995, parr. 38-47; Pramstaller v. Austria of 23 October 1995; Pfarrmeier v. Austria of 23 October 1995; Schmautzer v. Austria of 23 October 1995; Umlauft v. Austria of 23 October 1995; Gradinger v. Austria of 23 October 1995. For further details see: N. JAYAWICKRAMA, The judicial application of human rights law national regional and international jurisprudence, Cambridge University Press, Cambridge, 2017.
[51]ECtHR, J.B. v. Switzerland of 3 May 2001, par. 44; A.P., M.P. and T.P. and E.L., R.L. and J.O.-L. v. Switzerland of 29 August 2001. A. SEIBERT-FOHR, M.E. VILLIGER, Judgments of the European Convention of Human Rights. Effects and implementation, ed. Nomos, Baden-Baden, 2017
[52]ECtHR, Campbell v. Great Britian and Ireland of 28 June 1984. C. GRABENWARTER. European Convention on human rights. A commentary, C.H. Beck, München, 2014
[53]ECtHR, Benham v. Royaume-Uni of 19 June 1996. A. ASHWORTH, (2) Article 6 and the fairness of trials, in Criminal Law Review, 1999, pp. 262ss.
[54]ECtHR, M. v. Germany of 17 December 2009. F. MARCHADIER, Convention européenne des droit de l'homme et des libertès fondamentales, in Revue Critique de Droit International Privè, 193 (4), 2014, pp. 679-694.
[55]ECtHR, Gogitidze v. Georgia of 12 May 2015, par. 105. F. MARCHADIER, Convention européenne des droit de l'homme et des libertès fondamentales, op. cit.,

> 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 (...)"[56].

ECtHR, already in Labita case[57], has recognized the compatibility with ECHR of the prevention measures only because it is based on an assessment of social hazard of the recipient, thus considering that the prevention measures are not in contrast with ECHR principles against individuals suspected of belonging to mafia even before their conviction, since they tend to prevent the carrying out of criminal acts, in consideration of an assessment of danger of the subject who is the recipient, as a justifying assumption of an ablative intervention though not criminal-instrumental to the protection of public interests.

From the recognition of the preventive and non-punitive nature of anti-mafia confiscation, it follows the failure to violate the right to property (article 1 of the 1st Additional Protocol of ECHR), the presumption of innocence (article 6, § 2)[58] and the principle of legality (article 7), where it is possible to apply it retroactively[59].

In one of the first cases on the matter, the Commission, in applying these parameters, cites in Deweer v. Belgium sentence of 27 February 1980, in which it is reiterated that the criminal prosecution can be defined as the official notification issued by the competent authority of the reproach of having committed a criminal infringement, and, as stated in Guzzardi v. Italy case of 6 November 1980, the comparison of art. 5, par. 1 a) with art. 6, par. 2 and art. 7, paragraph 1, shows the purposes of ECHR, that you cannot have a conviction without a legal assessment of a criminal or, possibly, disciplinary infringement; however, the use of these terms for preventive and security measures is not compatible with the principle of strict interpretation (with the prohibition of analogy), which must be observed in "criminal matters". A preventive measure, it is specified, is not intended to repress an infringement, but is based on indices that denote the propensity to commit a crime.

EctHR, welcoming the arguments of the Italian government, recognizes that anti-mafia

[56]K. LIGETI, M. SIMONATO, Chasing criminal money Asset recovery in the European Union, op. cit.,
[57]ECtHR, Labita v. Italy of 6 April 2000.
[58]D. LIAKOPOULOS, Parità di armi nella giustizia penale internazionale, vol. 1, ed. Libellula, Puglia, 2018.
[59]ECtHR, Raimondo v. Italy of 22 February 1994; Prisco v. Italy of 15 June 1999; Madonia v. Italy of 25 March 2003; Arcuri and others v. Italy of 5 July 2001; Riela v. Italy of 4 September 2001; Bocellari and Rizza v. Italy; Bongiorno and others v. Italy of 5 January 2010, par. 45. For further analysis see: C. TEITGEN COLLY, La Convention europèenne des droits de l'homme: 60 ans et après?, ed. LGDJ, Paris, 2013.

confiscation is a measure of prevention, which has a function and a distinct nature from that of criminal sanction: while the latter tends to repress the violation of a criminal law and therefore its application is subject to the ascertainment of a crime and guilt of the accused, the prevention measure does not imply a crime and a conviction[60], but tends to prevent the commission from subjects deemed dangerous. It is denied that the suspect assumes the status of accused, it is noted that the preventive proceeding is independent of criminal proceedings and does not imply a guilty judgment, it is denied that confiscation constitutes "in essence" a criminal sanction relevant to ECHR. The anti-mafia confiscation presupposes only a preliminary declaration of social danger, based on the suspicion of belonging to a mafia-type association of the affected subject (and was subject to the application of a personal preventive measure) and, therefore, has no repressive but preventive function aimed at preventing illicit use of the property affected. It is also considered that the severity of the measure is not a sufficient criterion for determining whether it is a criminal sanction, underlining that confiscation is not an exclusive measure of criminal law, but it is widely used, for example, in administrative law. Member states' law of the Council of Europe shows that very strict but necessary and adequate measures for the protection of public interest, are also established outside the criminal field.

In De Tommaso v. Italy case of 23 February 2017 EctHR does not question the non-punitive nature of personal prevention measure and remains firm in considering that the prevention measures do not fall within the notion of criminal matters pursuant to art. 6 and 7 ECHR, while condemning Italy for the violation of art. 2 of IV Protocol which guarantees freedom of movement by the law no. 1423/1956, art. 1 and seq. (today article 1 of Legislative Decree no. 159/2011), as this legislation does not respect the principle of legality/taxability in determining the categories of recipients of generic danger and the same content of measure of personal prevention (the law, although being accessible, it does not guarantee the predictability of measure, whose application is left to the excessive jurisprudential discretion).

In Gogitidze case the EctHR does not qualify "penalty" a form of confiscation without condemnation (civil proceeding in rem), provided in the order of Georgia to allow the removal of proceeds of public corruption, without involving an accusation in criminal; EctHR considers this form of confiscation a form of regulation of the use of property ex art. 1, Prot. N. 1, ECHR, which

[60]ECtHR, Andersson v. Italy of 20 June 2002; Arcuri and others v. Italy of 5 July 2001; Riela v. Italy of 4 September 2001; Bocellari and Rizza v. Italy; Bongiorno of 5 January 2010, par. 45. C. TEITGEN COLLY, La Convention europèenne des droits de l'homme: ans et après?, op. cit.,

assumes a preventive or compensatory nature, citing EctHR jurisprudence in support of prevention confiscation[61]. The compensatory aspect consists in reconstituting the economic situation of the offended party in the same situation before the crime (the unjustified enrichment of public official) or in any case, in the absence of a offense, in restituting what has been illicitly acquired to the state[62]. We pursue

> "the general interest in ensuring that the use of goods in question does not benefit the appellant at the expense of community"[63].

Notwithstanding ECtHR also highlights in Gogitidze case a deterrent, general prevention purpose of the measures in question, which consists in preventing unjustified enrichment by means of corruption as such, by sending a clear signal to public officials already involved in corruption and their criminal acts, even if they manage to escape the criminal justice system, will not provide them or their families any benefit.

On the other hand, ECtHR only in the Welch case acknowledged the criminal nature of a form of enlarged confiscation of the English legal system on the basis of a series of aspects from which the punitive foundation of this sanction, along with the preventive one, would emerge in the light of the substantial notion of punishment expressed by the jurisprudence of ECtHR and the above criteria, which make it possible to look at the realities of the situation[64]. First of all, it is noted that confiscation is connected to a crime and presupposes, in fact, a conviction for drug trafficking. In relation to the nature and purpose of the measure, it is noted that the sanction in question was introduced with the act of 1986 to overcome the inadequacy of the previous forfeiture instruments, allowing the courts to subtract profits that had been converted into other capital assets; legislation that gives such extensive powers of confiscation also pursues the aim of punishing the offender. Preventive and reparative purposes can coexist with the punitive one and can be considered as elements of a real punishment. In several judgments of English courts this sanction is considered a penalty, even if this criterion is not considered decisive, as is the severity of the penalty. The decisive aspects are: the presumptions that all goods purchased in the six years preceding the proceeding represent the proceeds of drug trafficking unless the offender proves the opposite; the fact that the confiscation order is directed against profits involved in drug trafficking

[61]ECtHR, Gogitidze v. Georgia of 12 May 2015, par. 126.
[62]ECtHR, Veits v. Estonia of 15 January 2015.
[63]ECtHR, Phillips v. the United Kingdom of 12 December 2001, par. 52
[64]ECtHR, Welch v. United Kingdom of 9 February 1995, par. 27.

and is not limited to current enrichment or profit; the discretion of the judge to consider the degree of guilt of the accused in setting the amount to be confiscated; and the possibility of applying a custodial sentence in the event of the convicted person's insolvency. They are all elements that provide a strong indication of a punitive regime[65].

In Phillips v. Royaume-Uni case and correspondingly in Grayson & Barnham case, however, ECHR articulates its reasoning in a more complex way, because on the one hand it is recognized that the confiscation provided for by the Drug Trafficking Act 1994 represents a "penality" for the purposes of ECHR in relation to the recognition of the right to property, representing an interference pursuant to the second paragraph of that right[66]. On the other hand, for some reasons, however, the criminal nature of the procedure aimed at its application is denied because ECtHR considers that it does not involve the imputation of a crime pursuant to art. 6, § 2, ECHR4[67], or rather a "new charge" in addition to that object of condemnation for the application of confiscation under consideration. On the basis of the criterion of classification of the proceeding by national legislation, it is noted that the confiscation procedure does not imply a new charge in criminal matters against the defendant, does not blame him for any additional violation, but is part of the proceeding to establish the sanction (sentencing process) that follows the sentence[68]; in relation to the further criteria of the nature of the procedure and the type and severity of the sentence it is noted that even if it is true that the presumptions provided for by the legislation in question lead to the national court presuming that the defendant has been involved in other crimes, the subject of the conviction with reversal of the burden of proof against the accused and substitute prison sentence in the event of non-compliance, the purpose of the proceedings is not the conviction or the acquittal of the accused for other crimes, but is aimed to allow the court to set the amount to be confiscated, similarly to a procedure aimed at establishing the extent of the custodial sentence. Although it is assumed that he has benefited from drug trafficking in the past, this is not reflected in his "criminal record".

ECtHR then denies the applicability of the guarantees of art. 6 § 2 ECHR not only because it does not involve "any new" charge

> "within the meaning of article 6 § 2, but also because the guarantees of article 6 § 2 govern

[65]ECtHR, Phillips v. Royaume-Uni of 12 December 2001, par. 36ss. Grayson & Barnham v. The United Kingdom of 23 September 2008, par. 37,
[66]Divisional Court, 8 October 2003, R. (on the application of Lloyd) v Bow Street Magistrates' Court, EWHC 2003, Admin 2294, p. 136.
[67]LIAKOPOULOS, D., Der Beitritt der Europäischen Union zur EMRK: Jurisprudenz und kriminelle Profile, op. cit.,
[68]C. GRABENWARTER, European Convention on Human Rights-Commentary, op. cit., pp. 166ss.

> the criminal proceedings entirely and not only in the examination of merits of accusation[69], the presumption of innocence applies only in connection with "the particular offense" charged and does not apply in relation to the imputation of elements such as character and conduct within and for the purpose of determining the penalty, except that it is of such a nature and degree to entail a new charge under the autonomous concept of criminal matters of ECHR (...)"[70].

In this direction in Butler v. Royaume-Uni case ECtHR denies the link to the notion of criminal matters of the English civil recovery (seizure and confiscation of the drug trafficking cash contemplated in Part II of DTA 1994) a form of confiscation without conviction, reiterating that it is a regulation of the use of the property corresponding to the general interest, in this case represented by the fight against the trafficking of drugs[71]; and also in this context it is recognized that the use of presumptions is justified in criminal and especially in civil matters[72].

In similar terms, in Van Offeren-the Netherlands case is then decided, in relation to an enlarged form of confiscation under art. 36 of the Dutch criminal code, specifying also in this case that the procedure for the application of confiscation only concerns the measure of sanction and does not concern the guilt, judged in the main proceedings. This is not a criminal matter pursuant to art. 6 of ECHR in the light of the criteria developed by ECtHR[73]. ECtHR considers that confiscation is applied in a separate procedure (in order to avoid prolonging the duration of the process), which is directly related to the main proceeding, as only following a conviction is the procedure for ruling confiscation; in these circumstances it is reiterated that "the confiscation order procedure" can be considered as a part of the "sentencing process" according to national legislation. It follows that, according to the criterion of qualification of the procedure under the national legislation, it is not a criminal matter. In relation to the second and third criteria, the nature of proceedings and the type and severity of the sentence, ECtHR notes that, in a proceeding aimed at the application of confiscation, the accusation must establish "prima facie case" that the accused has profited from the crime of the conviction and other similar crimes. It is up to the convicted person to refute prosecution's hypothesis by demonstrating, according to civil law, that the profits in question have not been obtained from crimes for which he was convicted or from other crimes

[69]ECtHR, Minelli v. Switzerland of 25 March 1983, par. 30; Sekanina v. Austria of 25 August 1993; Allenet de Ribemont v. France of 10 February 1995. For more details see: W.A. SCHABAS, The European Convention on Human Rights: A commentary, op. cit., pp. 1755ss.
[70]W.A. SCHABAS, The European Convention on Human Rights: A commentary, op. cit.,
[71]ECtHR, Butler v. United Kindom of 27 June 2002, par. 8. According to the Court, this is a discipline proportionate to the aim to be pursued and guarantor of fundamental rights (the control of Magistrates'Court and in the Crown Court's appeal are sufficient, the rights of defense are guaranteed).
[72]ECtHR, Van Offeren v. The Netherlands of 5 July 2005.
[73]D. LIAKOPOULOS, European integration and its relation with the jurisprudence of European Court of Human Rights and private international law of European Union, in Homa Publica. Revista Internacional de Direitos Humanos e Impresa, 2 (2), 2018.

of the same nature. The purpose of proceedings is not to pronounce a conviction or acquittal for other crimes, but to determine the amount of profits obtained by the convicted person from or through drug trafficking or related crimes. In this way ECtHR considers that the purpose of proceeding is similar to that aimed at determining the amount of the pecuniary sentence or the duration of custodial sentence, and does not entail a new "accusation" pursuant to art. 6 § 2 of ECHR.

The proceedings taken into consideration by the ECtHR fall, however, perfectly in the broad definition of "proceeding in criminal matters" of the Regulation in question, since they are always proceedings related to a crime; the problem remains of the guarantees that these proceedings must take in order to be included in the scope of the Regulation, as will be discussed below. Apart from the concerns, examined elsewhere, on the consistency of the ECtHR jurisprudence on the matter, which continues to deny the guarantees of criminal matters to particularly invasive forms of confiscation connected to crimes.

9 FORMS OF CONFISCATION SUBJECT TO MUTUAL RECOGNITION

In addition, confiscation without conviction will fall within the scope of Regulation (article 127 ter, Ley organica 1/2015)[74] which, as mentioned, was introduced in a much wider form than the model provided for in Directive no. 42/2014 (which, in fact, only provides for the "minimum" confiscation powers, allowing member states to adopt wider ones), that is, in the case of death of the offender or of extinction of the crime or lack of responsibility of the author. The application of this form of confiscation presupposes the verification of an illegal patrimonial situation by the criminal court in an adversarial procedure; proceedings against those who have been formally accused or against the accused (a notion that also includes the person under investigation, "acusado o contra el imputado[75]") in relation to which there are reasonable indications of criminal activity,

[74]This regulation was introduced by the Organic Law 1/2015, of March 30, which modified the LO 10/1995 and reformed the Penal Code; Law 41/2015 of 5 October amended the law of criminal procedure to speed up criminal justice and strengthen the process and finally, through the Royal Decree 948/2015 of 23 October, the Office for Recovery and Management was regulated confiscated assets (Asset Management). With these reforms we want to "give the 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).

[75]En relación con el término "imputado", debe tenerse presente que a través de la LO 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica, se ha sustituido el término imputado en la LECr por "investigado o encausado" según la fase procesal (Vid. Preámbulo apartado V y Artículo único, apartado vigésimo). El término "investigado" "servirá para identificar a la persona sometida a investigación por su relación con un delito; en tanto que con el término "encausado" se "designará, de manera general, a aquél a quien la autoridad judicial, una vez concluida la instrucción de la causa, imputa formalmente el haber participado en la comisión de

when the situations listed would have prevented the continuation of criminal proceedings[76].

Moreover, the constitutional court considers that the imposition of comiso ampliado does not compromise the right to presumption of innocence

> ("the presumption of innocence acts as the right of the accused to not suffer a conviction unless the test is reached of guilt beyond reasonable doubt")

because the ascertainment of guilt is not called into question in respect of this principle: once the guilt is proven, the presumption of innocence is no longer involved; rather, in imposing confiscation, particular attention must be paid to the rest of guarantees of criminal trial and to the need for the right to effective judicial protection (SSTC 219/2006, FJ 9 y 220/2006, FJ 8). The constitutional court deems the circumstantial evidence of the criminal origin of the assets to be confiscated (STC 219/2006, FJ 9; 220/2006, FJ 8). In the same direction the supreme court pronounced with the sentence no. 338/2015, considering that the same canon of certainty cannot be claimed when it comes to verifying compliance with the presumption of innocence and when it comes to determining the factual assumption that allows the application of confiscation[77].

Not only but also the extended confiscation can be applied without condemnation (except in the hypothesis foreseen by article 127 quinquies of criminal code, decomposed expanding in case of actividad delictiva previa continuada), differently from what is foreseen in directive which conceived the confiscation without condemnation as a residual hypothesis and having a subsidiary character with respect to direct confiscation, as emerges from art. 4, sub-par. 2 and from recital n. 15. Without prejudice to the fact that part of the doctrine denies the application of the decomposed expanding without condemnation, because the presuppositions of this form of confiscation pursuant to art. 127 bis of criminal code, starting with the conviction for one of the listed crimes. It follows that confiscation without condemnation would apply only to proceeds that derive directly and in a manner established by the crime. Furthermore, it is believed that this form of confiscation

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un hecho delictivo concreto" (Preámbulo, apartado V). For further details see: S. GIRARDO PÉREZ, Actuaciones policiales en el àmbito de la ley de seguridad ciudadana, Punto Rojo Libros, Madrid, 2016.

[76]"2. El decomiso al que se refiere este artículo solamente podrá dirigirse contra quien haya sido formalmente acusado o contra el imputado con relación al que existan indicios racionales de criminalidad cuando las situaciones a que se refiere el apartado anterior hubieran impedido la continuación del procedimiento penal".

[77]"Ahora bien, ha de tenerse presente que no es exigible el mismo canon de certez (...) Mientras que en el caso del decomiso, respecto a la probanza de su presupuesto fáctico (la procedencia ilícita de un bien o derecho) no puede pretenderse que lo sea en los mismos términos que el hecho descubierto y merecedor de la condena, sino que, por el contrario, esa prueba necesariamente debe ser de otra naturaleza y versar de forma genérica sobre la actividad desarrollada por el condenado (o titular del bien decomisado) con anterioridad a su detención o a la operación criminal detectada (SSTS 877/2014, de 22 de diciembre; 969/2013, de 18 de diciembre (RJ 2014, 1238); 600/2012, de 12 de julio).

cannot be applied in case of acquittal for the predicate offenses (TS 17/12/14, EDJ 2014/255414)[78].

In Spanish legal system, always in implementation of Directive n. 42/2014, to ensure the effective application of confiscation the legislator intervened with L 41/2015 also in procedural matters governing the intervention in criminal trial of third parties whose rights are compromised by a provision of confiscation and, above all, a new procedure of autonomous confiscation, which will allow to apply the confiscation without conviction (arts 803 ter e) to 803 ter u) LECr). To this end, the new Título III ter of Book IV of the LECr (Ley de Enjuiciamiento Criminal para la agilización de la justicia penal y el fortalecimiento de las guaranas procesales- "BOE" 6 octubre) was introduced, with the heading

> "de la intervención de terceros afectados por el decomiso y of the procedimiento de decomiso autónomo".

The autonomous procedure pursuant to art. 803 ter e) 2 LECr, may be carried out when the prosecutor confines himself to the prosecution only to request confiscation, expressly reserving its application to this autonomous procedure and, therefore, only after the final conviction; this proceeding may start on the initiative of public prosecutor, furthermore, when, despite the existence of a punishable offense, the perpetrator has died or is not prosecuted because he is contumacious or not imputable.

This autonomous procedure also presents itself as a sort of hybrid where, on the one hand, article 803 ter g (Procedimen) provides that the rules governing the verbal judgment governed by title III of Book II of the "Ley de Enjuiciamiento Civil" are applicable and do not contradict the rules established in this chapter. On the other hand, with art. 803 ter h (Exclusividad of the Ministerio Fiscal en el ejercicio de la acción) is entrusted to the public prosecutor the exclusive competence to exercise the action on subject, and pursuant to art. 803 ter f ss. jurisdiction is established in the court or tribunal which pronounced the sentence, or who initiated the suspended proceedings or which, in any case, would have been competent if the trial was not possible due to the circumstances examined above, as contemplated by art. 803. In conclusion, reference is made to a criminal judge. By virtue, again, of art. 803 ter r (Recursos y revisión de la sentencia firme) the procedural rules of the appeal applicable to the shortened criminal trial will be applicable to the decomposed procedure, and therefore we return to a criminal procedure; for the destination of assets pursuant to art. 803 ter p the provisions of law and criminal code apply. The procedure is

[78]BGH, 15.03.2016-1 StR 662/15,

carried out against those involved in their relationship with the assets to be confiscated (also with reference to third parties with a claim, article 803 ter j Legitimación pasiva y citación a juicio). Article 803 ter m (Escrito de contestación a la demanda de decomiso) basically establishes that the adversarial procedure is activated only after the protest of the interested parties to the request for confiscation, presented by the public prosecutor and communicated to them, otherwise in the absence of dispute the competent judge can to pronounce the provision of definitive confiscation. In article 803 ter p (Efectos de la sentencia de decomiso) it is specified that the content of the outcome of the autonomous confiscation procedure will not be considered binding in the eventual subsequent judicial proceedings against the defendant, nor the eventual autonomous confiscation will be subject to judicial action in any subsequent criminal proceedings against the defendant.

In relation to the German legal system it should fall within the scope of Regulation as applied in the criminal trial, first of all, confiscation (Einziehung, § 73) in the enlarged form, named (following the 2017-Entwurf eines reform Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung BReg418/16, in implementation of Directive 42/2014/EU) "Erweiterte Einziehung von Taterträgen bei Tätern und Teilnehmern", § 73a) and no longer Erweiterter Verfall, § 73d117), even if considered by the German constitutional court measure-Maßnahme (ex §§ 11, 1, No. 8, and 61 StGB) and not penalty (Strafe)[79]. It should also include confiscation pronounced in an autonomous proceeding under § 76a, I Selbständige Anordnung[80]

> ("one must or can independently order the public acquisition or confiscation of the object o of the equivalent value or the uselessness")

when the conditions for the application of these sanctions are verified, that is above all the commission of a crime, but for de facto reasons no person can be prosecuted or convicted of the crime (escape, untraceable or unable to determine the identity of the responsible) or even for legal reasons (prescription, ne bis in idem, lack of imputability, reintroduction of articles § 422 ss stop-Abtrennung der Einziehung, 436 stop-E)[81] and law does not provide otherwise[82]. In this proceeding, as discussed elsewhere, the criminal judge must ascertain all the facts and evidence

[79]BVerfG, 14. 1. 2004-2 BvR 564/95, § 58 ss., § 70-72. For further details see: R. ESSER, A civil asset recovery model-The german perspective and European Human Rights, in J.P. RUI, U. SIEBER, Non conviction-based confiscation in Europe, Duncker & Humblot, Berlin 2015, p. 69.
[80]§ 76a I StGB, § 440 StPO Selbständiges Einziehungsverfahren, § 441 StPO Verfahren bei Einziehung im Nachverfahren oder selbständigen Einziehungsverfahren. D. FISCHER, O. SCHWARZ, E. DREHER, H. TRÖNDLE, Strafgesetzbuch und Nebengesetze, C.H. Beck, München, 2012.
[81]Referentenentwurf, (Entwurf eines Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung BReg418/16), p. 2. V. KREY, M. HEINRICH, Deutsches Strafverfahrensrecht, Kohlhammer Verlag, Stuttgart, 2018, pp. 373ss.
[82]§ 244 II StPO. For more details see: R. RAUXLOH, Plea bargaining in national and international law, ed. Routledge, London & New York, 2012

that are significant for the final decision[83]; the proceeding remains criminal with the relative standard of proof. This form of autonomous confiscation, therefore, even where enlarged, is not applied on the basis of the mere suspicion ("bloße Verdacht") of the illicit origin of the assets to be confiscated[84], but the conviction of judge is required without limitation ("uneingeschränkte richterliche Überzeugung") and that is the positive conviction of the illicit origin of goods, in compliance with the rule "in dubio pro reo" ("ganz hohe Wahrscheinlichkeit") as claimed by the constitutional court and the German supreme court in relation to the previous Erweiterter Verfall[85]. It is considered possible to apply this form of confiscation in the absence of a conviction precisely because it is considered that it is a criminal subtraction of profits aimed at the removal of an illicit allocation of assets and to restore the legal order, with a preventive function.

Since it is still a form of confiscation applied in a criminal proceeding (connected to a crime), Regulation will certainly also cover the confiscation hypothesis introduced with the reform for the terrorism and organized crime sector (crimes such as money laundering, child pornography, trafficking of human beings, drugs, weapons, etc.), and that is a form of confiscation without condemnation of the assets of suspected criminal origin, independently of the evidence of a specific crime, § 76a, sub-par. 4, considered by the same German doctrine as a kind of 135edera in rem ("Verfahren 135eder die Sache")[86]. The court can proceed with the confiscation of assets whose illicit origin is convinced in the hypothesis in which the assets are seized in a trial against persons suspected of the listed crimes, but the subject subjected to such provision cannot be prosecuted or condemned. This proceeding is certainly in criminal matters since it not only relates to proceeds of crime, but takes place before the proceeding judge or, in case of non-prosecution, the judge (criminal) who would have been competent where the action was exercised (§§ 435 and following of stop), and above all, by virtue of § 437 stop, the conviction of the judge about the illicit origin of the assets to be confiscated[87] implies the respect of the principle of free evaluation of proofs (§

[83]BGH, 10 February 1998-4 StR 4/98 (LG Bochum), in NStZ 1998, pp. 362; BGH, 22 November 1994, 4 StR 516/94 (LG Bochum), in NStZ 1995, 125, 470. O. SCHMIDT, Voraussetzungen der Anordnung des erweiterten Verfalls, in Jus 1995, pp. 463ss. In the same spirit: Urt. V. 17 June 1997-StR 187/97; J. BENSELER, Möglichkeiten der Gewinnabschöpfung zur Bekämpfung der Organisierten Kriminalität, ed. Iusccrim, Freiburg, 1996, pp. 26ss. H. GRAMCKOW, Einziehung bei Drogendelikten in den USA, C. Heymanns, Köln 1994, pp. 244ss.

[84]K. LIGETI, M. SIMONATO (eds.), Chasing criminal money. Challenges and perspectives on asset recovery in the EU, op. cit., pp. 12ss.

[85]BVerfG, 14. 1. 2004; BGH, 22. November 1994-4 StR 516/94-BGHSt-62-4, 371-374, Rn. 8; BVerfG, Beschluss vom 14. Januar 2004-2 BvR 564/95-BverfGE 110, 1-33, Rn. 86; BGH, NStZ RR2013, 207; BGH, Wistra 2014, 192-193; BGH, 23 May 2012-4 StR 76/12,which affirms the subsidiary nature of the enlarged confiscation with respect to direct confiscation; compliant BGH 1 StR 662/15-15 March 2016 (LG Hof) [=HRRS 2016 Nr. 583]. V. KREY, M. HEINRICH, Deutsches Strafverfahrensrecht, op. cit.,

[86]§ 244 II StPO. V. KREY, M. HEINRICH, Deutsches Strafverfahrensrecht, Kohlhammer Verlag, op. cit.

[87]According to the opinion that can be based on a plurality of indicators, such as the personal and economic conditions of the owner and, in particular, the "crass disproportion between the value of the property and the legal income of the interested part (§ 437 Absatz

437 paragraph 2 stop-E) and, therefore, a standard of criminal proof should be required; it is a form of confiscation without conviction, destined in the will of legislator to remove criminal economic situations in order to prevent the use of proceeds of crime and their reinvestment in criminal activities, not considered a penalty but a measure of subtraction of the unlawful proceeds, and therefore not subject to the principle of guilt. Notwithstanding the claim, at least in jurisprudence, of a criminal standard of proof of illicit origin, even in this case the perplexities of the doctrine and of Bundesrechtsanwaltskammer emerge which fear a violation of the principle of free conviction of judge (§ 261 stop) in fact, in particular by virtue of par. 437 stop, a concrete inversion of the burden of proof, in contrast with the presumption of innocence provided for by art. 6, par. 2 ECHR[88].

Some doubts arise about the possibility to include within the scope of application of the Directive a particular form of enlarged confiscation provided for in the Austrian legal system (§ 20b öStGB[89] Erweiterter Verfall), which is based on the presumption of the illegal destination of goods or, better, availability of the same by the criminal organization and not on the proof of illicit origin; this form of confiscation is directly applicable against the assets of criminal organization (§ 278a) or terrorist (§ 278b) or against assets intended for financing terrorism (§ 278d)[90] (very similar to the form of confiscation under art. 72 StGB[91] or confiscation against the terrorist organization pursuant to section 13 of the English Prevention of Terrorism (temporary provisions) Act 1989[92]. This form of confiscation can be applied in an autonomous procedure (in REM), independently of a sentence of conviction, directly against the organization. In relation to the similar form of confiscation laid down in Swiss law, the Bundesstrafgericht (Tribunal 136eder 136ederal) has specified that under § 72 StGB

1 Satz 2 StPO-E).

[88]D. LIAKOPOULOS, European integration and its relation with the jurisprudence of European Court of Human Rights and private international law of European Union, op. cit., D. LIAKOPOULOS, La volonté de la Cour de justice de privilégier la Convention européenne des droits de l'homme dans sa protection des droits fondamentaux, in International and European Union Legal Matters-working paper series, 2012.

[89](1) Vermögenswerte, die der Verfügungsmacht einer kriminellen Organisation (§ 278a) oder einer terroristischen Vereinigung (§ 278b) unterliegen oder als Mittel der Terrorismusfinanzierung (§ 278d) bereitgestellt oder gesammelt wurden, sind für verfallen zu erklären. V. KREY, M. HEINRICH, Deutsches Strafverfahrensrecht, op. cit.,

[90]This form of Verfall affects all assets that are in the power of disposal of a criminal organization (§ 278a, paragraph 1 öStGB) or terrorist (§ 278b) (or which constitute a means of financing terrorism, § 278d), or which, although originating from a fact punishable abroad, are in Austria, even if the offender does not fall under Austrian jurisdiction.

[91]Beschluss vom 30. November 2012 Beschwerdekammer Besetzung Bundesstrafrichter Stephan Blättler, Vorsitz, Andreas J. Keller und Tito Ponti, Gerichtsschreiber Stefan Graf Parteien A., vertreten durch Rechtsanwalt Patrick Lafranchi, Beschwerdeführer gegen Bundesanwaltschaft, Beschwerdegegnerin Vorinstanz Bundesstrafgericht, Strafkammer Gegenstand Beschlagnahme (Art. 263 ff. StPO).

[92]In 2000 it was reformed in the Terrorism Act 2000, and thereafter the Prevention of Terrorism Act 2005 and the Terrorism Act 2006 were issued (in addition to Terrorism (Northern Ireland) Act 2006).

> "the judge orders the confiscation of all assets subject to the power of disposal of a criminal organization, independently from their origin, previous use and future purpose. Therefore, it is irrelevant whether they are illicitly or lawfully acquired assets or whether they are intended for legal purposes (see: Federal Supreme Court 1S.16/2005 of 7 June 2005, E. 2.2). A good of a person suspected of involvement or assistance in a criminal organization can be confiscated if the person concerned does not refute, clearly demonstrating that the asset is neither directly nor indirectly subject to the power of disposal of the criminal organization"[93].

This form of confiscation does not fall within the confiscation models provided for by Directive no. 42/2014 (except to refer to the confiscation of assets intended for the realization of the offense), it may, however, fall within the scope of Regulation which only claims that it is a provision of confiscation pronounced in a proceeding in criminal matters as in the case in question concerning assets related to a criminal or terrorist organization and especially in defining the assets that may fall within the object of confiscation. Art. 2 of Regulation refers in addition to the proceeds or instruments of the offense, or to the assets that can be

> "confiscated through the application in the issuing state of one of the confiscation powers provided for in Directive 2014/42".

Also to assets that can be

> "confiscation under other provisions relating to the powers of confiscation, including confiscation in the absence of a final conviction, provided by the law of the issuing state following a proceeding for a crime".

Rather, however, certainly in the model provided for by art. 5 of Directive, the enlarged confiscation laid down in the Austrian legal system (§ 20b, paragraph 2, öStGB), where it presupposes the conviction for the most serious crimes (or for money laundering, criminal association or crimes for terrorism purposes), the connection time between the consumption of the offenses and the purchase of assets and the weakening of the illicit origin in accordance with the provisions of art. 5 of Directive

> ("if it is reasonable to assume that they derive from an unlawful act and their legitimate origin cannot be justified").

In line with the indications emerging from the Directive, the general confiscation of French law, conceived as a penalty against property, is aimed at serious crimes related to organized crime

[93]TPF BB.2006.11 of 10 May 2006, E. 5.1, TPF BB.2006.5, 28. June 2006 E. 4.1, BK_B 077/04 of 25 August 2004 E. 4, Sentence of the Federal Tribunal 1S.16/2005 of 7 June 2005 E. 2.2; Bundesstrafgericht, 19 January 2007, I. Beschwerdekammer, A. gegen Schweizerische Bundesanwaltschaft Zweigstelle Zürich-Eidgenössisches Untersuchungsrichteramt.

(such as the most serious cases of drug trafficking article 222-49, § 2 code pénal and laundering[94]) and in particular affects the "association de malfaiteurs"[95], presupposes a conviction, but allows the confiscation of all or part of the assets without the limits set by Directive, not requiring any proof of illicit[96], nor much less the disproportion or the temporal correlation[97]. Moreover, this model of confiscation, even if potentially effective, seems to be difficult to comply with the principles of punishable taxation, since the parameters for determination of the same are not predetermined the only limit is the amount of assets to be confiscated and with the principle of guilt understood as a parameter of proportionality of the same sentence.

The capital punishment, Vermögenstrafe of the German legal system, was in fact declared unconstitutional by the BverfGE[98] sentence, for violation of the principle of taxation (article 103, letter 2 GG). However, even this form of general confiscation of assets may fall within the broad scope of Regulation falling within a form of confiscation pronounced in criminal matters and which affects assets that are subject to confiscation

> "under other provisions relating to the powers of confiscation from the law of the issuing state following a proceeding for a crime"

article 2, paragraph 2, no. 3 Regulation); even if one could consider that this discipline does not respect the principles of criminal matters referred to in recital n. 16 and n. 18 of Regulation, starting from the principle of proportionality of the sentence sanctioned by art. 49, par. 3 ECHR, expressly referred to in art. 1, lett. 2 where the obligation to respect the fundamental rights and the juridical principles enunciated in art. 6 TEU[99] (the principle of proportionality is also expressly referred to in recital 15).

Another form of enlarged confiscation is provided for in the French legal system for offenses punished with a sentence equal to or greater than five years, capable of producing a direct or indirect profit[100]; following the conviction it is possible to confiscate all the goods in relation to

[94]Article 222-49 Version en vigueur au 31 janvier 2012, depuis le 11 juillet 2010.
[95]L. n° 2001-420, 15 May 2001-Art. 450-5 of criminal code.
[96]In France it was preferred, in the first instance, to adopt this solution with the confiscation général, instead of introducing the inversion of the burden of proof, concerning the origin of the assets, against the defendant, precisely to prevent this in the last case he succeeded in avoiding confiscation by fraudulently fulfilling his burden.
[97]A. DESSECKER, Gewinnabschöpfung im Strafrecht und in der Strafrechtspraxis, ed. Max Planck Institut, Freiburg 1992, pp. 350-351. E. DREHER, H. TRÖNDLE, § 43a, in Strafgesetzbuch und Nebengesetze, op. cit., pp. 492ss. T. PARK, Vermögenstrafe und "modernes" Strafrecht. Eine verfassungsrechtliche, strafrechtsdogmatische und Kriminalpolitische Untersuchung zur § 43 a StGB, C.H. Beck, Berlin 1997ss. K. TIEDEMANN, M. ENGELHART, Wirtschaftsrecht, F.F. Vahlen, Freiburg, 2017, pp. 210ss.
[98]BGH, 15 novembre 2002, 2 StR 302102 (LC Frankfurt a.M.), in NStZ 2003, 198
[99]A. HATJE, J.P. TERHECHTE, P.C. MÜLLER-GRAFF, Europarechtswissenschaft, ed. Nomos, Baden-Baden, 2018.
[100]"(...) il s'agit d'un crime ou d'un délit puni d'au moins cinq ans d'emprisonnement et ayant procuré un profit direct ou indirect, la confiscation porte également sur les biens meubles ou immeubles, quelle qu'en soit la nature, divis ou indivis, appartenant au

which the owner cannot justify the licit origin according to article 131-21, par. 5, as amended by Loi No. 2007-297 du 5 mars 2007 art. 66 JORF 7 mars 2007. This is a form of enlarged confiscation which falls partly within the definition under art. 5 of Directive n. 42/2014, being applied following conviction and on the basis of a real reversal of the burden of proof against the convicted person (we can remember, moreover, that in France not only the confiscation of assets of unjustified value is envisaged, but even the lack of justification for the origin of the possessions is autonomously charged with the crime of "non-justification de resources ou de l'origine d'un bien" by law no. 2006-64).

10 GUARANTEES OF CRIMINAL MATTERS (POSTPONEMENT)

Regulation not only reiterates that

> "fundamental rights and legal principles set out in article 6 of the Treaty on European Union (TEU)"

must be respected, but also recalls when the crime is committed through a minor with respect to which the accused cannot justify the basis of his authority (article 321-6-1), and 7 to 200,000 fine, when the offenses in question are trafficking in human beings, extortion or criminal association, or drug trafficking, even in cases of normal relationships with one or more drug users. They are increased to ten years imprisonment and a fine of 300,000 euro in the case of a crime referred to in the previous paragraph, is committed by one or more minors. It is therefore required, even in the last version, that the confiscation order be taken with the guarantees of criminal matter. Recital no. 18 states, in fact, that

> “(…) the essential guarantees applicable to the criminal proceedings envisaged by CFREU should apply to the criminal proceedings but which are covered by this Regulation”.

The Regulation, in short, requires, for the purpose of mutual recognition, that the confiscation order is taken in compliance with the right to due process provided for in art. 6 ECHR and in articles 47 and 48 of CFREU[101], as well as compliance with relevant legislation at European

condamné lorsque celui-ci, mis en mesure de s'expliquer sur les biens dont la confiscation est envisagée, n'a pu en justifier l'origine (...)".

[101]For further details see: M. SAFFIAN, D. DÜSTERHAU, A Union of effective judicial protection: Addressing a multi-level challenge through the lens of article 47 CFREU, in Yearbook of European Law, 33 (1), 2014, pp. 3ss. C. MAK, Rights and remedies: Article 47 EUCFR and effective judicial protection in european private law matters, in Amsterdam Law School Research Paper No.

level starting from CFREU on the essential guarantees applicable to criminal proceedings. ECtHR must establish that this is a crime proceeds (or instrument) and in a proceeding in which all the guarantees of criminal matters provided for in member state apply.

Not only that, but notwithstanding, that in the Explanatory Memorandum of Regulation proposal it is recalled that ECtHR has repeatedly considered compliant with art. 6 ECHR and the right to property pursuant to art. 1 of the Additional Protocol of ECHR forms of confiscation without conviction based on presumptions, provided they are refutable and "if effective procedural safeguards are respected" in line with Directive 2016/343 on the presumption of innocence (which in recital 22 accepts use of presumptions)m on the other the same Directive 2016/242 requires respect for the right to silence, as an important aspect of the presumption of innocence (recital 24). And, then, the evidence of illicit origin of the estate cannot be founded on the silence of the accused or prevented or to give it probative dignity, as it normally happens in the application of forms of enlarged confiscation, including the confiscation or prevention measure in relation to which the jurisprudence demands the full explanation of how the assets have been economically formed. In this way the adoption of Regulation should represent an incentive for the adoption of a model of the heritage process in compliance with the penalties, starting from the standard of criminal evidence concerning the illicit origin of assets, if the mutual recognition of the forms of enlarged confiscation provided for in the internal legal systems, both confiscation and of prevention.

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