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Abstract

Since many years, at international and European level the principle "crime doesn't pay" is unanimously accepted: the fight against crime passes through the establishment of a common and an effective system able to deprive criminals of proceeds of crime. Unfortunately, the different regimes used by the countries in Europe and in the world have not facilitated the recovery of such gains. In particular, within the borders of European Union, this fact has hindered mutual recognition of freezing and confiscation orders among the judicial authorities of Member States. The Directive 2014/42/EU aims to harmonise their legislation. At a conceptual level, recovery systems of the proceeds and instrumentalities of crimes can be classified into two broad categories: the non-conviction based confiscation, typical of common-law countries (in this case, confiscation is a measure against property) and the confiscation based on the conviction (here confiscation is a sanction against the person). Although the original proposal contained both regimes, after serious arguments within the Council and the Parliament - regarding especially the safeguard of the presumption of innocence - the new EU Directive requires Member states to enable the confiscation of criminal assets following a final conviction (also through in absentia proceedings) and admits, without a final conviction, to confiscate assets only when the suspected or the accused person is ill or has absconded. This Directive has a relevance for the establishment of a single regime of extended confiscation, which overcoming the FD 2005/212/JHA, seems to be a good step through a better judicial cooperation among Member States. It foresees also a clear safeguards framework of the rights of persons, including third parties subjected to confiscation orders who are not being prosecuted. Moreover the Directive, whereas the implementation of the Stockholm Programme and the protection of rights within a criminal proceeding, contains specific safeguards and judicial remedies which the person affected by the freezing or confiscation order can claim in his own defense. This brief study - describing the most important innovation introduced on the matter – aims to focus the reader's attention on the negotiations occurred and intends to highlight that the original ratio of the proposal hasn't been respected relating to some decisive points, reducing the scope of the Act. It has occurred e.g. for the claimed use of confiscated property for social purposes. Reading this study, the reader will find out why.

Il principio "il crimine non paga" è stato accolto già da diversi anni sia a livello europeo che a livello internazionale: la lotta contro la criminalità passa attraverso l'istituzione di un sistema comune ed effettivo in grado di privare i criminali dei proventi dei reati. Purtroppo, i differenti regimi usati finora negli Stati dell'Unione europea e del resto del mondo non hanno contribuito a favorire il recupero di questo tipo di guadagni. In particolare, all'interno dei confini dell'Unione europea la diversità delle normative interne ha ostacolato il reciproco riconoscimento dei provvedimenti di congelamento dei beni e di confisca tra le autorità giudiziarie dei vari Stati Membri. In questa direzione si colloca la Direttiva 2014/42/UE che nasce appunto con l'obiettivo di armonizzare le diverse legislazioni. Ad un livello concettuale i sistemi di recupero dei beni strumentali e dei proventi da reato possono essere classificati in due ampie categorie: la confisca non basata sulla condanna, tipica dei Paesi di *common-law*

(in questo caso la confisca è una misura contro la proprietà) e la confisca basata sulla condanna (in questi casi la confisca è una sanzione contro la persona). Sebbene la proposta originaria contenesse entrambi i regimi, in seguito a importanti argomentazioni del Consiglio e del Parlamento – riguardanti in special modo la salvaguardia della presunzione di innocenza – la nuova direttiva si limita a prescrivere agli Stati Membri di consentire la confisca dei proventi da reato sulla base di una sentenza di condanna definitiva (anche nei casi di procedimenti *in absentia*), limitando tale possibilità quando non è stata emessa una condanna definitiva ai soli casi in cui la persona sospetta o accusata è malata o in fuga. Questa direttiva è anche rilevante per l'istituzione di un unico regime di confisca estesa che, superando la Decisione quadro 2005/212/GAI, costituisce un importante passo avanti nel settore della cooperazione giudiziaria tra gli Stati membri.
La direttiva ha inoltre conseguenze rilevanti sui diritti della persone, incluso i terzi soggetti ai provvedimenti di confisca che non sono coinvolti in un procedimento penale e, in linea con quanto stabilito dal Programma di Stoccolma e nel rispetto del principio di protezione dei diritti degli indagati all'interno dei procedimenti penali, contiene specifiche garanzie e individua i mezzi di ricorso che la persona soggetta al provvedimento di congelamento o di confisca può invocare in sua difesa.
Questo breve studio – descrivendo le più importanti innovazioni introdotte sull'argomento – ha come scopo quello di focalizzare l'attenzione del lettore sul percorso di negoziazione che ha portato all'adozione dell'atto definitivo e di evidenziare come l'originaria *ratio* della proposta sia stata disattesa relativamente ad alcuni punti centrali. Questo è successo per esempio con riferimento all'utilizzo dei beni confiscati per scopi di interesse sociale. Leggendo questo studio il lettore ne scoprirà il motivo.

Keywords

Direttiva 2014/42/EU – Lotta contro il crimine – Cooperazione giudiziaria – congelamento – confisca – confisca di beni – confisca estesa – confisca di beni ai terzi – confisca per scopi sociali

Directive 2014/42/EU - Fight against crime - Judicial Cooperation - Freezing - Confiscation - Confiscation of value – Extended confiscation - Confiscation of third party - Confiscation for social purposes

THE NEW EU DIRECTIVE ON CONFISCATION : A GOOD (EVEN IF STILL PRUDENT) STARTING POINT FOR THE POST-LISBON EU STRATEGY ON TRACKING AND CONFISCATING ILLICIT MONEY

by Gabriella Arcifa

1. Foreword

According to UN estimates the total amount of criminal proceeds generated in 2009 was around $2.1 trillion of which only the 1% has been recovered[1]. In a globalized financial world, money laundering is an essential element of facilitating corruption, organized crime, and terrorism, and affects competition with law abiding economy. Since the '90s, in order to hit organized crime, tracking and recovering illicit money has become a political priority at international level (and in particular) the *international acquis* has grown steadily.

Suffice to remember:

a) the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime;

b) the 2000 UN Convention against Transnational Organized Crime;

c) the 2003 United Nations Convention against Corruption (Articles 52-59, which to date, have been ratified by the European Union and 23 Member States);

d) the 2008 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism (CETS 198), (to date signed by 19 EU Member States and the European Union, and ratified by 11 Member States);

e) the 2010 OECD Financial Action Task Force (FATF) recommendations on Confiscation and Asset recovery (Recommendations 3, 4 and 38).

At European Union level, after the adoption in 1999 of Tampere Conclusions, a first legislative text on confiscation was adopted on July 2001: the Framework Decision 2001/500/JHA. However, it soon appeared ineffective. It was then soon replaced by the Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property and by the Framework Decision 2006/783/JHA on mutual recognition to confiscation orders. Again, these texts didn't reach their objective because of the persisting substantial differences among the MS' legislations, so that, there were a high number of decisions opposing to the confiscation orders issued by another EU MS[2]. To overcome these problems, in 2008 the Commission proposed a more ambitious strategy with its Communication "Proceeds of organized crime – Ensuring that 'crime does no pay' (COM(2008) 766 final)[3].

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[1] For an overview of the income and profits of organized crime see the UNDOC Research Report, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes*, October 2011, in *http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf* .

[2] The Action Plan on the Stockholm Program foresaw an implementation reports on the Framework Decision 2006/783/JHA on mutual recognition to confiscation orders for 2013, not yet published. Moreover, as overview of the past, in 2010 only 13 MS implemented the FD, read more COM 2010(428), not published in the Official Journal, in http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0428&from=EN.

[3] Communication from the Commission to the European Parliament and the Council, *Proceeds of organised crime, Ensuring that "crime does not pay"*, Brussels, 20.11.2008, COM(2008) 766 final, in *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0766:EN:NOT* .

However, it was only after the entry into force of the Lisbon Treaty and the adoption of the Stockholm Program by the European Council on 10 December 2009 that it was possible to adopt by a qualified majority this kind of measures. This paved the way to more ambitious common standards[4].

The new strategy was endorsed by the 2010 Council Conclusions on Confiscation and Asset Recovery which made reference also to non-conviction-based confiscation procedures[5], the 2010 Commission Communication The EU Internal Security Strategy in Action[6] and finally the 2011 "anti-corruption package" submitted to the European Parliament and the Council in 2011.

Since then, tracking the illicit money has become the common objective of several EU legislative measures recently examined by the European Parliament. They deal with:

- the protection of EU financial interests;
- the revision of the anti-money laundering directive and the exchange of information linked with the transfer of funds;
- the freezing and confiscation of criminal assets.

2. The new Directive on Confiscation

On April 3, 2014, the EU Council of Ministers and the Parliament adopted the new Directive n. 2014/42/EU[7] on the freezing and confiscation of instrumentalities and proceeds of crime in the EU (only Poland voted against and UK and DK didn't take part to the vote). The text was agreed with the European Parliament which adopted its position on February 25 (only EFD group voted against – see here).The agreement has been welcomed by many, but concerns have also been raised, for instance by the European Criminal Bar Association – ECBA, according to which the new legislation can have an impact on protection of fundamental rights and against the proportionality principle[8].

The legal basis is founded on the art. 82.2 and 83.1 of the TFEU so that it defines the *minimum* rules to be applied in the EU MS when «...freezing property with a view of possible later confiscation and confiscation of property, recommending general principles for the management and disposal of the confiscation objects»[9].

The new directive has the merit to establish a clearer legal framework which can strengthen the judicial cooperation among the EU MS[10]. That having been said, it is worth noting that the initial scope of the draft Directive, as submitted by the Commission, has been significantly reduced during the negotiations between the European Parliament and the Council.

To better understand the dynamics of the inter-institutional negotiation in the following paragraphs, the initial negotiation mandate adopted by the Parliamentary Committee (draft report A7-

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4 It is worth reading A. DAMATO, P. DE PASQUALE, N. PARISI, *Confisca e Sequestro* in *Argomenti di diritto penale europeo*, 2011, p. 244. The study contains an analysis of the EU legislation on the matter with a referral to the Italian case law.

5 It is interesting to note the CARIN Steering Group's contribution to the Stockholm Program, which identified difficulties in the tracing of bank accounts and the mutual recognition of freezing and confiscation orders based on non-conviction-based procedures; the CARIN Network proposed to promote the creation of centralized bank account registers and the mutual recognition of non-conviction-based orders as best practices; finally it is also interesting to note the fact that some Member States already benefit from this kind of centralized registers. CARIN is an informal network of English speaking judicial and law enforcement practitioners, who are experts in the field of asset tracing, freezing, seizure and confiscation.

6 European Commission, Communication to the European Parliament and the Council, *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*, COM(2010)673, Brussels, 22 November 2010, announcing the proposal legislation – in object in this article – to strengthen the EU legal framework on confiscation, as an effective tool to disrupt international crime networks.

7 Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, Official Journal of the European Union L 127/1 of 29 April 2014.

8 See the Statement of the European Criminal Bar Association here: *http://www.ecba.org/extdocserv/201210_assetseizureECBA_statement.pdf*.

9 On the notion of "minimum rules" see notably the interpretation of Klip about *minimum* standard as a *maximum* standard, in A. KLIP, H. VAN DER WILT (eds.), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Sciences, Amsterdam 2012), pp. 1-21.

10 For a comparative approach about MS' legislation on the matter it is worth reading the researches conducted by Transparency International within the project: "Enhancing integrity and effectiveness of illegal asset confiscation – European Approach": the legal analysis - of main strong and weak areas in asset confiscation legal, institutional and policy practices in BG, RO and IT - has the aim of supporting the effectiveness, accountability and transparency of asset confiscation policies and practices in Europe, in *http://www.confiscation.eu/research/test.*

0178/2013) is juxtaposed with the final text as adopted by the Plenary (and by the Council). The following aspects require a particular attention:

- the scope
- the definition of proceeds and instrumentalities related to the criminal offence;
- the regime of confiscation;
- the eligibility and the meaning of the "extended confiscation powers"
- the conditions to admit a confiscation from a third party;
- the safeguards.

2.1. The scope

It is worth noting that for the first time in an EU legislative act[11]reference is made to mafia-type criminal organization (see first "whereas" n. 1) although the new Directive does not provide any EU definition of this kind of organized crime[12].

The new directive covers all the offences listed in the art. 83 TFEU and art. 14 makes clear that it replaces Joint Action 98/699/JHA, point (a) of Article 1, Articles 3 and 4 of Framework Decision 2001/500/JHA, and the first four indents of Article 1 and Article 3 of Framework Decision 2005/212/JHA. As a consequence art. 2, 4 and 5 of the Framework Decision 2005/2012 – will remain into force for criminal activities which fall outside the scope of the Directive (the FD refers to all the criminal offences punishable by deprivation of liberty for more than one year)[13].

This technique which let "survive" partially a former third pillar act (for criminal offences punishable by deprivation of liberty for more than one year) is questionable because it threatens the principle of legal clarity notably in a domain (judicial cooperation in criminal matters) which may affect fundamental rights. It would have been much better after the entry into force of the Lisbon Treaty and of the EU Charter to adopt a new full-fledged legislation as required by art. 9 of Protocol 36 of the Lisbon Treaty[14] which refers to legal acts and not to "rules" («…the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended.»)[15].

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11 Reference to "mafia-like" organizations is rather frequent in strategic, institutional political, EU non-legislative documents.

12 A legal definition exists only in Italian Law (Decree Law n. 629/1982, turned into law, as amended, by Act n. 726/1982 concerning: "Urgent measures to coordinate the fight against Mafias-related crime").

13 See the explanatory *memorandum* of the proposal COM(2012) 85 final, 2.3 – legal basis p. 9, http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0085/COM_COM(2012)0085_FR.pdf.

14 Art. 9: «The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union».

15 Article 3: «*Scope This Directive shall apply to criminal offences covered by:(a)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 ('Convention on the fight against corruption involving officials');(b)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; (c)Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment; (d)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; (e)Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism;(f)Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;(g)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; (h)Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime; (i)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[1]; (j)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; (k)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[22], as well as other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonized therein*».

2.2. Confiscation of proceeds and instrumentalities

The article 3 of the directive concerns the confiscation of instrumentalities, proceeds or property of correspondent value where a final conviction for a criminal offence is disposed by a judicial authority. It represents the traditional type of confiscation widely used among MS.

The article 2 of the directive extends the meaning "proceeds" respect to the previous FD and gives a definition of "instrumentalities" and "property". According to the most common definition of "proceeds", these are intended simply as any economic advantage deriving from a criminal offence, and this generic definition triggers divergent interpretations in the MS case-law.

Now, according to the article 2 para. 1 (and in accordance with the case law of the majority of Member States) "proceed" is any advantage which «…derives directly or indirectly from a criminal offence, including any form of property and any subsequent reinvestment or transformation of direct proceeds and any valuable benefits.».

The concept of "property" finds also a new detailed definition: it is intended as «property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title or interest in such property» (art. 2b).

It is worth noting that the LIBE draft report made reference also to goods held jointly with the spouse. This provision was intended to avoid the frequent and crafty use to transfer the goods fictitiously to the spouse just in view of subtracting property from any Court orders. However, the LIBE proposal had not to be endorsed by the Council.

2.3. The dual regime of confiscation adopted and the crucial issue regarding the non-conviction based confiscation

The final text agreed by the EP and the Council does not endorse the initial proposal to establish a full regime also for "non-conviction based confiscation". According to this regime, even in the absence of a criminal conviction, money or any assets could be confiscated where a (civil) court is satisfied or convinced that money or assets derive from activities of criminal nature. The State sues the property itself, proving that it is obtained through activities of criminal nature even if a prison sentence is not sought by the State whose real priority is to stop dirty money flows. This step is necessary to hamper the cross-border money laundering that can occur also during a criminal investigation, and makes a connection between criminal activity and property.

This kind of procedure could have been legally possible as already the United Nations Convention against Corruption just in 2003 invited the States Parties to take «…the necessary measures to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases» (art. 54 lett. c).

Moreover non-conviction based confiscation is recognized by common law States (e.g. in U.K. and IRL where it is better known as "civil asset forfeiture")[16].

However the EU legislator didn't dare to establish this regime and had maintained, as a general rule, a conviction based on confiscation which required a final criminal conviction, (even if with some derogations). The system proposed by the European directive is then different from the "civil asset forfeiture", as confiscation is considered to be taken against a person (so it is not an *actio in rem*) who could have been led, if the person if the person was able to stand trial, to a criminal conviction[17].

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[16] For a comparative view of confiscation in the common law jurisdiction and the EU proposal of Directive on freezing and confiscation see more J.P. 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», 8 August 2012, Era Forum, Treves.

[17] For a deep analysis of the Commission Proposal and LIBE amendments see A. M. Maugeri, *Proposta di Direttiva in materia di congelamento e confisca dei proventi del reato: prime riflessioni*, in *Diritto Penale Contemporaneo* n. 2/2012, p. 180, http://www.penalecontemporaneo.it/upload/1339995828Confisca%20Maugeri.pdfhttp://www.penalecontemporaneo.it/upload/133999

The article 4 of the new Directive is divided in two paragraphs: the first one obliges MS to take the necessary measures to enable confiscation of instrumentalities, proceeds or the corresponding value, "subject to a final conviction for a criminal offence", by making also clear that the power of confiscation exists even in the case of proceedings *in absentia*.

The second paragraph foresees a residual hypothesis of confiscation without a final criminal conviction: only in case of illness or absconding and only when criminal proceedings (regarding a criminal offence) have been initiated, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds. The exact wording is: «…where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial». So, as it is confirmed by the explanation contained in the "whereas that" 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, in the cases of illness or absconding of the suspected or accused person (notably, the whereas no. 15 uses the wording "at least", so that it is not excluded that MS may introduce other cases of non-conviction based confiscation.

Anyway Member States:

a) in case of absconding should take all reasonable steps and may require that the person concerned be summoned to or made aware of the confiscation proceedings (whereas no. 15);

b) in case of illness should ensure the right of that person to be represented in the proceedings by a lawyer (whereas no. 16).

Indeed, both the original proposal and the text tabled A7-0178/2013 contained two different articles (3 and 5), distinguishing explicitly between the conviction based confiscation and the non-conviction one[18]. The EP had tried to introduce a wider provision – not present in the original proposal of the Commission – but it didn't succeed to convince some influential Member States in the Council.

The paragraph 1 of the amendment 33 of LIBE draft stated that each Member State would have taken the necessary measures to allow the Courts to confiscate "proceeds and instrumentalities" without a criminal conviction, if they were convinced, on the basis of specific circumstances and all available evidences, that those assets derived from activities of criminal nature[19].

Thus, it seems that the non-conviction based confiscation wasn't a secondary hypothesis: article 5 of paragraph 2 took into account *also* (circumstances added to the general one described above) the situation of suspected or accused person who, if he was able to stand trial, he was led to a criminal conviction where:

1) death, illness, permanent or not, result in the person being unfit to stand trial;

2) the illness or flight from prosecution or sentencing prevent an effective prosecution in reasonable time with the serious risk that it could be barred by statutory limitations.

5828Confisca%20Maugeri.pdf; ID, *L'actio in rem assurge a modello di "confisca europea" nel rispetto delle garanzie CEDU?*, in *Diritto Penale Contemporaneo* n. 3/2013, p. 252, http://www.penalecontemporaneo.it/foto/49683_2013.pdf#page=258&view=Fit.

[18] Just the amendment n. 1 of the text tabled stated that «an effective fight against economic crime, organized crime and terrorism would require the mutual recognition of measures taken in a different field from that of criminal law or otherwise adopted in the absence of a criminal conviction».

[19]The article clarified also that confiscation was considered as such a "criminal sanction" irrespective of its definition in the national law: considering the EctHR case law. The text proposed was the following: «Each Member State shall take the necessary measures to enable judicial authorities to confiscate, as a criminal sanction, proceeds and instrumentalities without a criminal conviction where a court is convinced on the basis of specific circumstances and all the available evidence that those assets derive from activities of a criminal nature, while fully respecting the provisions of Article 6 of the ECHR and the European Charter of Fundamental Rights. Such confiscation is to be considered of criminal nature according, amongst others, to the following criteria: (i) the legal classification of the offence under national law, (ii) the nature of the offence and (iii) the degree of severity of the penalty that the person concerned risks incurring and shall also be in line with national constitutional law». The justification adducted was that the article 83 does not exclude a confiscation without a criminal conviction if it can be qualified as criminal sanction according to the criteria developed by the ECtHR in Engel Judgement. In this case the criminal nature and not the criminal conviction would have been the condition for any harmonization under Art. 83.1 TFEU.

Indeed, the Council position has prevailed: the non-conviction based confiscation remains only a residual hypothesis. Moreover, as comes up from the text, the LIBE proposal that would have allowed confiscation also in case of death has not been retained. Again, this is consistent with the notion of confiscation which, as a criminal sanction, cannot affect the heirs.

In conclusion, the Parliament's attempts to widen the notion of non-conviction-based confiscation have been highly controversial, not only because it is an almost unknown system in many EU Member States of civil law, but also because it is deemed to be a possible source of violation of human rights[20].

And this conclusion has been reached, although the European Court of Human Rights, in its decision of 10 July 2007, application n. 696/05, had already stated that the non-conviction based confiscation didn't violate the Convention of Human Rights.

2.4. …the extended powers of confiscation…

An important novelty introduced by the directive is the admissibility of the extended powers of 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» (referral n. 19).

Before describing the solution adopted by the directive, it is worth recalling that the previous FD provided for three different sets of *minimum* requirements among which the MS could choose in order to apply this measure. In practice, the wide range of discretion given to the MS had provoked a serious hindrance to the mutual recognition, because each MS followed different ways to apply the FD, in accordance with their own different concepts of extended confiscation.

More in details, according to the article 3 para. 2, the FD 2005/212/JHA allowed MS to choose among one of these options *alternatively* to apply an extended confiscation where:

a) *a national court based on specific facts was 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 which is deemed reasonable by the court in the circumstances of the particular case, or, alternately*

b) *a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of which it was deemed reasonable by the court in the circumstances of the particular case, or, alternately*

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*.

Indeed, the risk of MS' contradictory legislation was already foreseen: in fact according to art. 8 para. 3 a competent authority of the executing State could reject the recognition of confiscation *orders under the extended powers of confiscation.* To overcome this crux, the art. 5 of the new directive defines only one binding manner to apply the extended powers of confiscation.

As clearly explained by referral 21 «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».

[20] Notably Germany explicitly opposed to the non-conviction based confiscation in case of death (moreover, Germany was the only EU MS which had signed but not ratified the UN Convention against corruption of 2003).

The text doesn't require a full proof, breaking also with the FD which requires in all the options a fully convincing proof, because it constitutes a sort of *probatio diabolica* for the judge, preferring a persuasion based on a level of specific circumstances and a balance of probabilities (recital n. 21).

Furthermore, art. 5 of para. 2 of the new directive, makes reference to "criminal conduct" and to a list of criminal offences[21], while the LIBE text A7-0178/2013 refers to a generic notion of "activities of a criminal nature".

Another point worth noting is, that as such general exceptions, the original proposal of the Commission didn't consider the application of the extended power of confiscation when similar criminal activities:

a) could not be subject of criminal proceedings due to prescription under national criminal law, or

b) have already been subject to criminal proceedings from which resulted the final acquittal of the person or in case of *ne bis in idem* principle application.

In the text adopted all the exceptions have been removed[22].

2.5. The conditions to admit a confiscation from a third party

According to article 6 of the Directive, each MS shall adopt the necessary measure to ensure that both proceeds and instrumentalities can be confiscated if transferred directly or indirectly or acquired by third-parties.

The directive provides for value confiscation, when other property has been transferred in order to avoid the confiscation of the same whose value corresponds to the proceeds.

The provision takes into account all the situations in which the proceeds or property are transferred freely or in exchange of a significant lower price compared to the market value.

It is clear that who receives a property under these two conditions has a reasonable suspicion concerning the illicit origin of the same property.

As final clause, the paragraph 2 states that the confiscation should not prejudice the rights of *bona fide* third parties. It is worth reminding that the Parliament had tempted – with the amendment 43 – to oblige Member States to take legislative measures in order to prosecute persons who fictitiously attribute ownership and availability of property to third parties; just with the aim of avoiding seizure or confiscation measure. The amendment was rejected.

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[21] For the purpose of paragraph 1 of this article, the notion of "criminal offence" shall include at least the following: (a)active and passive corruption in the private sector, as provided for in Article 2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials; (b)offences relating to participation in a criminal organization, as provided for in Article 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit; (c)causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes if the child is over the age of sexual consent, as provided for in Article 4(2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided for in Article 5(4) of that Directive; offering, supplying or making available child pornography, as provided for in Article 5(5) of that Directive; production of child pornography, as provided for in Article 5(6) of that Directive; (d) illegal system interference and illegal data interference, as provided for in Articles 4 and 5 respectively of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, as provided for in Article 7 of that Directive, designed or adapted primarily for that purpose; the intentional production, sale, procurement for use, import, distribution or otherwise making available of tools used for committing offences, at least for cases which are not minor, as provided for in Article 7 of that Directive; (e)a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.

[22] Regarding the issue of prescription it is worth noting that an anomalous case is represented by Italy where the discipline of the so called "maximum ceiling" makes possible that the criminal offence extinguishes because of the prescription, regardless of whether or not the process is started.

2.6…and the safeguards under the article 8

The article 8 of the directive defines the measures to ensure that the persons affected by the above mentioned measures, provided by the Directive, have the right to an effective remedy and a fair trial in order to uphold their rights notably when confiscation is not based on a conviction.

It lists several guarantees which shall be ensured to the passive subject of freezing and confiscation measures, irrespective of the ownership at the time of confiscation. A fair and effective procedure of freezing and confiscation has to be balanced by the provision of specific procedural rights in accordance with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Safeguards have been gradually implemented from the original ones covered by the proposal and now the text lists the following:

1) the right to an effective remedy and a fair trial; indeed, before the final agreement it was specified that this right had to be assured even prior to the final decision, but this rule hasn't been maintained in the text adopted;

2) the right to a communication of the freezing order, indicating at least briefly, the reason or reasons for the order concerned. Derogations are admissible only to avoid jeopardising a criminal investigation;

3) the freezing decision remains in force only for as long as it is necessary to preserve property with a view of a subsequent confiscation, otherwise frozen property shall be returned immediately, according to the rules determined by national law;

4) the right to challenge the freezing and confiscation order before a court for the person whose property is affected;

5) the right of access to a lawyer (and to be informed about this right) throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights.

6) under the case covered by extended power of confiscation, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidences on the basis of which the property concerned is considered to be a property derived from criminal conduct.

7) third parties shall be entitled to claim title of ownership or other property rights.

8) if victims have claims against the person who is subject to a confiscation measure provided for in this Directive, Member States shall take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims. This is in accordance with the European victims "right law".

All the safeguards provided are in accordance with the EU Council, Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 30 November 2009, and the latest directives 2012/13 on the right to information in criminal proceedings and 2013/48 on the right of access to a lawyer.

3. Conclusions

Many EU MS are still lagging behind in implementing the EU legislation on confiscation. It has to be seen if the situation will be improved after the adoption of the new Directive and the ambiguous situation arising from the partial "survival" of the previous Framework Decision.

The situation remains uncertain with respect to the extended powers of confiscation and safeguards looks still incomplete.

According to the Author, another crux concerns the re-use of the confiscated assets for social purposes: despite the studies and the debates which have animated all the period of negotiations it does

not seem that the Directive has reached its original scope, regarding the need of imposing common and binding rules on the matter[23].

That having been said, it is worth underling that according to art. 10 para. 3 «Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes». Differently, the old version of the text emended by the Parliament was more binding: the wording used was «each Member State shall provide for the possibility of confiscated property being used for social purposes». The weaker meaning of the wording «shall consider to take», compared to the verb «shall provide» of the previous version of the text which has not been approved, is evident; so that the promised and claimed achievement of a binding use of the confiscated assets for social purposes has been only advocated by the directive but not definitively achieved.

On a positive side, the art. 11 of the new Directive contains an effective discipline on the monitoring of the volume and value of the freezing and confiscation orders requested and executed, with a view to transmitting data to the Commission. Needless to say, the cooperation between Members States' police, judicial and financial authorities will be essential.

According to the last Corrigendum Document of 29 April 2014, MS shall bring into force the laws, regulations and administrative provisions by 4 October 2016 (one year later compared to the previous version of the Directive, article 12).

The same Corrigendum Document postponed the date for the publication of the report on the impact of existing national law introduced to comply with the Directive by October 4, 2019.

Now it is up to Member States to adapt their national legislation to the new EU directive which - pursuant to a prudent approach - will certainly help Member States to establish a more effective regime of confiscation to fight against organized crime.

[23] See the Note requested by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament of the European Parliament to the Basel Institute on Governance, *The need for new EU legislation allowing the assets confiscated from criminal organizations to be used for civil society and in particular for social purposes*, in http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462437/IPOL-LIBE_NT(2012)462437_EN.pdf .