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Extended Confiscation of Criminal Assets: Limits and Pitfalls of Minimum Harmonisation in the EU

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Abstract

Confiscation laws are the mainstay of policies aimed at depriving criminals of their gain. One of the most debated aspects concerns the extension of the scope of confiscation beyond the direct proceeds of a specific crime for which a person has been convicted. The European scenario on "extended" confiscation, however, is characterised by an apparent disharmony that endangers co-operation between national authorities. In 2014, the EU adopted a Directive with the goal of introducing a common model of extended confiscation in all Member States. This article explores whether the new provisions on extended confiscation are adequate to achieve this objective, and highlights the pitfalls in the implementation of such provisions, particularly as regards respect for fundamental rights. For this purpose, the Directive will be analysed in light of both the case law of the European Court of Human Rights and the concept of minimum harmonisation, revealing inherent limitations.

Introduction

On a global scale, one may observe that, during the past two decades, national criminal justice policies have evolved in order to include, besides the traditional punishment of the offender, also the recovery of assets linked to crime. This development has a manifold rationale: punitive, preventive, and restorative reasons coexist in order to shape the various strategies against "dirty money".

Such a broadening of perspective has been spurred on at the international level through instruments addressing certain aspects of the response to crime. Besides the United Nations (UN)[1] and the Council of Europe (CoE),[2] the EU has been active in the field, in particular by trying to strengthen the co-operation between national authorities. In the last few years, the European impetus on the recovery of crime proceeds seems to have entered into a new phase.[3] According to the agenda of the EU, indeed "more should be done"[4] to target criminal money.

The recovery of assets is a complex process, having its core in the deprivation of assets belonging to criminals (or alleged criminals). One can observe a generally shared understanding between Member

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[1] See e.g. United Nations Convention Against Corruption of 31 October 2003 (UNCAC), particularly its Ch.V on asset recovery.

[2] See e.g. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 (Warsaw Convention).

[3] See M. Borgers, "Confiscation of the Proceeds of Crime: The European Union Framework" in C. King and C. Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Farnham: Ashgate, 2014), p.27; P. Faraldo Cabana, "Improving the Recovery of Assets Resulting from Organised Crime" (2014) 22 *European Journal of Crime, Criminal Law and Criminal Justice* 13; J. Lelieur, "Freezing and Confiscating Criminal Assets in the European Union" (2015) 5 *European Criminal Law Review* 279.

[4] Commission, "Proceeds of organised crime: Ensuring that 'crime does not pay'" COM(2008) 766 final, p.11.

States on the basic concept of confiscation, or criminal forfeiture.[5] Accordingly, confiscation means the final deprivation of the owner's property rights related to assets representing the direct result of a crime for which he/she has been convicted.

However, confiscation is increasingly becoming a multi-form concept. In order to strengthen the effectiveness of law enforcement powers over criminal assets, some Member States have stretched the traditional approach to criminal law and developed some new models of confiscation. The most renowned example of a non-traditional forfeiture scheme is represented by proceedings against "dirty" assets, independent from criminal proceedings, developed for example in the UK (in rem proceedings)[6] or more in general by confiscation orders issued regardless of previous criminal conviction (non-conviction-based confiscation).[7] In addition, national criminal justice systems tend to provide for possibilities to confiscate assets belonging to persons other than the convicted person (third-party confiscation) and assets not linked to the crime for which there has been a conviction (extended confiscation).

This article focuses on the latter form of confiscation, which is generally seen as one of the most incisive measures against criminal organisations: not only does extended confiscation allow law enforcement authorities to take away from the convicted person the proceeds of the crime for which he/she has been convicted, but it also gives them the possibility to deprive criminals of other assets presumably deriving from other illicit activities, not proven at trial. The efficiency reasons behind extended confiscation are self-evident: extended confiscation can be used by national authorities without proving '"beyond any reasonable doubt" the link with a specific crime. Consequently, national systems that employ extended confiscation also provide for a reversed burden of proof: certain assets belonging to the convicted person are presumed to be tainted unless the convict demonstrates the licit origin of the assets concerned.[8]

As it often happens in the Area of Freedom, Security and Justice, one of the main obstacles to the effectiveness of transnational co-operation between national authorities—and thereby to the implementation of respective EU policies—is the divergent approaches of the Member States. The latter still regard criminal justice as one of the last bulwarks to protect their sovereignty and national peculiarities. As regards "new" forms of confiscation, the national legal systems of the Member States are, indeed, very different.

The prospect of the EU action, therefore, needs to be assessed as regards its potential to have an impact on these aspects, since the effectiveness of the fight against dirty money greatly depends on the possibility of issuing such "new" types of confiscation orders that depart from the traditional features of criminal law, and on the execution of such orders even across national borders.

The purpose of this contribution is to analyse the most recent EU provisions on extended confiscation, assessing whether they are likely to reach the objective pursued by the EU legislator, i.e. the reduction of

[5] In this contribution the words "confiscation" and "forfeiture" are both used, since the term "confiscation" in the UK refers to "an order for payment of a specified sum of money", whereas "forfeiture" seems to correspond to the EU concept of confiscation. See D. Dickson, "Towards More Effective Asset Recovery in Member States—the UK Example" (2009) 10 *ERA Forum* 436.

[6] See, among others, P. Alldridge, *Money Laundering Law* (Oxford: Hart Publishing, 2013), p.223; M. Sutherland Williams et al., *The Proceeds of Crime*, 4th edn (Oxford: Oxford University Press, 2013), p.291; C. King, "Using Civil Processes in Pursuit of Criminal Law Objectives: a Case Study of Non-conviction-based Asset Forfeiture" (2012) 16 *International Journal of Evidence & Proof* 337; L. Campbell, *Organised Crime and the Law* (Oxford: Hart Publishing, 2013) 201; J. Rui, "Non-conviction Based Confiscation in the European Union—an Assessment of Art. 5 of the Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of Proceeds of Crime in the European Union" (2012) 13 *ERA Forum* 349.

[7] See J. Rui, "Introduction" in J. Rui and U. Sieber, *Non-Conviction-Based Confiscation in Europe* (Berlin: Duncker & Humblot, 2015), p.1; see also M. Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation: A Step Forward on Asset Recovery?" (2015) 6 *New Journal of European Criminal Law* 213.

[8] See J. Boucht, "Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU: on Striking a Balance between Efficiency, Fairness and Legal Certainty" (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 127.

the national differences. In particular, it aims to show the limits of mutual recognition against the backdrop of national differences in the pre-Lisbon setting, as well as the difficulty in overcoming national differences via minimum rules—as attempted by Directive 2014/42—and to assess how such an EU extended confiscation can meet the European human rights standards. Several fundamental rights might be indeed endangered by an overstretched efficiency: extended confiscation without clear limits might result in a sort of general confiscation depriving a convict of his/her whole fortune. Such an approach has been considered unacceptable ever since the Enlightenment because, inter alia, it would be unfairly burdensome for the innocent family members.[9]

In order to conduct this analysis, it is worth providing a brief overview of the evolution of the EU legal framework on extended confiscation.

Extended confiscation pre-Lisbon—a mutual recognition regime without mutual recognition?

The essence of mutual recognition is the acknowledgement and acceptance of national differences without aiming at creating similar legal concepts, or laws, throughout the territory of the Union.[10] Rather than trying to approximate national laws, the principal idea of the EU was to rely on the mutual recognition principle also in the field of asset recovery. Mutual recognition was first applied to provisional decisions of freezing property (Framework Decision 2003/577/JHA), and after some years to final confiscation orders. Framework Decision 2006/783/JHA[11] was intended to provide the legal basis for a new method of co-operation—replacing the traditional mutual legal assistance—by establishing rules under which a Member State recognises and executes in its territory a confiscation order issued by a court competent in criminal matters of another Member State.

However, even before the Lisbon Treaty, which explicitly acknowledges the relation between mutual recognition and approximation of national laws,[12] the EU legislature was well aware that international co-operation might be hampered by the differences between national approaches. Before the 2006 Framework Decision, therefore, the EU adopted Framework Decision 2005/212/JHA[13] in order to pave the way for the instrument on mutual recognition of confiscation orders. That instrument had the ambitious aim of introducing into all Member States the concept of extended confiscation.

The 2005 Framework Decision was based on the assumption that it is difficult for the executing authorities to recognise foreign orders based on confiscation regimes that are completely at odds with national legal principles. It was adopted after a Danish initiative had deemed it necessary to have a horizontal instrument determining "unambiguously"[14] the Member States' obligations as regards

[9] See especially the renowned Ch.XXV in Beccaria, *An Essay on Crimes and Punishments* (1764).

[10] See, among others, A. Klip, *European Criminal Law*, 3rd edn (Cambridge: Intersentia, 2016), p.394; V. Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing, 2009), p.115; C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: Oxford University Press, 2013), p.166; J. Ouwerkerk, *Quid Pro Quo? A Comparative Law Perspective on the Mutual Recognition of Judicial Decisions in Criminal Matters* (Cambridge: Intersentia, 2011), p.45; S. Allegrezza, "Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility" (2010) 9 *Zeitschrift für Internationale Strafrechtsdogmatik* 569, 572.

[11] Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders [2006] OJ L328/59.

[12] Article 82(2) TFEU.

[13] Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property [2005] OJ L68/49.

[14] Communication from the Kingdom of Denmark, "Initiative by the Kingdom of Denmark with a view to adoption by the Council of a draft Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property", Council Document 9956/02 (17 June 2002).

confiscation. In particular, the proposed instrument aimed to persuade Member States to "reduce"[15] the burden of proof regarding the source of assets held by a person convicted of an offence related to organised crime. The proposal was apparently too far-reaching for some Member States, and the rules eventually laid down—following negotiations within the Council—"in relation to"[16] the onus of proof became less straightforward than envisaged in the Danish initiative. Probably also for this reason Framework Decision 2005/212/JHA did not have great success. Assessing its implementation at the national level, the Commission expressed its concerns that "little progress has been made on transposing the Framework Decision in the Member States".[17]

In addition, the 2006 Framework Decision on mutual recognition of confiscation order does not seem to have had a strong impact on practice, and its implementation has been assessed by the EU Commission as unsatisfactory[18]: in 2010, only 13 Member States had transposed the Framework Decision into their national systems[19] and, most of the time, not even correctly or uniformly.[20]

The alleged failure of the EU efforts, however, is due not only to scarce or incorrect implementation of the supranational framework; part of the problem is represented by the EU approach itself. On the one hand, art.3(2) of the 2005 Framework Decision provided for three different criteria as regards the assessment of assets other than those strictly related to the conviction,[21] leaving to every Member State the choice to transpose only one criterion (and which one), two, or even all of them. On the other hand, the 2006 Framework Decision on mutual recognition of confiscation orders allows the executing authority not to execute orders of "extended confiscation" if the issuing Member State adopts a different option of the 2005 Framework Decision, and if those assets could not be confiscated following the option adopted by the executing Member State. Therefore, there have been countries following only one method to identify the scope of the extended confiscation compared with others following, for example, the other two. And, unfortunately, there were also countries transposing none of them. Co-operation requests, as a result, can be legitimately refused because of such differences.[22]

In other words, even before the entry into force of the Lisbon Treaty, the EU addressed the harmonisation of national approaches on extended confiscation; however, the relevant Framework Decision was watered down or scarcely implemented and resulted in little or no harmonisation. Furthermore, the EU intended to enhance the co-operation by introducing mutual recognition; nevertheless, as regards extended

[15] "Initiative by the Kingdom of Denmark with a view to adoption by the Council of a draft Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property", Council Document 9956/02 (17 June 2002).

[16] Framework Decision 2005/212/JHA, Recital 10.

[17] Report from the Commission, COM (2007) 805 final, p.6.

[18] Report from the Commission, COM (2010) 428 final.

[19] At the time of writing (March 2016) there were still four Member States not providing for the implementation of the Framework Decision at all.

[20] In this regard the implementation is "highly unsatisfactory", since "[a]ll additional grounds significantly limit the scope of practical application of the principle of mutual recognition and thus do not comply with the purpose, spirit and letter of the Framework Decision": Report from the Commission, COM (2010) 428 final, p.10.

[21] "Each Member State shall take the necessary measures to enable confiscation under this Article at least: (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": Framework Decision 2005/212/JHA art.3(2).

[22] See D. Flore, *Droit pénal européen*, 2nd edn (Brussels: Larcier, 2014), p.627.

confiscation, the mutual recognition instrument perpetuated the lack of harmonisation by rendering differences in national legislation as a legitimate ground for refusal.

For this reason, it does not seem excessive to consider the pre-Lisbon framework on extended confiscation incoherent and inadequate to reach the objectives of the EU. In particular, such an inadequacy is due to the fact that the rules described above are in contrast with the authentic rationale of mutual recognition, i.e. even if national regimes are different, such differences should be accepted. Rendering national differences a ground for refusal of extended confiscation orders empties the concept of mutual recognition. One could therefore conclude that the main problem of the pre-Lisbon regime was the apparent lack of political will of Member States to truly mutually recognise and execute extended confiscation orders, regardless of national differences as to the features of extended confiscation regimes. Such an approach denotes a failure of mutual recognition as such.

Directive 2014/42—can minimum rules define a European model of extended confiscation?

At the moment of entry into force of the Lisbon Treaty, the full application of the principle of mutual recognition was politically denied, inasmuch as national differences were still considered as grounds for refusal. Furthermore, the EU scenario on extended confiscation was still fragmented. Many Member States did not provide for the possibility of confiscating assets not linked to the crime for which there had been a conviction, and those that did adopted different criteria to determine the forfeitable proceeds.

From the perspective of a single EU Area of Freedom, Security and Justice, such differences result in great obstacles to efficient co-operation between Member States and a threat to the goal of effectively tackling criminal wealth. The EU Commission, therefore, decided to undertake a different route, and in 2012 proposed an instrument aiming at the harmonisation of national systems as regards confiscation, particularly those "new" forms of forfeiture going beyond the traditional basic conception of confiscation (see above).

To regulate on these aspects, on the other hand, the EU legislator has to face some problems concerning the nature of confiscation measures, and the necessary legal basis. A high degree of approximation of national laws finds, indeed, an obstacle in the limitations inherent in the Treaties. The regulation of extended confiscation consists of an intricate interconnection of procedural and substantive elements, which are addressed respectively by art.82 TFEU and art.83 TFEU. Both provisions—which jointly constitute the legal basis of the 2014 Directive—bestow on the EU the power to adopt "minimum rules". The objective and conditions of such twofold minimum harmonisation[23] are different in the two cases.[24]

The minimum harmonisation envisaged by art.82(2) TFEU operates on a procedural level and must be "necessary" to facilitate mutual recognition that is functional to the purposes of judicial co-operation, and therefore limited to the achievement of that goal. It is, however, difficult to draw a clear line clarifying what is necessary to facilitate and what is not: a strict conception of necessity would theoretically prevent any action, whereas a broad interpretation of the facilitation purpose could suggest a maximum approximation of national laws. On the other hand, clear boundaries derive from the scope of art.82(2),

[23] Approximation and harmonisation are used as synonymous in this contribution (similarly to Klip, *European Criminal Law* (2016)). Some authors prefer to distinguish the two terms: see e.g. F. Tadic, "How Harmonious can Harmonisation Be? A Theoretical Approach Towards Harmonisation of (Criminal) Law" in A. Klip and H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Amsterdam: Royal Netherlands Academy, 2002), p.1; F. Calderoni, "A Definition that Could not Work: the EU Framework Decision on the Fight against Organised Crime" (2008) 16 *European Journal of Crime, Criminal Law and Criminal Justice* 265.

[24] See A. Weyembergh, "The Functions of Approximation of Penal Legislation within the European Union" (2005) 12 *Maastricht Journal of European and Comparative Law* 149; J. Spencer, "Why is the Harmonisation of Penal Law Necessary?" in *Harmonisation and Harmonising Measures in Criminal Law* (2002), p.43.

which is limited to some aspects: mutual admissibility of evidence, rights of victims of crime, and—more relevant in the case of extended confiscation—rights of individuals in criminal procedure.[25]

The main challenges for the harmonisation of extended confiscation provisions, however, do not consist of the procedural rights accorded to convicted persons (which are addressed by art.8 of the Directive; see below), but rather of the substantive design of national regimes, namely the criteria to identify the assets that can be confiscated and their link with criminal conducts.

As to the substantive law, art.83(1) TFEU provides for "minimum rules concerning the definition of criminal *offences* and *sanctions*" in the areas of particularly serious crimes with a cross-border dimension listed in the provision. The problem in this regard is to understand what amounts to minimum rules; that is, what the limit of the EU legislative power is. Far from finding a definitive answer, the literature has so far debated on this concept applied to the definition of *criminal offences*, namely on the identification of the elements of crimes and the possibility for the Member States to add further elements.[26] Such a dilemma, on the other hand, has important consequences on the extent of the EU's power to criminalise certain conducts.[27] Extended confiscation regimes, however, are not affected by the EU definition of the elements of crimes, but rather by the supranational definition of sanctions.[28]

The meaning of "minimum rules" in the definition of "sanctions" is unclear, too. Its effects have been mainly debated as to the possibility of providing not only for the minimum level for maximum penalties but also for the minimum level for the minimum penalties.[29] In that case, the EU would have the possibility of ensuring a minimum level of penalties for certain crimes below which Member State cannot go. As regards the EU definition of extended confiscation, however, the main challenge does not concern the level of confiscation, that is, the minimum amount of assets that Member States have to confiscate. It rather concerns the definition of the features of such a type of sanction and the criteria to be adopted in order to determine the assets to be confiscated. Only a clear definition of the features that any national extended confiscation regime should have would effectively overcome the threefold approach of the 2005 Framework Decision.

On the other hand, proposing further harmonisation of extended confiscation as criminal sanction would have run counter to some national approaches justifying extended confiscation measures because they are not penalties, but different measures aiming to tackle dirty money.[30] In this sense, the nature of confiscation plays a crucial role with regard to the competence of the EU, since art.83 TFEU covers only criminal sanctions. Facing such dilemmas, the Commission adopted a cautious approach aiming at a minimum

[25] And—according to art.82(2)(d) TFEU—any other specific aspects of criminal procedure which the Council has identified in advance by a unanimous decision of the Council after having obtained the consent of the EU Parliament.

[26] H. Nilson, "How to Combine Minimum Rules with Maximum Legal Certainty" (2011) *Europaraettslig Tidskrift* 665; Klip, *European Criminal Law* (2016), p.181; V. Mitsilegas, "EU Criminal Law Competence after Lisbon: from Securitised to Functional Criminalisation" in D. Acosta Arcarazo and C. Murphy (eds), *EU Security and Justice Law* (Oxford: Hart Publishing, 2014), p.110; P. Asp, *The Substantive Criminal Law Competence of the EU* (Stockholm: Striftelsen, 2012), p.111; S. Miettinen, *The Europeanization of Criminal Law: Competence and its Control in the Lisbon Era* (Helsinki: Juvenes Print, 2015), p.99.

[27] Klip, *European Criminal Law* (2016), p.167; A. Weyembergh and S. de Biolley, "Approximation of Substantive Criminal Law: The New Institutional and Decision-making Framework and New Types of Interaction between EU Actors" in F. Galli and A. Weyembergh (eds), *Approximation of Substantive Criminal Law in the EU: The Way Forward* (Brussels, Editions de l'Université de Bruxelles, 2013), p.14.

[28] Asp, *The Substantive Criminal Law Competence of the EU* (2012), p.100.

[29] Weyembergh and De Biolley, "Approximation of Substantive Criminal Law" in *Approximation of Substantive Criminal Law in the EU* (2013), p.15; Asp, *The Substantive Criminal Law Competence of the EU* (2012), p.125; P. Asp, "Harmonisation of Penalties and Sentencing within the EU" (2013) 1 *Bergen Journal of Criminal Law and Criminal Justice* 53; W. de Bondt, "The Missing Link between 'Necessity' and 'Approximation of Criminal Sanctions' in the EU" (2014) 4 *European Criminal Law Review* 147.

[30] This is, for example, the case of the Italian extended confiscation provided by art.12sexies of Decree-Law No.306 of 1992. See A. Maugeri, "Confisca" in *Enciclopedia del Diritto*, Annali VIII (Milano: Giuffrè, 2015), pp.184, 220.

harmonisation consisting of a minimal definition of how extended confiscation should look like in all Member States.

The provision on extended confiscation was nonetheless much debated during the legislative process, and it was eventually further nuanced in the course of the negotiations. This is not surprising, since such a legal concept "does contain elements which may not readily be reconcilable with the basic principles of criminal law and criminal procedural law",[31] and thereby any attempt to regulate this matter has to deal with a delicate balance between effectiveness and fairness. The second part of this section aims to assess the potential added value of the adopted Directive 2014/42 of 3 April 2014[32] compared with the baseline scenario of the pre-Lisbon framework. Some references to the original proposal of the Commission will, however, be helpful to elucidate the rationale and content of the new provisions.

In this regard, it is worth recalling that the improvement of the existing mutual recognition instruments on confiscation falls beyond the scope of the 2014 Directive. This is due to the fact that the Commission identified the main problem in the diverging laws on confiscation and the resistance of Member States to accept such differences. Therefore, according to the Commission, the approximation of national laws on confiscation has priority over the amendment of the mutual recognition instruments, which is seen as a secondary step in recasting the existing framework.[33] The main purpose of the 2014 Directive, therefore, is to intervene on some aspects of national approaches to confiscation in order to broaden the possibility for national enforcement authorities to gain control over criminal assets and to harmonise the national regulation of such possibilities. This objective is pursued in many directions: non-conviction based, third-party and extended confiscation, together with the adoption of a broad concept of crime proceeds,[34] are meant to be the cornerstones of the new EU approach on asset recovery. In particular, through extended confiscation mechanisms, Member States should loosen the link between crime and proceeds.

As mentioned earlier, this measure is triggered by a final conviction in the same way as traditional confiscation is; nevertheless, the object of the extended confiscation is not only the proceeds of the specific crime for which there has been a trial and a conviction, but also other assets which presumably derive from other unspecified and unproven criminal activities. Article 5 of the 2014 Directive aims to overcome the stalemate created by the threefold concept adopted by the 2005 Framework Decision[35] by creating a single model of extended confiscation,[36] whereby,

> "Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct."[37]

[31] Boucht, "Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU" (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 127, 129.

[32] Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L127/39.

[33] See the Statement by the European Parliament and the Council on mutual recognition (31 March 2014), 7329/1/14.

[34] The economic advantage liable to be confiscated can also derive "indirectly" from a criminal offence. In reality, a broad notion of proceeds was already adopted within the Council of Europe. The 2005 CoE Convention specifies, indeed, that such an advantage may be "derived from or obtained, directly or indirectly, from criminal offences" (art.1).

[35] It is worth stressing that the 2005 Framework Decision is not replaced in its entirety, because owing to treaty limitation the 2014 Directive could cover only those crimes falling within the scope of art.83 TFEU.

[36] See A. Maugeri, "The Criminal Sanctions against the Illicit Proceeds of Criminal Organisations" (2012) 3 *New Journal of European Criminal Law* 257, 263.

[37] 2014 Directive art.5(1).

This provision has to be read together with art.8 of the Directive dedicated to the safeguards that must be provided by Member States in order to ensure that persons affected by freezing and confiscation orders may exercise their "right to an effective remedy and a fair trial".[38] Such a right is concretised in the duty to communicate the measure and its reasons to the person affected, and to provide for the effective possibility of judicial review (i.e. the "right to challenge the order before a court").[39] Furthermore, the Directive specifies that interested persons must be granted the possibility of challenging the circumstances of the case determining the amount of assets confiscated through extended confiscation.[40] In addition, the Directive states that all property owners affected by confiscation orders must have the right of access to a lawyer throughout the whole confiscation proceedings.[41]

It is doubtless that art.5 is more far-reaching than the existing provision of the 2005 Framework Decision. A broad notion of property liable to confiscation is accompanied by a vague description of the criteria leading to the decision on the specific assets to be removed from the possession of the convicted person. Additionally, if compared with the 2012 Commission proposal, one may observe that some amendments go in the direction of increasing the effectiveness of confiscation measures: the "other" criminal activities presumably generating profit do not need to be of a "similar" nature to the one causing the conviction. Furthermore, according to a literal interpretation of the text, those criminal activities could also be ascribed to other offenders, potentially overlapping with the idea of third-party confiscation.[42]

As regards the elements counterbalancing an overstretched effectiveness, the EU legislature specified that the extended property to be confiscated must be determined "on the basis of the circumstances of the case, including the specific facts and available evidence", and the court has to be "satisfied" that the property is linked with criminal conducts. Regarding the first aspect, in amending the reference only to the "specific facts" contained in the 2005 Framework Decision and in the 2012 Proposal, the EU legislature probably intended to stress the idea that specific factual elements are required in order to prove the other criminal conduct, which cannot be deduced only from vague suspicion. The second aspect is related to the standard of proof: national courts need no longer be "fully satisfied" (as in the 2005 Framework Decision) that the property is tainted, or find it "substantially more probable" (as in the 2012 Proposal); a lower standard will suffice (the courts should be merely "satisfied"). The likely result is that the standard applicable to this kind of assessment (of the link between property and other criminal conduct) will probably be closer to the standard applied in civil law cases than to that necessary to prove the criminal liability of the defendant. Nevertheless, it will probably be difficult for national legislatures to understand what standard exactly needs to be provided for such an assessment, since it seems hard to find a boundary between the concepts of "satisfaction", "full satisfaction" and "probability".

Similarly to non-conviction based confiscation, any attempt to extend the scope of confiscation is by nature dangerous, not only for its resemblance to those ancient forms of general confiscation of the whole belongings of convicted persons, but also for its potential impingement on human rights standards: major challenges will be therefore faced by national legislatures implementing the Directive by October 2016.[43] The new EU provision is more coherent than the previous Framework Decision; nonetheless, it is deliberately vague and leaves many questions open. For this reason, one could argue that national systems may in principle correctly implement the EU Directive in different ways, adopting very dissimilar options.

For example, not only does the standard of proof raise doubts, but also the evidentiary rules, namely the possible reversion of the burden of proof is not clarified. Would a system be compatible with art.5

[38] 2014 Directive art.8(1).
[39] 2014 Directive art.8(6).
[40] 2014 Directive art.8(8).
[41] 2014 Directive art.8(7).
[42] The 2005 Framework Decision specified that the "other conduct" needs to be ascribed to the convicted person.
[43] Corrigendum to Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L138/114.

that provides for extended confiscation of all the properties of the convict, unless he/she can demonstrate a lawful origin of (part of) that property? Moreover, are there any common criteria to assess the disproportion between property and lawful income, inasmuch as it would reveal a criminal lifestyle? Could a conviction for drug trafficking lead to the deprivation of presumed benefits from corruption?

In addition, contrary to the Proposal of the Commission, the final text of the Directive does not spell out that the previous criminal conduct must refer to the convicted person: does it represent a sort of implicit endorsement of non-criminal forfeiture measures issued without any proof of criminal liability? Furthermore, beside the disproportion between property and income, are there further "circumstances of the case" that Member States should consider to prove a link with previous criminal conduct? Finally, one of the options provided by the 2005 Framework Decision specified that the scope of the extended confiscation should cover a "reasonable" period prior to conviction, whereas no reference to a time-limit is provided in the 2014 Directive: does this mean that it is suggested that Member States should not consider any period at all and target every property of the convicted person? Or—as seems more likely—that it is left to each Member State to decide whether to introduce a period prior to confiscation for assessing the disproportionate increase of property, and to define the length of such a period?

Against that scenario, in particular considering the broad room for manoeuvre left to national legislators, one might really question whether the EU has actually made a step forward in the creation of a common approach on extended confiscation, since it is difficult to imagine how art.5 might be able to ensure a high level of approximation between national provisions. Furthermore, it does not seem to provide clear answers to some questions related to the protection of fundamental rights.

The approach of the European Court of Human Rights to extended confiscation

Because it touches upon some crucial problems related to the nature and purpose of confiscation, any extended confiscation regime raises concerns as to the respect of the fundamental rights of persons affected by final orders removing their property ownership, in particular as regards presumption of innocence, fair trial rights and the right to property. Both the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the EU (CFREU) set the (minimum) level of such protection. So far, only the European Court of Human Rights (ECtHR) has judged a number of cases involving examples of extended confiscation. In the future, also the Court of Justice (ECJ) may be asked to clarify the content and scope of the rights provided by the CFREU. In particular, either with regard to national laws implementing the Directive or to the Directive itself, the ECJ may be called to decide whether the protection offered by the CFREU in the context of extended confiscation goes beyond the level ensured by the ECHR.

The benchmark is therefore represented by the approach followed by the ECtHR. This is not watertight, though. The ECtHR, indeed, applied some general criteria to assess national confiscation measures, and the outcome ultimately depended on the peculiarities of national laws on confiscation and on the factual circumstances of the case. In other words, it would be misleading to draw from those judgments a firm answer on the compliance of extended confiscation with the ECHR.

The issues at stake are at least twofold. First, one could ask whether extended confiscation is a penalty for the offence judged at trial, or a different measure not aiming at the punishment of the defendant but at the neutralisation of crime profit. As said, many national laws follow the second view, since confiscation is usually labelled as a "security measure" aiming at the removal of illegal proceeds from the licit economy.[44] The conviction, according to this view, is just a "trigger" for the confiscation measure. The ECtHR, however, adopts an autonomous concept of penalty, independent from national labels. Since the well-known *Engel* judgment, the ECtHR has developed some criteria to assess whether a certain measure is substantially

[44] See e.g. Italian Criminal Code art.240.

punitive, regardless of its formal classification at the national level.[45] This question, however, does not touch upon the core issues raised by mechanisms of extended confiscation: a penalty for one specific offence can be applied at the end of a "fair trial" if traditional principles on penalties are met, namely legality (i.e. if sanctions are not retroactive)[46] and proportionality.

The real problematic issue—and this is the second debated aspect—is the relation between extended confiscation and the other criminal conduct not judged at trial: one could even argue that such questions would not arise if there is no specific reference to other criminal activities. Is extended confiscation a penalty also for those offences?

The consequences, if the answer is affirmative, would be clear: no criminal penalty can be inflicted without due process in compliance with all standards enshrined in art.6 ECHR.[47] In this sense, we should consider extended confiscation also as that "new charge" mentioned in art.6(2) ECHR triggering the presumption of innocence: a penalty would be therefore applied following a charge—substantially represented by the reference to other criminal conduct—through lower standards of proof, and without the safeguards typical of criminal proceedings. This consideration led, for example, the German Federal Court of Justice to intervene, imposing higher standards of proof on the wording of the statute allowing courts to confiscate those assets belonging to a person convicted of an offence related to organised crime which, on the basis of a "justified assumption", appeared related to other offences not judged at trial.[48]

The tendency of the ECtHR, however, is to consider the reference to other offences only as a criterion to determine the extent of the confiscation, operating in the sentencing phase (for the judged offences) but not representing a new charge for the other non-judged offences allegedly committed by the convicted person.[49]

In the *Phillips* case, the ECtHR was asked to establish whether, in that specific case concerning the extended confiscation system in the UK, the applicant was subject to new charges and, if not, whether the presumption of innocence produced an effect—notwithstanding the absence of new charges. The ECtHR examined the case on the basis of three criteria: the classification of the proceedings under national law, their essential nature and the type and severity of penalty that the applicant risked incurring. As to the nature of the procedure, the main argument leading the court to find the facts of the case in compliance with art.6(2) ECHR is that the purpose of the extended confiscation "was not the conviction or acquittal of the applicant for any other drug-related offence" but "to enable the national court to assess the amount

[45] The well-known criteria established by the Court in the case *Engel v Netherlands* (1979–80) 1 E.H.R.R. 647 are the classification of the offence in domestic law, the nature of the offence and the severity of the penalty.

[46] The ECtHR found the retrospective application of a confiscation measure in breach of art.7, for example, in *Welch v United Kingdom* (1995) 20 E.H.R.R. 247, as well as in *Sud Fondi v Italy* (75909/01) 20 January 2009. See also *Varvara v Italy* (17475/09) 29 October 2013.

[47] In a case not strictly related to extended confiscation (*Varvara v Italy* (17475/09) 29 October 2013 at [71]) the ECtHR indeed observed: "La logique de la 'peine' et de la 'punition', et la notion de 'guilty' (dans la version anglaise) et la correspondante notion de 'personne coupable' (dans la version française), militent pour une interprétation de l'article 7 qui exige, pour punir, une déclaration de responsabilité par les juridictions nationales, qui puisse permettre d'imputer l'infraction et d'infliger la peine à son auteur. A défaut de quoi, la punition n'aurait pas de sens … Il serait en effet incohérent d'exiger, d'une part, une base légale accessible et prévisible et de permettre, d'autre part, une punition quand, comme en l'espèce, la personne concernée n'a pas été condamnée."

[48] The reference to this decision can be found in T. Weigend, "Assuming that the Defendant is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice" (2014) 8 *Criminal Law and Philosophy* 285, 295. The further question rightly raised by the author is whether it suffices to increase the standards of proof or whether it is necessary to afford "the defendant a full criminal trial regarding the offence that allegedly produced the items in his possession".

[49] See R. Ivory, "The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases" (2013) 9 *Utrecht Law Review* 159.

at which the confiscation order should properly be fixed".[50] As to the other prong of the question—whether the presumption of innocence applies even if no new charges are brought—the ECtHR simply noted that art.6(2) ECHR,

> "can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new 'charge' within the autonomous Convention meaning",[51]

without further elaborating on the nature and degree of those specific accusations deriving from the confiscation procedure.

Furthermore, the ECtHR held that the reversal of the burden of proof—provided in the UK in order to ascertain the link between assets and other offences—did not violate the notion of a fair hearing under art.6(1) ECHR.[52] According to the ECtHR, the applicant benefited from adequate safeguards: among them, a public hearing where he could adduce documentary and oral evidence, and the effective possibility of rebutting the presumption of the criminal origin of the assets targeted by the extended confiscation.[53] In addition, the interference suffered by the applicant with the peaceful enjoyment of his possessions was considered proportionate by the ECtHR in the light of art.1 of Protocol 1 ECHR.

It must be noted, however, that, at least in one case, the ECtHR has considered "extended confiscation" to be in breach of the Convention. However, this was due not to a different approach followed by the Court, but rather to the specific circumstances of the case: in particular, because the confiscation measures "related to the very crimes of which the applicant had in fact been acquitted".[54]

The common assumption is that ECtHR has accepted the idea of extended confiscation as such. Nevertheless, applying its approach to a hypothetical concrete model adopting to the maximum extent the indications of the Directive does not necessary lead to reassuring conclusions. Reading art.5(1) of the Directive, indeed, the impression is that it is difficult to deny that there is a close connection between extended confiscation and criminal liability for prior criminal conduct.[55] Such extended confiscation seems to be closely connected to the idea of a criminal charge for the other offences not judged by a court "beyond any reasonable doubt". Even if the purpose of the assessment conducted to determine the extent of the extended confiscation is not to decide about the acquittal or the conviction of a subject, it is true that art.6(2) ECHR "governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge".[56] In other words, lower standards of proof and the absence of a new trial for the other "criminal conduct" might conflict with the presumption of innocence if not counterbalanced by adequate limitations and procedural safeguards.[57]

[50] *Phillips v United Kingdom* (41087/98) 11 B.H.R.C. 280; [2001] Crim. L.R. 817 ECtHR at [34]. The same reasoning can be found in *Van Offeren v Netherlands* (19581/04) 5 July 2005 ECtHR; see Maugeri, "The Criminal Sanctions against the Illicit Proceeds of Criminal Organisations" (2012) 3 *New Journal of European Criminal Law* 257, 289.

[51] *Phillips* (41087/98) 11 B.H.R.C. 280 at [35].

[52] See T. Kooijmans, "The Burden of Proof in Confiscation Cases: A Comparison between the Netherlands and the United Kingdom in the Light of the European Convention of Human Rights" (2010) 18 *European Journal of Crime, Criminal Law and Criminal Justice* 225.

[53] See also *Grayson v United Kingdom* (2009) 48 E.H.R.R. 30 at [49].

[54] *Geerings v Netherlands* (2008) 46 E.H.R.R. 49. Although not related to "extended confiscation", see also *Vulakh v Russia* (33468/03) 10 January 2012, where the Court "emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence" (at [32]); and *Paraponiaris v Greece* (42132/06) 25 September 2008 at [33].

[55] Boucht, "Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU" (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 127, 148.

[56] *Phillips* (41087/98) 11 B.H.R.C. 280 at [35].

[57] A similar view valorising a broader application of the presumption of innocence, on the other hand, has been expressed by Judge Bratza in his partly dissenting opinion in *Phillips* (41087/98) 11 B.H.R.C. 280: "I see a close

The presumption of innocence indeed applies to all phases of criminal proceedings and should protect the individual from assumptions as to his or her criminal liability. Even if the reference to other offences is not considered a new charge *stricto sensu*, it might nonetheless reflect the opinion that the convicted person is also guilty of other crimes before (or irrespective of whether) he or she has been judged. In this sense, the ECtHR has clarified on several occasions that the presumption of innocence protects the individual against statements of judicial authorities suggesting, in the absence of any formal finding, that that person is considered guilty.[58] Even the recently adopted EU Directive on the presumption of innocence—the fourth instrument adopted within the "EU Roadmap on procedural safeguards"[59]—affirms that judicial decisions, other than those on guilt, should not refer to that person as being guilty.[60]

Where such indications of guilt refer to offences other than those justifying the conviction, there is no apparent reason not to apply this facet of the presumption of innocence to the sentencing phase. The avoidance of "public references to guilt" should therefore be a guiding criterion for national legislators charged with the implementation of the EU Directive(s), in order to shape the extended confiscation in a way that the decision on assets does not imply any decision of guilt of the convicted person for the other offences. In this sense one could read the abolition in art.5 of the 2014 Directive—compared with the 2005 Framework Decision—of the reference to other criminal conduct "of the convicted person": the other proceeds confiscated would be therefore merely tainted property that needs to be confiscated regardless of the identification of the perpetrator. Furthermore, in this view, one could explain the suppression of the original second paragraph proposed in 2012, which aimed to prevent the extended confiscation in case of statutory limitation or violation of the *ne bis in idem* principle.[61] The fact itself that a confiscation measure directed towards proceeds of other offences is able to constitute a *bis* would have acknowledged that it implies a certain degree of determination on guilt.

However, if the argument based on the nature of confiscation holds, it must be noted that such a concept of "extended confiscation" is very far from the traditional idea of basic confiscation. On the contrary, it has more in common with the idea of an *actio in rem* (in this case for the proceeds of the "other" offences) which, at the end of the legislative process, was not fully endorsed by the EU legislature.[62] In other words, if we consider the confiscation merely as a measure to remove tainted property from the legal economy, it is not necessary to link the targeted assets with a specific convicted—or even suspected—person. It would be, according to this view, a determination of a property's criminal nature, not of a person's guilt. At this point, however, one might wonder whether under this logic a conviction is necessary at all in order to trigger the extended confiscation.

In conclusion, art.5 of Directive 2014/42 does not appear consistent in the way it provides for criminal law standards for the first group of confiscated assets (those related to the proved offence), and civil law

relationship between cases where presumptions are applied at the trial stage for the purpose of determining a defendant's guilt of the offence charged and cases such as the present where presumptions are applied after conviction and as part of the sentencing process for the purposes of determining what assets of the defendant are to be regarded as derived from the proceeds of drug trafficking and thus liable to confiscation."

[58] As regards a decision concerning acts in relation to which a person had not been formally accused or tried, see particularly *Nerattini v Greece* (43529/07) 18 December 2008 ECtHR at [2]–[24]; see also *Didu v Romania* (34814/02) 14 April 2009 ECtHR at [37]; and *Minelli v Switzerland* (8660/79) 25 March 1983 ECtHR at [37].

[59] Council Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C295/1.

[60] Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016]OJ L65/1 art.4

[61] 2012 Proposal art.4(2) stated that "Confiscation shall be excluded where the similar criminal activities referred to in paragraph 1 (a) could not be the subject of criminal proceedings due to prescription under national criminal law; or (b) have already been subject to criminal proceedings which resulted in the final acquittal of the person or in other cases where the ne bis in idem principle applies".

[62] See Directive 2014/42 art.4(2).

standards for the second (as to those proceeds related to the other, unproved, offences). Considering the confiscation as a penalty for the offence for which a person has been tried and found guilty, but considering the relation with other offences as a mere modality to determine the extent of such a penalty,[63] seems a far-fetched argument capable of justifying the efficiency of such measures used "as a weapon in the fight against the scourge of drug trafficking"[64] or other serious crimes.

The justification of such harsh measures against property seems to find its foundation on the principles of necessity and proportionality, namely on the argument that, even if not ideal, they are necessary to fight organised crime effectively. At a national level, they have been mainly provided in that context, and the EU did the same in 2005.[65] However, the scope of art.5 of the new Directive is much broader, going beyond organised crime.[66] Very often, deviations from traditional ideals of substantive and procedural criminal law have been justified on the basis of the peculiar features and seriousness of organised crime.[67] Going beyond these borders might now re-open the debate on the legitimacy of such measures.

Conclusion

Article 5 of Directive 2014/42 aims to address the EU's fragmented scenario on extended confiscation by putting forward a provision obliging all Member States to adopt a new approach to asset recovery, in particular by going beyond the traditional idea of confiscation as a penalty for a specific crime proven at trial.

The single concept outlined in that provision goes beyond the threefold option indicated by the previous EU legal framework, and this is certainly to the credit of the new instrument. It is undoubtedly a provision that gives Member States the possibility of adopting far-reaching rules, for some aspects by going towards the idea of non-criminal proceedings against criminal assets. Nevertheless, it is uncertain whether it can ensure that the same model is applied throughout the EU, since there is the risk that it will concretely result in a provision leaving many options open, similarly to the 2005 Framework Decision.

The indications contained in art.5 are indeed so vague that national extended confiscation regimes might be still very different even after the implementation of this instrument; and such differences represent one of the causes of difficult co-operation in this field. The debate on its implementation will be therefore focused especially on the burden of proof, on the period prior the conviction to be taken into consideration for the evaluation of the disproportion, and on the nature of criminal activities that could justify the suspicion of tainted property.

At the same time, such non-specific criteria might be even transposed in national laws not compliant with the standards set forth by the ECHR and the CFREU. Measures impinging, inter alia, on the right to property need to have foreseeable limits, and clear criteria have to be provided in order to determine the extent of such an impingement. The recent EU Directive seems to fail in that regard: again, this task is left to national legislators, who may well manage to remedy the shortcomings of the EU legal framework. However, this may not be enough to render the Directive immune from the scrutiny of the CJEU as regards the respect of proportionality. The decision in *Digital Rights Ireland* sounds a warning in this respect: the interference with fundamental rights prescribed by an EU instrument must be "precisely circumscribed

[63] This is, on the other hand, the view explicitly submitted by the UK Government in *Phillips* (41087/98) 11 B.H.R.C. 280; [2001] Crim. L.R. 817 at [28].

[64] *Phillips* (41087/98) 11 B.H.R.C. 280 at [52].

[65] 2005 Framework Decision art.3 required Member States to provide for extended confiscation in case of conviction for certain crimes committed within the framework of a criminal organisation, or in case of terrorism.

[66] Directive 2014/42 art.5(2)(e) provides for a general threshold, i.e. in case of a "criminal offence that is punishable … by a custodial sentence of a maximum of at least four years".

[67] See Boucht, "Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU" (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 127, 162.

by provisions to ensure that it is actually limited to what is strictly necessary".[68] Such "clear and precise rules"[69] do not seem to be laid down by the Directive.

[68] *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (C-293/12) EU:C:2014:238; [2014] 3 C.M.L.R. 44 at [65].
[69] *Digital Rights Ireland* (C-293/12) EU:C:2014:238 at [65].