

CROSS-BORDER ORGANIZED CRIME AND SEIZURE OF THE PROCEEDS

By Constantin Duvac*, Mihai Adrian Hotca* and Norel Neagu*

Abstract

The authors makes an analysis as to the legal content of the four modalities of the constituted plurality of offenders, regulated in the Romanian criminal law: creation of an organized crime group (art. 367 C. pen.); creation of illegal intelligence structures (art. 409 C. pen.); association in order to commit the crime provided for in art. 8 para. (1) from Law no. 241/2005 and the association or initiation of an association for the purpose of committing acts of terrorism or the accession or support in any form of such an association (art. 35 of Law no. 535/2004).

Confiscation of proceeds of crime is ruled by a general principle: crime does not pay. Whether the perpetrator is punished or not for his crime, whether the proceeds of crime are in his/her possession or not, this principle governs the rules related to confiscation. Its roots can be found in all international and national instruments and also in international and national case-law. The foundation of confiscation rules stem from this principle.

The second part of this study will focus on five main points related to confiscation: international instruments, EU instruments, European case law in respect to confiscation, Romanian legislation on confiscation of proceeds and instrumentalities of crime, and problems in respect to non-conviction-based confiscation.

Keywords: criminal law, plurality of offenders, organized crime, special seizure of the proceeds.

A. CROSS-BORDER ORGANIZED CRIME

1. The Romanian Penal Code from 1969, repealed at the first February of 2014, had 2 incriminations regarding some manifestations of organized crime: conspiracy (art. 167) and association to commit crimes (art. 323), the local judicial doctrine and practice making a correct application of them, distinguishing them from forms of criminal participation such as authorship, co-authorship, instigation and complicity.

After the appearance of new forms of manifestation and the evolution of organized crime, these regulations became insufficient.

Although after the events of 1989 this issue (organized crime, "internationalization of crime") was investigated in Romania only from a criminological point of view¹, after 2003, once the Law no. 39/2003² regarding the prevention and fight against organized crime was adopted, we can observe the tendency to analyse in particular the legal-penal implications of this phenomenon.

Romanian doctrine under the influence of comparative law tried to offer new solutions in this regard to the Romanian criminal legislator.

As such, under the influence of the doctrine, the criminal lawmaker took, even if later on, the necessary measures in order to elaborate and adopt specific incriminations and an adequate sanctioning system.

Faced with this phenomenon, the criminal law was also faced with the need to incriminate and sanction again these complex criminal manifestations and to develop an adequate legal instrument that, respecting the fundamental principles of criminal law proper to the rule of law, would also constitute an effective weapon in the fight to prevent and combat such antisocial acts³.

* President of the Romanian National Group affiliated to AIDP, Professor at Romanian-American University, E-mail: constantin.duvac@rau.ro.

* The prime-vicepresident of Romanian National Group affiliated to AIDP, Professor, Nicolae Titulescu University, E-mail: mihaihotca@gmail.com.

* Associate Professor, Romanian-American University, E-mail: norel.laurentiu.neagu@rau.ro.

¹ Dan Banciu, Sorin M. Rădulescu, *Corruption and organized crime in Romania*, Ed. Continent XXI, Bucharest, 1994, p. 24.

² M. Of. no. 50 of January 29, 2003. It should be noted that the adoption of this law also gave effect to the provisions of Law no. 565/2002 (M. Of. no. 813 of November 8, 2002) ratifying the United Nations Convention against Transnational Organized Crime, adopted in New York on November 15, 2000.

³ George Antoniu, *Reflections on organized crime*, in *Criminal Law Review* no 3/1997, p. 35.

Organized crime thus appears in the Romanian criminal law not only as a challenge to the legislator, determining it to identify new forms of combating through the criminal law the acts of this kind, but also to the criminal doctrine, determining the scientists to reflect on the nature, gravity and particularities of the criminal actions committed by criminal offenders associations, to suggest new, specific and effective ways of fighting, by means of the criminal law, against the mentioned phenomenon.

2. The identification of the appropriate repressive means did not remain unchallenged either with regard to the activity of the International Association of Penal Law which addressed this issue at the 1999 Congress in Budapest, with the theme "The Criminal Justice System Facing the Challenge of Organized Crime" and at the one from 2009 in Istanbul, with the theme "The main challenges posed by the globalization of criminal justice".

3. The phenomenon of "globalization of crime" in recent years has not remained without consequences at the level of Romanian criminal law. The Romanian legislator reacted quickly after ratifying the main international conventions related to this process (phenomenon), incriminating under criminal sanction new activities dangerous to the society and its members.

For example: The International Convention against Transnational Crime of 2000 was ratified by Law no. 565/2002; The international convention for the repression of terrorist financing, adopted by the General Assembly of the United Nations on December 9, 1999, was ratified by Law no. 623/2002; The international convention for the repression of acts of nuclear terrorism, signed in New York on September 24, 2005, was ratified by Law no. 269/2006; The Council of Europe Convention on the Prevention of Terrorism, signed in Warsaw on May 16, 2005, was ratified by Law no. 411/2006.

It should be mentioned that, according to art. 11 par. (2) of the Romanian Constitution, republished, "The treaties ratified by the Parliament, according to the law, are part of the national law".

4. Then, the Romanian state adopted specific legislation to combat organized crime more effectively: Law no. 39/2003 regarding the prevention and combating of organized crime;

Law no. 535/2004 on preventing and combating terrorism

Law no. 508/2004 regarding the establishment, organization and functioning within the Public Ministry of the Directorate for Investigating Organized Crime and Terrorism (currently this is regulated by GEO 78/2016);

Law no. 286/2009 on the Criminal Code, entered into force on February 1, 2014.

5. In the Romanian criminal law, there are four modalities of the constituted plurality of offenders: creation of an organized crime group (art. 367 C. pen.); creation of illegal intelligence structures (art. 409 C. pen.); association in order to commit the crime provided for in art. 8 para. (1) from Law no. 241/2005 and the association or initiation of an association for the purpose of committing acts of terrorism or the accession or support in any form of such an association (art. 35 of Law no. 535/2004).

6. **Creation of an organized crime group**¹ it was drafted in such a way as to give up the parallelism existing in the previous criminal law between the texts that incriminate this kind of acts (organized crime group, association for the commission of crimes, plot, terrorist group) in favour of establishing a framework incrimination – creation of an organized crime group – with the possibility of maintaining as a distinct incrimination of the terrorist association, given its specificity.

¹ **Art. 367 C. pen.** – *Creation of an organized crime group*: "(1) The act of initiating or creating an organized crime group or of joining or supporting such a group in any way shall be punishable by no less than 1 and no more than 5 years of imprisonment and a ban on the exercise of certain rights.

(2) When the offences included in the purpose of an organized crime group are punished by life imprisonment or by a term of imprisonment exceeding 10 years, it shall be punishable by no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights.

(3) If the acts set out in par. (1) and par. (2) were followed by the commission of an offence, the rules on multiple offences shall apply.

(4) No penalty shall apply to the individuals who committed the acts set out in par. (1) and par. (2) if they report the organized crime group to the authorities before it was discovered and before the commission of any of the offences included in the purpose of the group.

(5) If the perpetrator of one of the acts referred to in par. (1)-(3) facilitates, during the criminal investigation, discovery of the truth and the prosecution of one or more members of the organized crime group, the special limits of the penalty are reduced by one-half.

(6) An "organized crime group" means a structured group, made up of three or more persons, which exists for a certain period of time and acts in a coordinated manner for the purpose of perpetrating one or more offences".

The formation of an organized criminal group is the act of the person who associates with other persons (at least two) or who initiates the formation of a group for the purpose of committing one or more crimes, as well as the person who joins or supports, in any form, such a group.

The material element consists of several alternative actions, namely: initiating or forming an organized criminal group or joining or supporting such a group in any form.

The initiation action can be committed by a single perpetrator or by several, each of them having the capacity of the perpetrators of the criminal act, regardless of whether or not the organized criminal group was formed and regardless of whether the perpetrator or perpetrators who initiated the formation they entered that group or not. Consequently, the simple initiation in the mentioned form is sufficient to characterize the consummation of the crime, independent of the formation of the group.

This involves the externalization of the criminal thought (*nuda cogitationes*), of the intention to establish an organized criminal group, the communication of the establishment project and the purpose for which the group is to exist.

In judicial practice, it was decided that there is an organized criminal group: if the defendants acted in a coordinated manner, each of them fulfilling specific roles, in order to commit the crime of smuggling, in order to obtain a financial or other material benefit¹; or if the defendant, repeatedly over time, took over groups of people with a view to their fraudulent crossing of the state border and requested the other defendants to, in exchange for sums of money, organize and ensure the effective crossing of the state border state, illegally, by groups of people²; or if the defendants acted for a period of time and in a coordinated manner, each of them fulfilling certain roles in the execution of the criminal plan, in order to commit the crime of human trafficking, in order to obtain a financial or other material benefit³.

In the absence of a single cumulative requirement regarding the organized criminal group, it is not achieved, and the rules of criminal participation will apply.

Therefore, the group formed occasionally for the immediate purpose of committing one or more crimes and which does not have continuity or a determined structure, or predetermined roles for its members within the group, does not constitute an organized criminal group. This means that the existence of the examined crime is conditioned by the presence of the organized criminal group for an indefinite but significant period, implying continuity, not permanence, a determined structure or pre-established roles for its members within the group.

Unlike occasional associations with a view to committing a certain crime, the activity of the organized criminal group is carried out over a longer period and in a coordinated manner, a fact that requires the provision of information, means of execution, transport, and product recovery results from crimes. These groups, in addition to the leaders who lead and direct the criminal activity, are also made up of other people from the sphere of political, legal, economic, social activity.

The purpose of these groupings is to obtain maximum profits in the shortest possible time. The High Court of Cassation and Justice, Panel for Preliminary Ruling on Questions of Law in criminal matter, by Decision no. 12/2014, established that the facts stipulated by art. 323 of the previous Criminal Code and art. 8 of Law no. 39/2003, in the regulation prior to the changes made by Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code, are found in the criminalization of art. 367 of the Criminal Code, not being decriminalized.

Also, through Decision no. 10/2015, in the interpretation of the provisions of art. 367 pars. (1) and (6) of the Criminal Code, the same court, in order to unify the judicial practice in the matter, established that in the hypothesis in which, with the entry into force of the new Criminal Code, the crime falling within the scope of the organized group was decriminalized, one of the essential features of the crime is no longer fulfilled, namely the condition of typicality.

For the existence of the offense provided for in art. 367 of the new Criminal Code, the purpose of the crime can be any, except for the facts provided in art. 32 committed under the conditions of art. 2, both from Law no. 535/2004 regarding the prevention and combating of terrorism and those to whom

¹ I.C.C.J., s. pen., dec. nr. 3238/2008, scj.ro.

² I.C.C.J., s. pen., dec. nr. 1255/2006, scj.ro.

³ I.C.C.J., s. pen., dec. nr. 1940/2011, scj.ro.

they send creation of illegal intelligence structures (art. 409), the association in order to commit the crime provided for in art. 8 para. (1) from Law no. 241/2005 and *the association or initiation of an association for the purpose of committing acts of terrorism or the accession or support in any form of such an association* (art. 35 of Law no. 535/2004).

In these cases, the special texts will be retained.

The examined text essentially incriminates some acts preparatory to the commission of criminal acts, as an independent crime, *sui generis*, which, in the absence of the express will of the legislator, provided in art. 367 para. (3), would have been absorbed in the act to which it refers.

The crime can be committed by any criminally responsible natural or legal person.

In order for the concrete act to constitute a crime, the incriminated actions must refer to an organized criminal group.

The form of guilt with which this crime can be committed is the direct intention qualified by the purpose provided in the content of the subjective element of the crime.

The purpose crimes for the commission of which at least three persons form an organized criminal group must not be from those provided in art. 32 committed under the conditions of art. 2, both from Law no. 535/2004.

According to art. 367 para. (4) of the new Criminal Code, the persons who have committed the acts provided for in para. (1) and para. (2) of art. 367, if he denounces the organized criminal group to the authorities, before it has been discovered and the commission of any of the crimes included in the group's purpose has begun.

The application of this cause of non-punishment is only possible if three conditions are met, cumulatively:

- the criminal group has not been discovered by the authorities;
- the group has not gone on to commit the crimes that are the object of the criminal plan;
- the person to report the act of setting up the group to the authorities.

7. The establishment of illegal information structures¹ is a crime against national security, being systematized in title X of the special part of the Criminal Code.

It can be committed by any natural or legal person who meets the general conditions of criminal liability. Initiation or incorporation can be done by a single person, instead the incorporation must be done by at least two people. Instigation and complicity are possible in such an act.

In order for the incriminated action to fall under the scope of the text, it is necessary that the information structure be established on the territory of Romania and be prohibited by law.

From a subjective point of view, the crime can only be committed with a direct intention qualified by purpose, in the sense of finality, represented by the collection of state secret information or the carrying out by them of an activity of gathering or processing such information, in the manner illegal.

8. The association for the purpose of reimbursement, restitution or legal compensation of fees and taxes from the state budget².

This crime with alternative contents is a special variant of the crime of fraud (art. 244 Penal Code) and has no material object, the money obtained being the product of the crime.

In the standard version, the author is qualified, respectively a natural or legal person taxpayer.

In the case of constituted plurality, at least 2 authors are required.

¹ **Art. 409 C. pen.** - The initiation, organization or establishment on the territory of Romania of some information structures for the purpose of gathering secret state information or carrying out by them an activity of gathering or processing such information, outside the legal framework, and punishable by imprisonment from 3 to 10 years and the prohibition of certain rights. This is an alternative content offence. Thus, if the perpetrator participates in all the activities of setting up the illegal information structure, later also participating in the collection and processing of secret state information, he commits a single crime.

² **Art. 8 of Law no. 241/2005** – (1) It constitutes a crime and is punishable by imprisonment from 3 to 10 years and the prohibition of certain rights or by a fine, the determination by the taxpayer in bad faith of taxes, fees or contributions, resulting in obtaining, without the right, sums of money as reimbursements or restitutions from the general consolidated budget or compensations due to the general consolidated budget. (2) It constitutes a crime and is punishable by imprisonment from 5 to 15 years and the prohibition of certain rights or by a fine the association in order to commit the act provided for in paragraph. (1). (3) The attempt of the facts provided for in para. (1) and (2) shall be punished.

9. The terrorist association ¹. Acts of terrorism are provided for in art. 32 of Law no. 535/2004 and is sanctioned with the penalty provided by law for the crime committed, whose special limits are increased by half, without being able to exceed the general maximum penalty, and with the prohibition of certain rights.

From a subjective point of view, all the forms of plurality constituted by criminals can only be committed with direct intention qualified by purpose, which has the meaning of finality, and not of result.

10. Conclusions. Romanian legislation has established several forms of plurality constituted by independent criminals, as autonomous, sui-generis crimes that are not absorbed in the crimes to which they refer.

In the case of the commission of any of the forms of the plurality constituted by criminals and the facts to which they refer, the rules of the contest of crimes will be applicable, they not being absorbed in the facts to which they refer.

These obstruction offenses are intended to prevent the commission of the offenses to which they relate.

Therefore, the Romanian legislator, in accordance with the European legislation on the matter, created the necessary tools to successfully combat organized crime.

B. CONFISCATION OF PROCEEDS OF CRIME

1. INTERNATIONAL INSTRUMENTS

1.1. UN COVENTIONS

Article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Articles 12-14 of the United Nations Convention against Transnational Organized Crime and article 31 of the United Nations Convention against Corruption establish the measures that parties to the Conventions are expected to take on asset confiscation as a way of preventing profit from crime. The Conventions respond to the reality that serious crime (organized crime, drug trafficking, corruption) function outside national or international law, ignoring, circumventing or frustrating domestic laws unless those laws work to their advantage, with assistance from experts.² Illicit drug trafficking generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels. Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing³, parties to the convention provided for confiscation measures.

In respect to corruption, the rationale for instituting confiscation measures stems from the belief that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law, and is thought to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery, while acknowledging the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights⁴.

The Convention envisages a comprehensive set of measures on prevention of corruption and money laundering, commitments of states with respect to the criminalization of acts of corruption and the laundering of proceeds of crime, measures on freezing, seizure, and confiscation of instrumentalities and proceeds of such crimes, protection of witnesses, compensation for damages caused by

¹ **Art. 35 of Law no. 535/2004:** (1) The act of associating or initiating the creation of an association for the purpose of committing acts of terrorism or joining or supporting, in any form, such an association is punishable by imprisonment from 5 to 12 years and the prohibition of certain rights, without being able to exceed the maximum punishment provided by law for the crime that falls within the scope of the association. (2) The act of leading a terrorist entity is punishable by imprisonment from 7 to 15 years and the prohibition of certain rights.

² UNITED NATIONS OFFICE ON DRUGS AND CRIME, Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime, Vienna, 2011, p. 7.

³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, Vienna, Preamble.

⁴ United Nations Convention against Corruption, New York, 2003, Preamble.

corruption, measures of international cooperation on relevant cases, including recovery of assets obtained through corruption.¹

The provisions of the UN Conventions in respect to confiscation are almost identical (although more briefly stated in the drug trafficking Convention and more elaborated in the other two Conventions). The only difference resides in the scope of the conventions:

- UNITED NATIONS CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES OF 1988² has a focused scope: illicit traffic in narcotic drugs and psychotropic substances having an international dimension;
- UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME³ limits itself to transnational⁴ organized crime, money laundering, corruption, obstruction of justice, other serious crimes of at least 4 years penalty, trafficking in persons, smuggling of migrants, illicit manufacturing of and trafficking in firearms and ammunition
- UNITED NATIONS CONVENTION AGAINST CORRUPTION focuses on bribery of foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official, abuse of functions and undue influence for mercenary purposes, illicit enrichment, bribery and embezzlement of property in the private sector, laundering of proceeds of crime, obstruction of justice and concealment of property.

In respect to provisions on confiscation, there are definitions of the terms of property, proceeds of crime and confiscation, the emphasis being put on the notion of crime (hence, conviction-based confiscation) and respecting the property of bona fides third parties. There is an additional provision in the UN Convention against corruption regulating the administration by the competent authorities of frozen, seized or confiscated property:

(d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority

¹ OECD Anti-Corruption Network for Eastern Europe and Central Asia, Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia, 2018, p. 8.

² Article 1 DEFINITIONS "Confiscation", which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority. Article 5 CONFISCATION Each Party shall adopt such measures as may be necessary to enable confiscation of: a) **Proceeds derived from offences** established in accordance with article 3, paragraph 1, or **property** the **value** of which **corresponds** to that of such **proceeds**; b) **Narcotic drugs and psychotropic substances**, materials and equipment or **other instrumentalities** used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

(...)

- (6) a) If proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.
b) If proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to seizure or freezing, be liable to confiscation up to the assessed value of the intermingled proceeds.
c) Income or other benefits derived from:
i) Proceeds;
ii) Property into which proceeds have been transformed or converted; or
iii) Property with which proceeds have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds.
- (7) Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.
- (8) The provisions of this article shall **not be construed as prejudicing the rights of bona fide third parties**.
Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

³ United Nations Convention against Transnational Organized Crime, Palermo, 2000.

⁴ The term 'transnational' is defined in Article 3(2).

In respect to confiscation and seizure¹, the rules are simple: parties to the convention are obliged to adopt measures to enable confiscation of (a) **Proceeds of crime** derived from offences covered by this Convention or **property the value of which corresponds** to that of such proceeds; (b) Property, equipment or other **instrumentalities** used in or destined for use in offences covered by this Convention.

Also, if proceeds of crime have been **transformed or converted**, in part or in full, into **other property**, such property shall be **liable to the measures** referred to in this article instead of the proceeds. If proceeds of crime have been **intermingled** with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation **up to the assessed value** of the intermingled proceeds.

Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been **transformed or converted** or from property with which proceeds of crime have been **intermingled** shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

There are some provisions related to the onus of burden of proof: the possibility of requiring that **an offender demonstrate the lawful origin of alleged proceeds** of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings is provided for.

All these provisions, however, are not to prejudice **the rights of bona fide third parties**.

1.2. AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

The declared scope of the convention relates to active and passive corruption, misappropriation or other diversion of property by a public official, abuse of functions and undue influence for mercenary purposes, illicit enrichment, laundering the proceeds of crime.

“Confiscation” means any penalty or measure resulting in a final deprivation of property, proceeds or instrumentalities ordered by a court of law following proceedings in relation to a criminal offence or offences connected with or related to corruption – definition identical to the one from the CoE Conventions.

“Proceeds of Corruption” means assets of any kind corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to or interests in such assets acquired as a result of an act of corruption – definition identical to the notion of ‘property’ from the UN Conventions.

According to Article 16 of the Convention (Confiscation and Seizure of the Proceeds and Instrumentalities of Corruption): (1) Each State Party shall adopt such legislative measures as may be necessary to enable: ... (b) confiscation of proceeds or property, the value of which corresponds to that of such proceeds, derived, from offences established in accordance with this convention.

The framework for confiscation is less developed than that provided for in the UN and CoE Conventions.

1.3. THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION

In this convention only the term "Property" has a definition, which is almost identical to the one in the UN Conventions (except the corporeal or incorporeal description).

The scope of the convention is active and passive corruption, abuse of functions, illicit enrichment, laundering the proceeds of crime.

The provisions of the Inter-American Convention are very general and do not include a definition of the confiscation measure. According to Article 15 (Measures regarding property): In accordance with their applicable domestic laws and relevant treaties or other agreements that may be in force between or among them, the States Parties shall provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with this Convention.

¹ There are similar provisions on confiscation in all three conventions in different articles (art. 5 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, art. 31 of the UN Convention against Corruption, art. 12 of the UN Convention against Transnational Organized Crime.

1.4. OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS DATED 1997

The scope of the convention is focused: bribery of a foreign public official.

Confiscation is provided for under Article 3(3) – **Sanctions** - Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and **confiscation** or that **monetary sanctions of comparable effect** are applicable.

The OECD Convention is the only convention to explicitly consider confiscation a **sanction**, even if it does not specify whether its nature is criminal, administrative or civil. However, it appears to be criminal in nature (by interpretation *per a contrario*), due to the contents of Article 3(4): Each Party shall consider the imposition of **additional civil or administrative sanctions** upon a person subject to sanctions for the bribery of a foreign public official.

1.5. CoE Conventions

The CoE Conventions have similar definitions and confiscation provisions as those provided for in the UN Conventions. Therefore, we will briefly present the main similarities and differences.

1.5.1. CONVENTION ON LAUNDERING, SEARCH, SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CRIME

The fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale. One of these methods consists in depriving criminals of the proceeds from crime and instrumentalities.¹ The scope of the convention is related to money laundering and proceeds from predicate offences.

1.5.2. CONVENTION ON LAUNDERING, SEARCH, SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CRIME AND ON THE FINANCING OF TERRORISM

The scope of the convention is financing of terrorism and related money laundering offences and/or other². The terms defined in the convention are very similar to those in the UN Conventions:

- a. "**proceeds**" means any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. It may consist of any property as defined in sub-paragraph b of this article;
- b. "**property**" includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property;
- c. "**instrumentalities**" means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;
- d. "**confiscation**" means a **penalty** or a **measure**, ordered by a **court** following **proceedings** in relation to a **criminal offence** or criminal offences resulting in the **final deprivation** of property;

The rules related to confiscation measures³ are, however, somewhat different: the general rule is almost the same, establishing an obligation to enable confiscation of **instrumentalities** and **proceeds** or **property the value of which corresponds** to such proceeds and laundered property.

Also, a rule related to the scope of confiscation provisions is established in respect to **money laundering** and to the categories of offences in the **appendix** to the Convention, and a reservation

¹ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 1990, Preamble; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 2005, Preamble.

² In the Appendix to the convention are mentioned: participation in an organized criminal group and racketeering; terrorism, including financing of terrorism; trafficking in human beings and migrant smuggling; sexual exploitation, including sexual exploitation of children; illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder, grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; extortion; forgery; piracy; insider trading and market manipulation.

³ For reference, see Article 2 from the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 1990:

Article 2 – Confiscation measures

- (1) Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate **instrumentalities** and **proceeds** or **property the value of which corresponds** to such **proceeds**.
- (2) Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies only to offences or categories of offences specified in such declaration.

can be made insofar as the **offence is punishable by deprivation of liberty** or a detention order for a maximum of **more than one year**. However, a declaration on this provision in respect of the confiscation of the proceeds from tax offences for the sole purpose of being able to confiscate such proceeds, both nationally and through international cooperation, under national and international tax-debt recovery legislation; and/or b only to a list of specified offences can be made.

In respect of offences which are subject to the confiscation regime, **mandatory confiscation** may be provided for, including in particular the offences of **money laundering, drug trafficking, trafficking in human beings and any other serious offence**.

Also, similar to the UN Conventions, the burden of proof may be placed upon the offender: in respect of a serious offence or offences as defined by national law, **an offender may be required to demonstrate the origin of alleged proceeds** or other property liable to confiscation to the extent that such a requirement is consistent with the principles of domestic law.

Article 5 establishes **the categories of goods** encompassed by **freezing, seizure and confiscation measures**:

- a. the **property** into which the **proceeds** have been **transformed** or **converted**;
- b. **property** acquired from **legitimate sources**, if **proceeds** have been **intermingled**, in whole or in part, with such property, **up to the assessed value** of the intermingled proceeds;
- c. **income** or **other benefits** derived from **proceeds**, from property into which **proceeds of crime** have been **transformed** or **converted** or from property with which proceeds of crime have been **intermingled**, up to the **assessed value** of the intermingled proceeds, in the same manner and to the same extent as proceeds.

Legal remedies are also provided for in Article 8: interested parties affected by freezing, seizure and confiscation measures shall have effective legal remedies in order to preserve their rights.

2. EU INSTRUMENTS

Provisions on confiscation at EU level are complex and in process of amending.

A first set of provisions was drafted in the early 2000, covering a range of criminal and procedural provisions: Framework-Decision 2005/212/JHA¹, Framework Decision 2003/577/JHA,² Framework-Decision 2006/783/JHA³, Framework-Decision 2001/500/JHA⁴, Framework-Decision 2007/845/JHA⁵. Framework-Decision 2003/577/JHA, Framework-Decision 2006/783/JHA and Framework-Decision 2007/845/JHA regulate mutual recognition and cooperation provisions and are not subject to the current analysis, which focuses on substantial criminal law aspects.

One of the first legal instruments with criminal provisions in the field of confiscation is Framework-Decision 2001/500/JHA. This Framework Decision strengthens the provisions of 1990 CoE Convention, by reducing the possibility to uphold reservations to the Convention, by increasing penalties for crime provided for in the Convention and by enforcing confiscation to other property than **instrumentalities** and **proceeds** of crime, **property the value of which corresponds** to such **proceeds**.⁶

An evolutionary step in regulating confiscation is made in Framework-Decision 2005/12/JHA.

2.1. Framework Decision 2005/12/JHA

¹ Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, JOUE L 68/49 from 15.3.2005.

² Council Framework Decision 2003/577/JHA as regards the freezing of property between the Member States, JOUE L 196/45 from 2.8.2003.

³ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, JOUE L 328/59 from 24.11.2006.

⁴ Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, JOUE L 182/1 from 5.7.2001.

⁵ Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, JOUE L 332/103 from 18.12.2007.

⁶ Article 3 Value confiscation

Each Member State shall take the necessary steps to ensure that its legislation and procedures on the confiscation of the proceeds of crime also allow, at least in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders. However, Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4000.

The words "property", "proceeds" and "confiscation" shall have the same meaning as in Article 1 of the 1990 Convention.

Even if extremely brief, Framework-Decision 2005/212/JHA manages to define the key notions¹ and establish obligation to provide for confiscation and extended confiscation of instruments and proceeds of crime. Even if these definitions are identical to the one provided for in the CoE Conventions from 1990 and 2005, at least this time there is no referral to the Conventions in order to glimpse the meaning of the provisions of the EU instrument.

The confiscation provision is also influenced by the provisions of the CoE Conventions, stipulating the obligation to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds (Article 2). A supplementary provision states that in relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence.

Article 3 deals for the first time with **extended** powers of **confiscation**. Thus, it is possible to confiscate either wholly or in part, property belonging to a person convicted of an offence committed within the framework of a criminal organization as defined by EU law², when the goal offence of the criminal organization is one of the Euro crimes (counterfeiting in connection with the introduction of the euro,³ money laundering,⁴ trafficking in human beings,⁵ unauthorized entry, transit and residence,⁶ sexual exploitation of children and child pornography,⁷ illicit drug trafficking,⁸ terrorism⁹ – fields already covered by EU criminal law instruments).

The extended confiscation can be ordered:

- a) where a national court based on specific facts is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,
- b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,
- c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

Also, extended confiscation may concern **property acquired by the closest relations** of the person concerned and **property transferred to a legal person** in respect of which **the person concerned** –

¹ Article 1 **Definitions**

For the purposes of this Framework Decision:

‘proceeds’ means any economic advantage from criminal offences. It may consist of any form of property as defined in the following indent, ‘property’ includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property,

‘instrumentalities’ means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences,

‘confiscation’ means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property,

‘legal person’ means any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations.

² Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organization in the Member States of the European Union, JOUE L 351/1 from 29.12.1998.

³ Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, JOUE L 140/1 from 14.6.2000.

⁴ Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, JOUE L 182/1 from 5.7.2001.

⁵ Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, JOUE 203/1 from 1.8.2002.

⁶ Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, JOUE L 328/1 from 5.12.2002.

⁷ Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, JOUE L 13/44 from 20.1.2004.

⁸ Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, JOUE L 335/8 from 11.11.2004.

⁹ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, JOUE L 164/3 from 22.6.2002.

acting either alone or in conjunction with his closest relations — **has a controlling influence**. The same shall apply if the person concerned receives a significant part of the legal person's income. Procedures other than criminal procedures to deprive the perpetrator of the property in question may be used.

According to Article 4, **interested parties affected** by confiscation or extended confiscation should have **effective legal remedies** in order to preserve their rights.

2.2. Directive 2014/42/EU

An extensive amending of previous dispositions took place in the last years, starting with criminal law provisions, as provided for in Directive 2014/42/EU,¹ and continuing with cooperation Regulation 2018/1805/EU.² Regulation 2018/1805/EU, even if revolutionary, regulates mutual recognition and cooperation provisions and is not subject to the current analysis, which focuses on substantial criminal law aspects.

Directive 2014/42/EU provides definitions for the main notions (confiscation; proceeds; instrumentalities, property), determines the scope, and regulates, to the fullest extent possible, the matters relating to confiscation, extended confiscation, confiscation from a third party, freezing of property with a view to confiscation, safeguards for persons whose rights may be affected by confiscation, execution of confiscation, management of frozen and confiscated property, and statistics in the EU countries on confiscated assets.³

The current directive provides for the most complex and detailed international instrument in the field of confiscation to date. The definitions of property, instrumentalities, proceeds, and confiscation are improved and refined, there is a clear mention as to the conditions for confiscation in case of conviction or lack of thereof, a clear scope as regards offences which can give rise to confiscation⁴ and also improved provisions on extended confiscation and also third parties' confiscation.

The existing concept of proceeds of crime in EU instruments has been further clarified to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. Thus, proceeds can include any property including that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It can also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.⁵

¹ 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, JOUE L 127/39 from 29.4.2014.

² 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, JOUE L 303/1 from 28.11.2018. This regulation replaces the provisions of Framework Decision 2003/577/JHA as regards the freezing of property between the Member States and Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders.

³ OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia*, 2018, p. 10.

⁴ The Directive applies to criminal offences covered by Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union, OJ C 195/1 from 25.6.1997, Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140/1 from 14.6.2000, Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment, OJ L 149/1 from 2.6.2001, Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182/1 from 5.7.2001, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164/3 from 22.6.2002, Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192/54 from 31.7.2003, Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335/8 from 11.11.2004, Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300/42 from 11.11.2008, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1 from 15.4.2011, Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335/1 from 17.12.2011, Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 218/8 from 14.8.2013.

⁵ See Directive 2014/42/EU, Preamble, par. 11.

The main rule on confiscation is related to conviction-based confiscation: subject to a **final conviction for a criminal offence**, it should be possible to **confiscate instrumentalities** and **proceeds of crime**, or **property** the value of which **corresponds** to such instrumentalities or proceeds. The final conviction can also result from proceedings **in absentia**.

Confiscation of property the value of which corresponds to instrumentalities, the relevant provisions could be applicable where, in view of the particular circumstances of the case at hand, such a measure is **proportionate**, having regard in particular to the value of the instrumentalities concerned.¹

However, non-conviction-based confiscation is also regulated: when confiscation on the basis of a final conviction is not possible, it should nevertheless under certain circumstances still be possible to confiscate instrumentalities and proceeds, at least in the cases of **illness** or **absconding** of the suspected or accused person. However, in such cases of illness and absconding, the existence of **proceedings in absentia** would be sufficient to comply with this obligation. When the suspected or accused person has absconded, the person concerned is to be summoned to or made aware of the confiscation proceedings.²

Illness should be understood to mean the inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which the proceedings cannot continue under normal conditions. Suspected or accused persons may be requested to prove illness, for example by a medical certificate, which the court should be able to disregard if it finds it unsatisfactory. The right of that person to be represented in the proceedings by a lawyer should not be affected.³

An exemption to confiscation is also provided for: confiscation should not be ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person, on the basis of the circumstances of the respective individual case which should be decisive.

The 2014 Directive also regulates extended confiscation: there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. As the previous instrument from 2005 provided for three different sets of minimum requirements in order to apply extended confiscation, it was necessary to further harmonise the provisions on extended confiscation by setting a single minimum standard: **Extended confiscation** should be possible where a **court is satisfied** that the **property in question is derived from criminal conduct**. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider **on the balance of probabilities**, or to **reasonably presume that it is substantially more probable**, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person **is disproportionate to his lawful income** could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a **requirement for a certain period of time** during which the property could be deemed to have originated from criminal conduct.⁴

Third party confiscation is also regulated: as the practice by a suspected or accused person of transferring property to a **knowing third party** with a view to avoiding confiscation is common and increasingly widespread, provisions to allow for the confiscation of property transferred to or acquired by third parties⁵ should be introduced as binding rules. Third party confiscation may be **subsidiary** or **alternative** to direct confiscation.

As the EU instrument substantially affects the rights of persons, not only of suspected or accused persons, but also of third parties who are not being prosecuted, **specific safeguards and judicial**

¹ See Directive 2014/42/EU, Preamble, par. 17.

² See Directive 2014/42/EU, Preamble, par. 15.

³ See Directive 2014/42/EU, Preamble, par. 16.

⁴ See Directive 2014/42/EU, Preamble, par. 19-21.

⁵ See Directive 2014/42/EU, Preamble, par. 24-25.

remedies in order to guarantee the preservation of their fundamental rights should be provided for, including the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they have other property rights ('real rights', '*ius in re*'), such as the right of usufruct.¹**Proposed amendments**

The existing framework is considered insufficient to tackle current needs. Therefore, a proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation has been forwarded and is in the last stages before adoption.

The EU instrument is meant to harmonise existing rules and replace the several existing instruments, both in terms of substantial provisions as well as procedural ones.²

The new instrument is **extending the scope** of freezing, seizure and confiscation measures to covering the profits from all offences where **organised crime groups** are active in:

- **the areas of crime listed in Article 83(1)**, including the illicit trafficking in weapons, munitions and explosives as defined in the Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organized crime, to which the Union is party and also
- **all crimes that are harmonised at EU level**, including frauds against the financial interests of the European Union, environmental crimes, money laundering, waste and residues produced in the context of drug production and trafficking, the facilitation of unauthorized entry and residence
- other crimes, such as counterfeiting and piracy of products, the illicit trafficking in cultural goods, organised or armed robberies, racketeering and extortion or tax crimes, murder or kidnapping, forgery of administrative documents or the trafficking in stolen vehicles, when committed within the framework of a criminal organisation, as defined in Article 1 of Council Framework Decision 2008/841/JHA, and punishable by deprivation of liberty of a **maximum of at least four years**.³

Also, the notion of **property** that can be subject to freezing and confiscation should be defined broadly, to include also legal documents or instruments evidencing title or interest in property subject to freezing and confiscation including, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures, as well as trusts. The definition should cover all forms of property, including crypto assets.⁴

Alongside confiscation of proceed of crime and instrumentalities, confiscation of **property of equivalent value** and **third-party confiscation** are also regulated. In respect to the latter, it should be possible **at least** in cases where it has been established that third parties **knew or ought to have known** that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value. The rules on third party confiscation should extend to both natural and legal persons, without prejudice to the right of third parties to be heard, including the right to claim ownership of the property concerned. In any event, the rights of bona fide third parties should not be affected.⁵

Extended confiscation is also regulated and improved. It provides for the confiscation not only of property associated with a **specific crime**, including proceeds of crime or its instrumentalities, but also of additional property which the court determines as being **derived from criminal conduct**, while there is **no requirement of a conviction** for such criminal conduct. The relevant conduct could consist of any type of offence.⁶ The standard of proof as regards the origin of the property from the 2014 Directive are maintained.

¹ See Directive 2014/42/EU, Preamble, par. 33.

² Interinstitutional File 2022/0167(COD), 9314/23, Brussels, 22 May 2023. As this Directive provides for a comprehensive set of rules, which would overlap with already existing legal instruments, it should replace Council Joint Action 98/699/JHA, Council Framework Decision 2001/500/JHA, Framework Decision 2005/212/JHA, Decision 2007/845/JHA, and Directive 2014/42/EU with regard to the Member States bound by this Directive.

³ Proposed directive, Preamble, par. 9-10.

⁴ Proposed directive, Preamble, par. 12.

⁵ Proposed directive, Preamble, par. 23-24.

⁶ Proposed directive, Preamble, par. 25.

Non-conviction-based confiscation is broadened in the new proposal. Confiscation should also be possible where a final conviction is not possible because of **illness**,¹ **absconding or death** of the suspected or accused person, where the **limitation periods** prescribed under national law **for the relevant offences** have expired **after the criminal proceedings have been initiated**, or also where a final conviction is not possible because the suspected or accused person cannot be held liable because of **amnesty** granted before the final conviction as provided for under national law. Confiscation in such cases should only be allowed where **the criminal proceedings could have led to a final criminal conviction should the circumstances above not have existed**.²

A new form of confiscation relates to **unexplained wealth**: due to the intrinsically opaque nature of organised crime, it is not always possible to link property derived from criminal **conduct** to a specific criminal offence and confiscate such property; in such situations, **it should be possible to confiscate property when the property is identified in the context of an investigation in relation to a criminal offence** and the court is satisfied that the property is derived from criminal **conduct, at least where this conduct is liable to give rise, directly or indirectly, to substantial economic benefit and committed** within the framework of a criminal organisation. Confiscation of such unexplained wealth should be enabled **when the investigation in which the property was identified** concerns an **offence** that is punishable by deprivation of liberty of a maximum of **at least four years**. These conditions should ensure that confiscation of property not linked to a specific offence for which the owner has been convicted is limited to **property stemming from criminal conduct that is serious** in nature. **Such confiscation shall only be pursued where other forms of confiscation are not possible, and, alternatively or cumulatively**, where the property to be confiscated has been frozen in the context of an investigation in relation to a criminal offence committed within the framework of a **criminal organisation**. Confiscation of unexplained wealth should not prejudice the rights of **bona fide third parties**.³

The **standard of proof** as regards the origin of the property that this proposed directive sets out in the provision on **extended confiscation** and in the provision on **confiscation of unexplained wealth** is **the same**, in principle. Under both provisions, the court has to be satisfied that the property is derived from criminal conduct, while there is no requirement of any conviction for such criminal conduct. While the provision on **extended confiscation** is only applicable when a person is **convicted of a criminal offence**, in which case property belonging to that person can be ordered where the court is satisfied that the property is derived from criminal conduct, the provision on confiscation of **unexplained wealth applies irrespectively of the outcome of the investigation in relation to an offence that triggered its application**. Confiscation of unexplained wealth should be **possible when proceedings are discontinued**, regardless of the reason, **as well as when proceedings result in a judgment**. In cases of conviction, either extended confiscation or confiscation of unexplained wealth would in principle be possible. When the offence is prosecuted, the confiscation order should not necessarily have to be tried in conjunction with the offence, **being possible that the issue of confiscation to be separated from the criminal charges and be tried separately**.⁴

Another circumstance that could be considered is **the absence of a plausible licit source of the property**, as the provenance of lawfully acquired property can normally be accounted for. Also, the person's **connection to people linked to a criminal organisation** could also be of relevance. The mechanism of confiscation of unexplained wealth is **not intended to be used** when in the individual case the application of the rules would be **manifestly unreasonable or disproportionate**. A requirement for a **certain period of time during which the property could be deemed to have originated from such criminal conduct** could also be determined.⁵

¹ Illness should be understood to mean the inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which the proceedings cannot continue. Cases, where illness only results in a **temporary suspension** of the criminal proceedings, which may continue after such suspension, **are not concerned** (Proposed directive, Preamble, par. 27).

² Proposed directive, Preamble, par. 26.

³ Proposed directive, Preamble, par. 28.

⁴ Proposed directive, Preamble, par. 28.

⁵ Proposed directive, Preamble, par. 28.

In respect to **legal remedies**, freezing, confiscation, and interlocutory sales orders should be communicated to the affected **person** without **undue** delay, to allow the affected person to challenge them; **postponement of communicating freezing orders to the affected person due to the needs of the investigation is possible**. Such communications should, as a general rule, indicate the reason or reasons for the order concerned. Where the affected person or whereabouts of the affected person are **unknown** or where the communication to each of the affected persons would entail a **disproportionate burden**, the communication may be made by means of a **public announcement**. The affected **person** party should have the effective possibility to challenge the freezing, confiscation, and interlocutory sales orders. In the case of confiscation orders where all elements of the criminal offence are present but a **criminal conviction is impossible**, the defendant should have a possibility to be **heard** before the adoption of the order, where possible. In the case of confiscation orders pursuant to provisions on extended confiscation and confiscation of unexplained wealth, **circumstances that may be challenged** by the affected person when challenging the confiscation order before a court should also include **specific facts and available evidence** on the basis of which the property concerned is considered to be property that is derived from criminal conduct.¹

Confiscation measures should respect the principle of **proportionality**: exemptions are possible to the extent confiscation would be disproportionate to the offence or accusation in question. In exceptional circumstances, confiscation is not ordered **or executed**, insofar as it would represent **undue hardship** for the affected person, such as cases where it would put the person concerned in a situation in which it would be very **difficult** for the affected person to **survive**.²

3. Case law: ECtHR and ECJ rulings

3.1. ECtHR

In the case-law of the European Court of Human Rights confiscation was deemed to be a criminal penalty in respect to the provisions of the Convention. The ECtHR analysed in several cases the possibility to issue a confiscation measure in case of an acquittal of the accused for lack of *mens rea*, or in case of time barring of the offence or third-party confiscation. We will briefly present three such cases (Sud Fondi, Varvara and G.I.E.M.) with impact on EU and national legislation in the field of confiscation of proceeds and instrumentalities of crime.

3.1.1. Sud Fondi

In the Sud Fondi case, the three applicant companies were the owners of the land and buildings that were the subject of the application. In a judgment of an Italian criminal court was held that **the buildings had been built illegally**. However, as the local authority had granted planning permission, the defendants were **acquitted for lack of mens rea**, stating that they had not been guilty of negligence and had had no unlawful intent to commit the offences, which were the result of an “inevitable and excusable error” in the interpretation of “vague and poorly formulated” regional regulations which interfered with the national law. However, the court ordered **confiscation** of all the land and buildings and their transfer to the municipality.³

The ECtHR found that the Italian court had acquitted the applicant companies’ representatives on the grounds that they had made an inevitable and excusable error in the interpretation of the regulations that had been broken. In this context, which was both legal and factual, the accused’s error as to the legality of the building projects had, in the Italian Court’s view, been inevitable. Since **the statutory basis for the offence did not satisfy the criteria of clarity, accessibility and foreseeability**, it had been impossible to foresee that a penalty would be inflicted. Further, for the purposes of Article 7, a **legislative framework that did not enable** an accused to **know the meaning and scope of the criminal law** was **deficient** not only as regards the general conditions pertaining to the “quality” of the “law”, but also as regards the **specific requirements of legality in the criminal law**. Consequently, the **confiscation** of the properties had not been prescribed by law for the purposes of Article 7 and amounted to an **arbitrary penalty**.⁴

¹ Proposed directive, Preamble, par. 34-35.

² Proposed directive, Preamble, par. 35.

³ ECtHR, Information Note on the Court’s case-law No. 115, January 2009, *Sud Fondi Srl and Others v. Italy* - 75909/01, Judgment 20.1.2009 [Section II].

⁴ *Ibidem*.

3.1.2. Varvara

In *Varvara v. Italy* was established that criminal proceedings were instituted against the applicant for unlawful land development. Many years later, in 2006, a court of appeal discontinued the proceedings on the grounds that prosecution of the offence had become time barred in 2002, but ordered the confiscation of the land and buildings concerned.¹

The ECtHR observed that the proceedings against the applicant had been discontinued on the grounds that prosecution of the offence of unlawful land development had become time-barred; however, a criminal penalty had been imposed on him, namely the confiscation of the structures and land concerned by the unlawful development plan. It was unclear to the Court how the punishment of an accused person whose trial had not led to a conviction could be reconciled with Article 7 of the Convention, which set forth the principle of legality in criminal law. The ECtHR maintained that it was **inconceivable** for a system to allow the **punishment** of a **person** who had been found innocent, or in any case had **not been found criminally liable in a verdict as to his guilt**.²

The prohibition on **imposing a penalty without a finding of liability** was thus a further consequence of the principle of **legality in criminal law**, and likewise flowed from **Article 7**. This principle had already been established by the Court in relation to Article 6 § 2 of the Convention. The Court had held that such a situation could not be compatible with the presumption of innocence³ and had found a violation of Article 6 § 2.⁴

A comparison of Article 5 § 1 (a) with Article 6 § 2 and Article 7 § 1 showed that for Convention purposes there could not be a “conviction” unless it had been established in accordance with the law that there had been an offence – either criminal or, as appropriate, disciplinary. Similarly, there can be no penalty unless personal liability has been established.⁵

The “penalty” and “punishment” rationale and the “*guilty*” concept (in the English version) and the corresponding notion of “*personne coupable*” (in the French version) support an interpretation of Article 7 as requiring, in order to implement punishment, a finding of liability by the national courts enabling the offence to be attributed to and the penalty to be imposed on its perpetrator. Otherwise the punishment would be devoid of purpose. It would be inconsistent on the one hand to require an accessible and foreseeable legal basis and on the other to permit punishment where, as in the present case, the person in question has not been convicted.⁶

In the present case the criminal penalty imposed on the applicant, despite the fact that the criminal offence had been time-barred and his liability had not been established in a verdict as to his guilt, was incompatible with the principle that only the law could define a crime and prescribe a penalty, an integral part of the principle of legality as enshrined in Article 7 of the Convention. Accordingly, the penalty in issue was not provided for by law for the purposes of Article 7 and was arbitrary.⁷

3.1.3. G.I.E.M.

The applicants are four companies with legal personality and a director of the fourth company (Mr Gironda). Under Italian planning law, where the offence of “unlawful site development” is materially made out, the criminal court is bound, whether or not the defendants have been convicted, to confiscate the developed land (and any buildings thereon), even when it is in the possession of a third party (except one proving to have acted in good faith). The applicants complained that they had been affected by confiscation measures without having been formally convicted (either because neither the company nor its directors had ever been prosecuted; or because only the directors had been prosecuted; or because the criminal proceedings had become time-barred – this being the case of Mr Gironda).⁸

¹ ECtHR, Information Note on the Court’s case-law No. 167, October 2013, *Varvara v. Italy* - 17475/09, Judgment 29.10.2013 [Section II].

² ECtHR, *Varvara v. Italy* - 17475/09, Judgment 29.10.2013 [Section II], par. 66-67.

³ ECtHR, *Geerings v. the Netherlands*, no. 30810/03, Judgment 1.03.2007, par. 47.

⁴ ECtHR, Information Note on the Court’s case-law No. 167, October 2013, *Varvara v. Italy* - 17475/09, Judgment 29.10.2013 [Section II].

⁵ ECtHR, *Varvara v. Italy* - 17475/09, Judgment 29.10.2013 [Section II], par. 69.

⁶ ECtHR, *Varvara v. Italy* - 17475/09, Judgment 29.10.2013 [Section II], par. 71.

⁷ ECtHR, *Varvara v. Italy* - 17475/09, Judgment 29.10.2013 [Section II], par. 72.

⁸ ECtHR, Information Note on the Court’s case-law 219, June 2018, *G.I.E.M. S.r.l. and Others v. Italy [GC]* - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC].

In establishing the applicability of Article 7 of the Convention, the ECtHR had to find out if **confiscation** of property without a person being formally prosecuted or because the criminal proceedings had become time-barred, constitutes a **penalty** under the autonomous meaning of Article 7 of the Convention.

The European Court ruled in the affirmative, stating that the **confiscation measures could be regarded as “penalties”** within the meaning of Article 7 of the Convention, that Article was applicable, **even in the absence of criminal proceedings** for the purposes of Article 6.¹

In so finding, the Court relied for the assessment of the existence of a “penalty” on several criteria: whether the measure in question is imposed following a decision that a person is guilty of a criminal offence; the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.²

(i) *Had the confiscations been imposed following convictions for criminal offences?* – Even though no prior criminal conviction had been handed down against the applicant companies or their representatives, the impugned confiscation measure was nevertheless attached to a “criminal offence” based on general legal provisions.³ In any event, a different conclusion in relation to this criterion would not in itself serve to rule out the “criminal” nature of the measure.⁴

(ii) *Classification of confiscation in domestic law* – Article 44 of the Construction Code, which governed the confiscation measure at issue in the present case, bore the heading “Criminal sanctions”. This element indicates that confiscation is indeed a “penalty” within the meaning of Article 7.⁵

(iii) *The nature and purpose of the confiscation measure* – The nature and purpose of the confiscation of the applicants’ property had been punitive, as the confiscation measure was a mandatory sanction, its imposition not being subject to proof of a situation of actual danger or of concrete risk for the environment and could thus be imposed even in the absence of any actual activity with the aim of transforming land.⁶

(iv) *The severity of the effects of the confiscation* – The impugned confiscation measure was a particularly harsh and intrusive sanction. Within the boundaries of the site concerned, it applied not only to the land that was built upon (or was intended to be built upon) or in respect of which a prohibited change of use was found, but also to all the other plots of land making up the site. Moreover, no compensation was due.⁷

(v) *Procedures for adopting and enforcing the confiscation measure* – The measure was ordered by the criminal courts. The Court was not persuaded by the argument that the criminal courts acted “in the place of the administrative authority”. The criminal court’s role was not simply to verify that no site development had been carried out in the absence of or in breach of planning permission, but also to ascertain whether the development, authorised or not, was compatible with all the other applicable rules (the planning regulations). In other words, the criminal court acted independently of the administrative authority, whose position it could disregard.⁸

In its ruling on the compliance with the safeguards of Article 7, the Court analysed whether the impugned confiscation measures required a mental element, whether the absence of formal conviction has any significance and whether the confiscation measure can be imposed on third parties, which were not part in the proceedings.

(i) *Whether the impugned confiscation measures required a mental element* – The Grand Chamber confirmed that Article 7 required, for the purposes of punishment, a mental link demonstrating an

¹ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 233.

² ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 211.

³ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 218.

⁴ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 219.

⁵ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 220-221.

⁶ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 223 and 225.

⁷ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 227.

⁸ ECtHR, Information Note on the Court’s case-law 219, June 2018, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC].

element of personal liability on the part of the perpetrator of the offence, without which the penalty could not be regarded as foreseeable.¹

Nevertheless, this requirement did not preclude the existence of certain forms of objective liability stemming from presumptions of liability. In principle the Contracting States remained free to penalise a simple or objective fact as such, irrespective of whether it resulted from criminal intent or from negligence. Presumptions of fact or of law were acceptable, provided they did not have the effect of making it impossible for an individual to exonerate himself from the accusations against him. As the Convention had to be read as a whole, those principles from the Article 6 § 2 case-law also applied under Article 7.²

(ii) *The absence of a formal “conviction”* – Article 7 **precluded** the imposition of a **criminal sanction** on an individual without his **personal criminal liability** being **established** and declared beforehand. Otherwise, the principle of the presumption of innocence guaranteed by Article 6 § 2 of the Convention would also be breached.³

The Court stated that the *Varvara* judgment did not lead to the conclusion that confiscation measures for unlawful site development necessarily had to be accompanied by convictions decided by “criminal” courts within the meaning of domestic law. The applicability of Article 7 did not have the effect of imposing the “criminalisation” by States of procedures which, in exercising their discretion, they had not classified as falling strictly within the criminal law.⁴ It was necessary and sufficient for the declaration of criminal liability to comply with the safeguards provided for in Article 7, provided it stemmed from proceedings complying with Article 6.

While establishing that a **formal conviction is not mandatory**, the Court nevertheless had to ascertain whether the impugned confiscation measures were at least preceded by a formal declaration of criminal liability in respect of the applicants. Since the applicant companies had not been prosecuted themselves, the question whether the declaration of criminal liability required by Article 7 had to meet formal requirements arose only in respect of Mr Gironda.⁵

It was necessary to take into account, first, the importance in a democratic society of upholding the rule of law and public trust in the justice system, and secondly, the object and purpose of the rules applied by the Italian courts. The relevant rules sought to prevent the impunity which would stem from a situation where, by the combined effect of complex offences and relatively short limitation periods, the perpetrators of such offences systematically avoided prosecution and, above all, the consequences of their misconduct.⁶

In the Court’s view, where the courts found that all the elements of the offence of unlawful site development were made out (as in Mr Gironda’s case), while discontinuing the proceedings solely on account of statutory limitation – and provided that the rights of the defence were respected –, those findings could be regarded as constituting, in substance, the “conviction” required by Article 7 for the imposition of a penalty.⁷

However, even if no breach of Article 7 was established in respect to Mr Gironda, nevertheless the Court ruled that the applicant had been declared guilty in substance in spite of the fact that the prosecution of the offence in question had become statute-barred; this constituted a breach of his right to be presumed innocent, finding a violation of Article 6 § 2 of the Convention.⁸

(iii) *Whether the confiscation measure could be imposed on the applicant companies, which were not parties to the proceedings* – Having regard to the principle that a person could not be punished for an act engaging the criminal liability of another, a confiscation measure that was applied, as in the present

¹ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 242.

² ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 243.

³ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 251.

⁴ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 252.

⁵ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 255 and 257.

⁶ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 260.

⁷ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 261.

⁸ ECtHR, Information Note on the Court’s case-law 219, June 2018, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC].

case, to individuals or legal entities which were not parties to the proceedings was incompatible with Article 7 of the Convention.¹

Since Italian law, as in force at the time, did not provide for the liability of legal entities, limited-liability companies could not, as such, be “parties” to criminal proceedings, in spite of their distinct legal personality. Accordingly, they could not be legally “represented” in the context of the relevant criminal proceedings in the present case. The companies thus remained “third parties” in relation to those proceedings. Nevertheless, the acts (and ensuing liability) of their respective legal representatives had been directly attributed to those companies.²

3.2. ECJ

The European Court of Justice was also seized with several interesting problems in relation to confiscation measures, namely whether such measures can be taken in civil proceedings for confiscation of illegally obtained assets without those court proceedings being subject to a finding of criminal offence, or in respect to goods belonging to a third party acting in good faith and without an effective remedy.

3.2.1. C-234/18

In the case “**AGRO IN 2001**” the ECJ was requested to rule whether EU law precludes Member States from providing for civil proceedings for confiscation of illegally obtained assets without those court proceedings being subject to a finding of criminal offence, or the conviction of the persons accused of committing such an offence.

As regards the facts, BP, the Chair of the supervisory board of a Bulgarian bank was subject to criminal proceedings for having incited others, from December 2011 to 19 June 2014, to misappropriate funds belonging to that bank in the sum of approximately €105 million. The criminal proceedings are pending and have not yet given rise to a final judgment. Independently of those criminal proceedings, the Bulgarian Commission for the combatting of corruption and for the confiscation of assets found that BP and members of his family had acquired assets of a considerable value whose origin could not be established. That commission therefore brought civil proceedings before the Sofiyski gradski sad (Sofia City Court, Bulgaria) with a view to confiscating illegally obtained assets.³

By its judgment, the Court held that the Framework Decision on the confiscation of property⁴ aims at obliging Member States to establish common minimum rules for the confiscation of crime-related instrumentalities and proceeds, in order to facilitate the mutual recognition of judicial confiscation decisions adopted in criminal proceedings.⁵

It follows that that framework decision does not therefore govern the confiscation of instrumentalities and proceeds ordered in the context of or following proceedings that do not concern the finding of one or more criminal offences.⁶

The Court observed that the **confiscation proceedings** pending before the referring court are **civil in nature** and that those proceedings coexist, in national law, with the confiscation regime under criminal law. Those proceedings concern assets alleged to have been illegally obtained, and they are **conducted independently of any criminal proceedings** brought against the person accused of committing offences **and of the outcome of such proceedings**, and in particular of the possible conviction of that person.⁷

In those circumstances, the Court found that the decision that the referring court is called upon to adopt in the main proceedings does not fall within the context of proceedings relating to criminal

¹ ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 274.

² ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC] - 1828/06, 34163/07 and 19029/11, Judgment 28.6.2018 [GC], par. 266.

³ Court of Justice of the European Union, PRESS RELEASE No 32/20 Luxembourg, 19 March 2020, Judgment in Case C-234/18, *Komisija za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo v BP and Others*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200032en.pdf>.

⁴ Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, OJ 2005 L 68/49 from 15.3.2005.

⁵ ECJ, Case C-234/18, *BP and Others*, ECLI:EU:C:2020:221, par. 56.

⁶ ECJ, Case C-234/18, *BP and Others*, ECLI:EU:C:2020:221, par. 57.

⁷ ECJ, Case C-234/18, *BP and Others*, ECLI:EU:C:2020:221, par. 60.

offences and therefore **does not fall within the scope of** Framework Decision on the confiscation of property.¹

The Court concludes that **EU law does not preclude** national legislation which provides that the **confiscation of illegally obtained assets** is ordered by a national court following **proceedings** which are **not subject** either to a **finding of a criminal offence** or, *a fortiori*, the conviction of the persons accused of committing such an offence.²

3.2.2. C-393/19

In the case “**Okrazhna prokuratura - Haskovo and Apelativna prokuratura - Plovdiv**” the ECJ was asked by the referring court whether a national rule permitting the confiscation of an instrumentality that was used to commit an aggravated smuggling offence but belongs to a third party acting in good faith and which does not allow that third party the possibility of setting out his or her point of view is contrary to EU law.

The facts of the case are as follow: OM was employed by a transport company established in Turkey as the driver of an international freight lorry to make a journey from Turkey to Germany. On 11 June 2018, he agreed to a proposal made to him to transport approximately 3.000 antique coins illegally in the tractor unit used for his journey in return for payment. After crossing the border between Turkey and Bulgaria, OM was subject to customs check which resulted in the discovery of the coins concealed in the tractor unit. During the investigation, the Turkish company sought the return of the tractor unit and trailer, maintaining that it had no connection to the criminal offence and that the return of that property would not impede the investigation. That request was refused. On 22 March 2019, OM was convicted by the Okrazhen sad Haskovo (Regional Court, Haskovo, Bulgaria) of aggravated smuggling. Following that conviction, the coins and the tractor unit were seized for the benefit of the Bulgarian State. Since the trailer was not directly linked to the commission of the offence, it was returned to the Turkish company. The coins and **tractor unit** were **seized** for the benefit of the State.³

The ECJ observed that Article 2(1) of Framework Decision 2005/212 provides that each Member State is to take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.⁴

In that context, the Court analysed the confiscation measure in the light of Article 17(1) of the Charter, which provides, inter alia, that everyone has the right to own his or her lawfully acquired possessions, to use them and dispose of them. While the right to property guaranteed by that provision does not constitute an absolute prerogative, in accordance with Article 52(1) of the Charter, limitations may be placed on the exercise of the rights and freedoms enshrined therein, on condition that those limitations genuinely correspond to objectives of public interest pursued by the European Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.⁵

The Court found that, in the present case, the aim pursued by the national legislation at issue in the main proceedings consists of preventing, in the general interest, the unlawful importation of goods into the country. Given that the confiscation of property, that is to say, the definitive deprivation of the right of ownership in respect of that property, substantially affects the rights of persons, it must be noted that as regards a **third party acting in good faith**, who did not know and could not have known that his or her property was used to commit an offence, such **confiscation** constitutes, in the light of the objective pursued, a **disproportionate and intolerable interference impairing the very substance of his or her right to property**.⁶

¹ ECJ, Case C-234/18, *BP and Others*, ECLI:EU:C:2020:221, par. 61.

² ECJ, Case C-234/18, *BP and Others*, ECLI:EU:C:2020:221, par. 62.

³ Court of Justice of the European Union PRESS RELEASE No 4/21, Luxembourg, 14 January 2021, Judgment in Case C-393/19 *Okrazhna prokuratura - Haskovo and Apelativna prokuratura – Plovdiv v OM*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-01/cp210004en.pdf>.

⁴ ECJ, Case C-393/19, *OM*, ECLI:EU:C:2021:8, par. 49.

⁵ ECJ, Case C-686/18, *Adusbef and Federconsumatori*, ECLI:EU:C:2020:567, par. 85, Case C-393/19, *OM*, ECLI:EU:C:2021:8, par. 52-53.

⁶ ECJ, Case C-393/19, *OM*, ECLI:EU:C:2021:8, par. 54-55.

The Court concluded that a national rule, such as that at issue in the main proceedings, does not comply with the right to property enshrined in Article 17(1) of the Charter, in so far as it provides that the property of a third party acting in good faith used to commit an aggravated smuggling offence may be the subject of a confiscation measure, and that Article 2(1) of Framework Decision 2005/212, read in the light of Article 17(1) of the Charter, must be interpreted as **precluding** national legislation that permits the **confiscation** of an instrumentality used to commit an aggravated smuggling offence, where that **property belongs to a third party acting in good faith**.¹

As regards the right to a remedy of the owner of the confiscated property, the Court referred to the legislation in force, namely Article 4 of the Framework Decision 2005/212, which provides that each Member State is to take the necessary measures to ensure that interested parties affected by measures inter alia under Article 2 of that framework decision have **effective legal remedies** in order to preserve their rights. The Court ruled that the scope of Article 4 of Framework Decision 2005/212, having regard to the general nature of the wording of the said article, refers not only to those found guilty of an offence but also to all other persons affected by the measures provided for in Article 2 of that framework decision, accordingly **including third parties**. Also, according to Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the European Union have been violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article and inter alia is entitled to a fair hearing.²

The right to an effective remedy means that a third party whose property has been confiscated must be entitled to challenge the legality of that measure in order to recover that property where the confiscation is not justified. As the third party concerned in the main proceedings has no direct access to justice under national legislation,³ with the result that he or she is not able to assert his or her rights effectively, according to the referring court, the ECJ ruled that a third party whose property is confiscated is deprived of the right to an effective remedy.⁴

The Court concluded that Article 4 of Framework Decision 2005/212, read in the light of Article 47 of the Charter, must be interpreted as **precluding** a national law which permits the **confiscation**, in the context of **criminal proceedings**, of property belonging to a person **other than the person who committed the criminal offence, without** the former being afforded an **effective remedy**.⁵

3.2.3. C-845/19⁶

In the case “**Okrazhna prokuratura - Varna**” the ECJ was asked whether Directive 2014/42 precludes national legislation which allows for the confiscation, in favour of the State, of property allegedly belonging to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings. Even if the question seems similar to the one in the case above, C-393/19, however, the circumstances of the case are different.

Two Bulgarian nationals (‘the persons concerned’) were convicted of the possession, in February 2019 in Varna (Bulgaria), of highly dangerous narcotics, without authorisation and with a view to their distribution. Following that criminal conviction, the Okrazhna prokuratura – Varna (Regional Public Prosecutor’s Office, Varna) applied to the Okrazhen sad Varna (Regional Court, Varna) for the confiscation of sums of money which had been discovered in their respective homes in the course of searches. At the hearing before that court, the persons concerned stated that the sums of money seized belonged to members of their respective families. Those family members did not take part in the proceedings before that court, since national law does not permit them to do so. The referring court refused to authorise the confiscation of those sums of money, taking the view that the criminal offence of which the persons concerned had been convicted was not such as to generate an economic

¹ ECJ, Case C-393/19, *OM*, ECLI:EU:C:2021:8, par. 56-58.

² ECJ, Case C-393/19, *OM*, ECLI:EU:C:2021:8, par. 60-62.

³ In a situation where the State is at the origin of the confiscation and where the national legislation and practice does not provide for a procedure by which the owner can defend his or her rights, that State cannot relieve itself of its responsibility under the European Convention for the Protection of Human Rights and Fundamental Freedoms to provide for such a procedure by asking the person who was not tried for the criminal offence leading to the confiscation to seek recovery of their property from a third party (European Court of Human Rights of 13 October 2015, *Ünsped Paket Servisi SaN. V e TiC. A. Ş. v. Bulgaria*, CE:ECHR:2015:1013JUD000350308, § 32).

⁴ ECJ, Case C-393/19, *OM*, ECLI:EU:C:2021:8, par. 63-65.

⁵ ECJ, Case C-393/19, *OM*, ECLI:EU:C:2021:8, par. 68.

⁶ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864.

benefit. In addition, although there is evidence that the persons concerned had been selling narcotics, they had not been charged with nor convicted of such a criminal offence. The Regional Public Prosecutor's Office, Varna, brought an appeal against that judgment, arguing that that court had failed to take account of Directive 2014/42 when applying the relevant national provisions.¹

Prior to answering the main questions, the Court had to establish the scope of the offences which were covered in the Directive, particularly whether illicit drug trafficking taking place within the borders of a single Member state is included in said scope.

The Court ruled that, pursuant to the first subparagraph of Article 83(1) TFEU, the European Union is able to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis and that 'illicit drug trafficking' is one of those areas of crime.² Thus, the possession of narcotics for the purposes of their distribution is a particularly serious form of crime with a cross-border dimension, so that the EU legislature is competent to adopt, on the basis of that provision, minimum harmonisation rules concerning the definition of criminal offences and sanctions in the area under consideration, without that competence covering **solely situations in which** the elements inherent in the commission of a particular offence **are not confined within a single Member State**, such a limitation being not apparent from the provisions of Directive 2014/42 either.³

Consequently, the Court decided that the **possession of narcotics** for the purposes of their **distribution** comes within its **scope**, even though **all the elements** inherent in the commission of that offence are **confined within a single Member State**.⁴

The referring court was also asking for the interpretation of the concept of 'economic advantage derived ... indirectly from a criminal offence', set out in Article 2(1) of Directive 2014/42. More specifically, by those questions, the referring court wishes to ascertain, in essence, first, whether that provision must be interpreted as precluding national legislation which does not provide for the confiscation of an economic advantage derived indirectly from a criminal offence and, second, whether the sums of money seized at the home of the persons concerned and their families and, in the car, used by one of the persons concerned constitute such an economic advantage.⁵

The Court answered that in its view the concept of 'economic advantage derived ... indirectly from a criminal offence' comes within the definition of the concept of '**proceeds**' set out in Article 2(1) of Directive 2014/42, according to which 'proceeds' are 'any economic advantage derived directly or indirectly from a criminal offence', which 'may consist of any form of property and includes **any subsequent reinvestment or transformation of direct proceeds and any valuable benefits**',⁶ that national law, subject to verification by the referring court, which alone has jurisdiction to interpret national law, does indeed provide for the confiscation of an economic advantage derived indirectly from a criminal offence⁷ and that, if the referring court finds in the contrary, assuming that the **directive was transposed incorrectly or incompletely** into Bulgarian law, that directive **may not be relied upon** as such by a Member State **against an individual** in order to disapply a provision of domestic law which is contrary to it,⁸ in order to impose obligations on that individual.⁹

Another issue addressed was whether the money found in the searches can be subject to confiscation, although the criminal offence for which the accused were prosecuted did not, in itself, generate an economic advantage and there was evidence that the persons concerned had been selling narcotics, even if they were neither prosecuted for nor convicted of such a criminal offence.

¹ Court of Justice of the European Union PRESS RELEASE No 189/21 Luxembourg, 21 October 2021, Judgment in Joined Cases C-845/19 and C-863/19 *Okrazhna prokuratura – Varna*, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210189en.pdf>.

² ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 32.

³ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 33.

⁴ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 34.

⁵ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 37.

⁶ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 38.

⁷ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 42.

⁸ ECJ, Case C-568/19, *Subdelegación del Gobierno en Toledo (Consequences of the judgment in Zaizoune)*, ECLI:EU:C:2020:807, par. 35.

⁹ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 43.

The Court answered that in order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of **additional property** which the court determines constitutes the **proceeds of other crimes**.¹

Thus, confiscation under Article 4 of Directive 2014/42 is not possible in the case at hand, given that the sums of money whose confiscation is sought could not, therefore, have arisen from that criminal offence of which the accused persons were prosecuted.²

However, extended confiscation is possible under Article 5 of the Directive, provided that there conditions are met: firstly, the person to whom the property belongs must be convicted of a '**criminal offence**' that is punishable by a custodial sentence of a **maximum of at least four years**, secondly that the criminal offence of which the person has been convicted must be liable to give rise, **directly or indirectly**, to **economic benefit** and thirdly that proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were **transferred** by a suspected or accused person **to third parties**, or which were acquired by third parties from a suspected or accused person, at least if those third parties **knew or ought to have known** that the **purpose** of the transfer or acquisition was to **avoid confiscation**.³

When determining whether a criminal offence is liable to give rise, directly or indirectly, to economic benefit, 'Member States may take into account the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences'.⁴ The court must, in any event, be satisfied, on the basis of the circumstances of the case, including the specific facts and available evidence, that the property in question is derived from criminal conduct taking into account the fact that the value of the property in question is disproportionate to the lawful income of the convicted person.⁵

Lastly, confiscation from a **third party** presupposes that it has been established that a suspected or accused person has transferred proceeds to a third party or a third party has acquired such proceeds, and that that third party was aware of the fact that the purpose of that transfer or acquisition was to avoid confiscation. The Court ruled that EU law **precludes** national legislation which allows for the **confiscation** of property allegedly belonging to a person other than the perpetrator of the criminal offence, **without** that person having the **right to appear** as a **party** in the confiscation **proceedings**.⁶ The persons affected by the confiscation measures, including third parties who claim or in respect of whom it is claimed that they are the owner of the property whose confiscation is being contemplated, have the right to an **effective remedy** and a **fair trial** in order to uphold their rights: the right of **access to a lawyer** throughout the confiscation proceedings, which clearly entails the right of the third parties **to be heard** in the context of those proceedings, including the right to **claim ownership of the property** concerned by the confiscation.⁷

4. Romanian criminal legislation

Romanian criminal code provides for the confiscation of **proceeds** and **instrumentalities** of crime, and also of **indirect benefits**, for **equivalent value confiscation** and for **extended confiscation**, with provisions similar to those of the international and EU legislation. Being an implementation of the latter, it is normal that Romanian legislation to be more similar to the EU provisions.

Confiscation of proceeds and instrumentalities of crime is provided for in Article 112 of the Criminal Code. Its scope is broader than the one provided for in international acts: as the text is drafted, confiscation can be ordered alongside a conviction decision, but could be taken irrespective of such decision (non-conviction-based confiscation).

Crime is defined in the Romanian criminal code as being "the deed **provided by the criminal law**, committed with **guilt, unjustified** and **imputable** to the person who committed it" (Article 15).

¹ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 53.

² ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 56.

³ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 59, 64 and 68.

⁴ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 65.

⁵ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 67.

⁶ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 85.

⁷ ECJ, Joined Cases C-845/19 and C-863/19, *Okrazhna prokuratura – Varna*, ECLI:EU:C:2021:864, par. 76 and 82.

Confiscation is a safety measure taken in consideration of the danger posed by the good or assets which remain in the possession of the perpetrator. Thus, confiscation can be ordered against the person who committed an **unjustified act provided for by the criminal law** (Article 107 par. 2 Romanian criminal code). Thus, confiscation can be ordered irrespective of the guilt of the offender or whether the deed is imputable to the person who committed it:

"Art. 112: Special confiscation¹

Extended confiscation is ordered in respect to other assets or goods than those associated with a specific crime for which the perpetrator is convicted. Extended confiscation in Romania is ordered only in the case of conviction of the accused and can be taken for a period of time 5 years before and, if necessary, after the moment of committing the crime, and also on assets transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid confiscation. Extended confiscation can be ordered if the respective goods come from criminal activities, in the court's opinion, and such opinion can be based on the disproportion between the legal income and the wealth of the person: *Art. 112¹: Extended confiscation²*.

5. Conclusions

Confiscation is ordered in accordance to the principle "crime does not pay". Usually, confiscation is issued following a conviction decision, but there are cases where non-conviction-based confiscation is possible, especially in cases of illness or trial in absentia, or in cases where the assets are transferred

¹ **Art. 112 – Special confiscation** – (1) The following are subject to special confiscation:

- a) the goods produced by committing the **act provided for by the criminal law**;
- b) the assets that were used, in any way, or intended to be used to commit **an act provided for by the criminal law**, if they belong to the perpetrator or if, belonging to another person, he knew the purpose of their use;
- c) the goods used, immediately after the commission of the act, to ensure the escape of the perpetrator or the preservation of the benefit or the product obtained, if they belong to the perpetrator or if, belonging to another person, he knew the purpose of their use;
- d) the assets that were given to determine the commission of an act provided by the criminal law or to reward the perpetrator;
- e) the assets acquired by committing the act provided for by the criminal law, if they are not returned to the injured person and to the extent that they do not serve to compensate him;
- f) goods whose possession is prohibited by criminal law.

(2) In the case provided for in para. (1) lit. b) and letter c), if the value of the assets subject to confiscation is clearly disproportionate to the nature and seriousness of the act, confiscation is ordered in part, by monetary equivalent, taking into account the consequence produced or that could have been produced and the contribution of the asset to it. If the assets were produced, modified or adapted for the purpose of committing the act provided for by the criminal law, their entire confiscation is ordered.

(3) In the cases provided for in para. (1) lit. b) and letter c), if the assets cannot be confiscated, as they do not belong to the criminal, and the person to whom they belong did not know the purpose of their use, their monetary equivalent will be confiscated, applying the provisions of para. (2).

(4) The provisions of para. (1) lit. b) does not apply in the case of acts committed through the press.

(5) If the goods subject to confiscation according to para. (1) lit. b)-e) are not found, money and goods are confiscated in their place until their value is equal.

(6) Assets and money obtained from the exploitation of the assets subject to confiscation, as well as the assets produced by them, are also confiscated, with the exception of the assets provided for in para. (1) lit. b) and letter c)."

² **Art. 112¹ – Extended confiscation** – (1) Assets other than those provided for in art. 112 are subject to confiscation, when a person is ordered to be sentenced for an act likely to procure him a material benefit and for which the punishment provided by law is imprisonment of 4 years or more, the court forms its conviction that the respective goods come from criminal activities. The conviction of the court can also be based on the disproportion between the legal income and the wealth of the person.

(2) The extended confiscation is ordered on the assets acquired by the convicted person in a period of 5 years before and, if necessary, after the moment of committing the crime, until the date of issuance of the act of notification to the court. Extended confiscation can also be ordered on assets transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid confiscation.

(3) For the application of the provisions of para. (2) the value of the assets transferred by the convicted person or by a third party to a family member or a legal entity over which the convicted person has control will also be taken into account.

(4) By goods, according to this article, we also mean sums of money.

(5) When determining the difference between the legal income and the value of the assets acquired, the value of the assets at the date of their acquisition and the expenses incurred by the convicted person and his family members will be taken into account.

(6) If the goods subject to confiscation are not found, money and goods are confiscated in their place until their value matches.

(7) Assets and money obtained from the exploitation or use of the assets subject to confiscation, as well as the assets produced by them, are also confiscated.

(8) The confiscation cannot exceed the value of the goods acquired during the period provided for in paragraph. (2), which exceeds the level of lawful income of the convicted person."

to a knowing third party. European legislation is in the process of adding to situations of non-conviction-based confiscation, especially cases of amnesty, death of the perpetrator, and limitation period (time barring).

Romanian legislation covers all these cases of non-conviction-based confiscation and has several others (such as underage minor or irresponsible perpetrator) where proceeds of crime and instrumentalities can be confiscated.

When dealing with non-conviction-based confiscation (especially in cases of limitation period), Romanian courts are very careful in analysing only Romanian legislation, which provides for legal provisions allowing such measure irrespective of the guilt of the offender.

Also, intended modifications of EU legislation are in line with Romanian case-law. However, this type of non-conviction-based-confiscation clashes with the European Convention for the Protection of Human Rights and Fundamental Freedoms. Neither Romanian case-law, nor EU legislation provide for an explanation as to how the ECHR provisions are respected in this case.

According to the Charter of Fundamental Rights of the European Union (Article 52 par. 3), in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention, except when Union law provides more extensive protection. Also, the provision of EU law in the field of confiscation directly mentioned the ECHR (see preamble, par. 32 of the proposed Directive): *"This Directive respects the fundamental rights and observes the principles recognized by the Charter of Fundamental Rights of the European Union ('the Charter') and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), as interpreted in the case-law of the European Court of Human Rights. This Directive should be implemented in accordance with those rights and principles."*

Confiscation is considered a criminal penalty in the case-law of the ECtHR and a finding of liability in the absence of a conviction amounts to a violation of Article 6(2), the right to the presumption of innocence. Neither Romanian case law, nor that of the ECJ has analysed yet the nature of confiscation as being a criminal penalty or not. Also, the implication of non-conviction-based-confiscation in relation to the principle of the presumption of innocence is not yet resolved.