

## Research Questionnaire:

### Part A – Analysis by each Member of the Research Team of the legal order of their EU Member State

**Introductory question:** How is the extended confiscation understood in legal order of your EU Member State?

• **RT 1: How was the adoption of extended confiscation explained in the process of its introduction into the internal legal system in your EU Member State (e.g. by legal amendments):**

The law of March 5, 2007,<sup>1</sup> has profoundly modified the provisions of Article 131-21 Penal Code (CP) by introducing an extended confiscation, thus transposing the Framework Decision 2005/212.

In the amendment to modify art. 131-21 CP with the law of 2007, the modification and introduction of the extended confiscation was justified by: "It modifies Article 131-21 of the Penal Code relating to confiscation in order to generalize this penalty for all offenses punishable by at least one year of imprisonment, and to allow the "extended" confiscation of property whose origin cannot be justified when the duration of imprisonment incurred is greater than or equal to five years (I) and it extends the regime of confiscation of all property for the offenses of child pornography in an organized gang and counterfeit money (II and III). These amendments bring French legislation into full compliance with the obligations resulting from Framework Decision No. 2005/212/JHA of February 24, 2005, of the Council of the European Union on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, a decision that must be transposed by March 2007."<sup>2</sup>

The law of June 3, 2016, which is the transposition of Directive 2014/42, did not modify Article 131-21 CP and did not have any significant impact on extended confiscation.

• **RT 2: is there any case law in your EU Member State relating to confiscation (e.g. of constitutional court, court of appeals):**

**1. Constitutional Council (Conseil constitutionnel): On the constitutionality of extended confiscation:**

- Decision n° 2010-66 QPC of November 26, 2010: Confiscation

Article 131-21 CP is in conformity with the constitution.

With regard to the principle of necessity of penalties, the Council ruled that the existence of a confiscation penalty does not, in itself, violate the principle of necessity of penalties. It is not excluded that, in certain hypotheses, the repression of an offence by the penalty of confiscation can constitute a manifestly disproportionate repression. However, the assessment of the

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<sup>1</sup> Loi n° 2007-297 du 5 mars 2007 relative à la prévention de la délinquance (1).

<sup>2</sup> AMENDEMENT N° 238 <https://www.assemblee-nationale.fr/12/amendements/3338/333800238.asp>

proportionality of penalties can only be made in relation to the offence for which the penalty is provided.

The Constitutional Council ruled that, taking into account the cases for which they are intended and the property to which they apply, these different hypotheses (paragraphs 1, 5 and 7) in which the accessory penalty of confiscation is intended, do not disregard the principle of necessity of penalties and are not manifestly disproportionate.

As for the right to property, the Council decided that article 131-21 of the Criminal Code, which preserves the right to property of third parties in good faith, is not contrary to any other right or freedom guaranteed by the Constitution.

The Council did not comment on the constitutionality of paragraph 6 of article 131-21 CP (extended confiscation of property).

- The Court of Cassation on article 131-21, paragraph 6 CP (extended confiscation of assets)

The constitutional reform of 2008 allowed any litigant, during a trial, to challenge the constitutionality of a law that predates the creation of the Constitutional Council or that has not been submitted to its control: Question prioritaire de constitutionnalité (QPC). When a QPC is lodged before a court or a court of appeal, the court must decide without delay on the transmission of this question to the Court of Cassation, by giving a motivated decision. When a QPC is transmitted to the Court of Cassation or lodged before it, the High Court ensures that the conditions of admissibility are met and rules on the seriousness of the challenge. The competent chamber decides either to refer the QPC to the Constitutional Council or not to refer the QPC to the Constitutional Council.

The Criminal Chamber refused a first referral to the Constitutional Council of the question concerning the constitutionality of the confiscation of property (Art. 131-21 paragraph 6CP) in matters of pimping by a decision of February 12, 2014<sup>3</sup>. It was argued that the possibility for the criminal judge to order the confiscation of all or part of the property of the person convicted for acts of procuring, was contrary to Articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen of 1789 (which protect the right of ownership), to article 8 of the same text (principle of necessity of proportionality of the penalties), and to article 34 of the Constitution which forbids the legislator to extend its competence in violation of the right of property and of the principles of necessity and proportionality of the penalties protected by the above mentioned texts.

In order to refuse to refer this question, the criminal chamber first recalled that the provisions of article 131-21 of the penal code instituting the accessory penalty of confiscation were declared constitutional by the Constitutional Council on 26 November 2010. The provisions of article 225-25 of the penal code constitute a special application specific to the offence of procuring of the confiscation defined in identical terms by article 131-21. It then affirms that the device is consistent with the constitution because of the seriousness of the offense (Article 222-25 CP - the offense of procuring) thus punished by the confiscation of property and the optional nature of this accessory penalty left to the discretion of the judge.

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<sup>3</sup> Cass. crim. 12 février 2014, n. 13-83.760.

This solution was reaffirmed on May 24, 2016.<sup>4</sup>

- Decision n° 2021-949/950 QPC of November 24, 2021: Article 131-21 of the Penal Code is almost entirely declared unconstitutional with regard to the procedural status of third parties.

Neither article 131-21 of the Penal Code, in its wording resulting from the law of December 6, 2013, nor any other provision provides that when the confiscation of a joint marital property is envisaged, the non-convicted spouse should be able to present his or her observations on this measure before the court of judgment; the Constitutional Council declares and consequently censures the second, fourth, fifth, sixth and eighth paragraphs of article 131-21 of the Code, which are contrary to article 16 of the Declaration of 1789, which protects the right of the persons concerned to exercise an effective legal remedy as well as the respect of the rights of the defense. Considering that the immediate abrogation of the provisions declared unconstitutional would entail manifestly excessive consequences by depriving the court of judgment of the possibility of pronouncing a sentence of confiscation, the Council postpones the abrogation of the said provisions until December 31, 2022, and decides that the measures taken before the publication of the present decision cannot be challenged on the basis of this unconstitutionality.

This decision suggests that a law on confiscation is expected in 2022 and will likely overhaul the provisions and refurbish Article 131-21.

## **2. Introduction by the Court of Cassation of a proportionality control by the criminal court**

In a jurisprudential evolution, the criminal chamber of the Court of Cassation has imposed the implementation of a control of the proportionality of the confiscations pronounced by the criminal judge. But the criminal judge is not obliged to control the proportionality of all confiscation sentences. In the state of the case law of the criminal chamber, the principle of proportionality appears to apply to all confiscations, except for those involving property that in its entirety constitutes the object or proceeds of the offense (Court of Cassation, criminal chamber, June 27, 2018, n. 16-87.009).

The principle of proportionality therefore applies to extended confiscation, which is particularly prejudicial to property rights:

- Application of the principle of proportionality in matters of confiscation of property article 131-21 paragraph 6 CP: The need for a proportionality control for the confiscation in 131-21 paragraph 6 CP was for the first time affirmed in a decision rendered by the criminal chamber of the Court of Cassation on March 30, 2016.<sup>5</sup> The criminal chamber consecrated the obligation for the judge to assess the proportionality of the infringement of the right of property and to state the criteria that must be taken into account during this control: the seriousness of the facts and the personal situation of the person concerned. It is therefore up to the judge, in order to avoid any risk of arbitrariness, to assess the necessity of the infringement of the right of property of the

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<sup>4</sup> Cass. crim. 24 mai 2016, n. 15-81.287.

<sup>5</sup> Cass. crim. 30 mars 2016, n. 15-81.550.

person concerned with regard to the concrete seriousness of the acts of which he is accused and his personal situation.

- Confiscation of property whose origin could not be justified (Art. 131-21 paragraph 5 CP): The criminal chamber has not yet pronounced positively on the application of the principle of proportionality to the confiscation of property confiscated pursuant to Article 131- 21 paragraph 5 of the Penal Code. This application could, however, be deduced from the statements of the judgment of June 27, 2018, which only excluded from the scope of application of the principle of proportionality the confiscation of property constituting, in their entirety, the proceeds of the offense.
- Confiscation of objects qualified as dangerous or harmful by law or regulation, or the possession of which is unlawful (Art. 131-21 Paragraph 7 CP): The criminal chamber has not yet had to rule on the application of the principle of proportionality to the confiscation of such objects. Such an application could be deduced from the decision of the Court of Cassation of June 27, 2018.

### **3. Jurisprudential disputes: Question of conformity with treaty provisions.**

There is a relatively large body of case law concerning these extended confiscations, in which the violation of treaty provisions guaranteeing, in particular, the right to property and respect for family life is often invoked, on the grounds that the confiscation penalty is disproportionate.

However, case law has validated the conformity of general confiscation with treaty law in numerous judgments:

- A decision of the criminal chamber of the Court of Cassation validated the compliance of the general confiscation of property with the European Convention on Human Rights and the International Convention on the Rights of the Child guaranteeing respect for property and family life, in a case in which all the property of the convicted person had been confiscated, including the family home (Cass. crim. 03/11/2011 n° 10-87811).
- In a decision of September 3, 2014, the Court of Cassation validated the conformity of confiscations of real estate belonging to a civil company convicted, like its manager, for aggravated pimping - real estate, some of which had been used to commit the offenses, but others had no connection with it. The criminal chamber stated "that in order to confirm the sentence of confiscation and to add to it that of real estate belonging to SCI Letort, whose manager was Mrs. X., the judgment retained, after having noted the importance of the profits drawn from the activities of prostitution, that the goods constituted the elements of the patrimony of this company; that in this condition, the confiscations were regularly pronounced since [. ...] the Court of Appeal only used the faculty given to it by articles 131-21 paragraph 6, 131-39 and 225-25 of the penal code" (Cass. crim. 3 September 2014, n° 13-83760)
- In a decision of September 24, 2014, the criminal chamber considered that Articles 131-21 paragraph 6 and 222-49 paragraph 2 had been correctly applied, in a drug trafficking case in which the Bordeaux Court of Appeal had confirmed the confiscation of movable property and an apartment acquired prior to the commission of the offenses, holding "that since the confiscation was based on paragraph 2 of Article 222-49 of the

Penal Code and that it remains a measure of accessory patrimonial sanction proportionate to the seriousness of the criminal acts, the confiscation is justified for all the property of the two convicted persons and the defendant-appellants, whether this property has an exclusive, partial or no link with the criminal acts; that given the seriousness of the facts of drug trafficking and their particularly dangerous nature for society and public health, it is appropriate to confirm this particularly opportune decision. Whereas in so ruling, the Court of Appeal, which did not disregard the conventional provisions invoked, made the exact application of articles 131-21, paragraph 6, and 222-49, paragraph 2, of the penal code;". (Cass. crim. September 24 2014, n° 13-85.921). The Court of Cassation thus stated that there was no violation of Article 6§2 of the European Convention on Human Rights and Article 1 of the Additional Protocol thereto on the protection of intellectual property.

**• RT 3: Is there any specific experience by practitioners in your EU Member State which created a special attitude to (extended) confiscation? (e.g., organised crime, terrorism, drug crime, money laundering)? How did it influence the legislation (formulation of legal provisions of) (extended) confiscation?**

Before the law of March 27, 2012,<sup>6</sup> there was the problem in practice of so-called prête-noms<sup>7</sup> and social structures that allow the convicted person not to appear as the legal owner of property of which he has the free disposal and of which he is the real economic owner. Before this law, the confiscation provided for by Art. 131-2 paragraph 5 and 6 was limited to the property of which the convicted person was the owner.<sup>8</sup>

The 2012 law introduced the confiscation of property of which he is not the owner but of which he has free disposal, subject to the rights of the owner in good faith.

**• RT 4: What is the legal nature of extensive confiscation in your EU Member State?**

In the new Penal Code of 1994, confiscation was conceived as a penalty which aims, as such, at repressing the infringement of public order by the offender. The criminal chamber of the Court of Cassation has affirmed in several of its decisions that confiscation constitutes a penalty (Cass. crim. 8 June 1977 n. 76-93.504, Cass. crim. 13 Nov. 2008, n. 08-83.597).

Confiscation can be:

- An accessory penalty :
  - Accessory criminal or delictual penalty: For natural persons: Art. 131-10 CP When the law provides for it, a crime or an offence can be sanctioned, in addition to the main penalties, by the confiscation of an object or an animal. Same for legal persons: Art. 131-39 n. 8 and 10 CP
  - Accessory penalty for misdemeanours

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<sup>6</sup> LOI n° 2012-409 du 27 mars 2012 de programmation relative à l'exécution des peines (1)

<sup>7</sup> Legal term characterizing the status of an agent who, in execution of a secret agreement with his principal, performs acts as if he were engaging for himself.

<sup>8</sup> Rapp. Sénat n. 302 (2011-2012), p. 87.

- An alternative penalty pronounced by the criminal judge in criminal matters.

### **Extended confiscation:**

The law provides for hypotheses in which property can be seized even though there is no link between said property and the offense.

#### **1) Presumption of links with a criminal activity (Art. 131-21 paragraph 5 CP)**

Article 131-21 paragraph 5 CP: "If it is a crime or an offence punishable by at least five years of imprisonment and having procured a direct or indirect profit, the confiscation also relates to movable or immovable property, whatever its nature, divided or undivided, belonging to the convicted person or, subject to the rights of the owner in good faith, of which he has free disposal, when neither the convicted person, nor the owner, put in a position to explain the property of which the confiscation is envisaged, have been able to justify the origin thereof."

The law of March 5, 2007<sup>9</sup> introduced a paragraph 5 to article 131-21 providing for the confiscation of property which, without having the slightest connection with the offence prosecuted, is presumed, because of the nature of the offence, to be the product of the offender's criminal activity.

The Act of March 27, 2012<sup>10</sup> added the possibility of confiscating property of which he is not the owner but of which he has free disposal, subject to the rights of the owner in good faith.

In the amendment to modify art. 131-21, the change was justified by: "It modifies Article 131-21 of the Penal Code relating to confiscation in order to generalize this penalty for all offenses punishable by at least one year's imprisonment, and to allow for "extended" confiscation of property whose origin cannot be justified when the term of imprisonment incurred is greater than or equal to five years (I) and extends the regime of confiscation of all property for the offenses of child pornography in an organized gang and counterfeit money (II and III). These amendments bring French legislation into full compliance with the obligations resulting from Framework Decision No. 2005/212/JHA of the Council of the European Union of February 24, 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, which must be transposed before March 2007."<sup>11</sup>

Several conditions must be met for this extended confiscation to be pronounced:

- Confiscation can only be pronounced if it is a crime or an offence punishable by a prison sentence of five years or more.
- The crime or offence must have resulted in a direct or indirect profit
- Only property owned by the convicted person, or property freely at his free disposal, subject to the rights of the bona fide owner, may be confiscated. The question arises as to what is meant by "free disposal"? The Court of Cassation has developed abundant

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<sup>9</sup> Loi n° 2007-297 du 5 mars 2007 relative à la prévention de la délinquance (1).

<sup>10</sup> LOI n° 2012-409 du 27 mars 2012 de programmation relative à l'exécution des peines (1)

<sup>11</sup> AMENDEMENT N° 238 <https://www.assemblee-nationale.fr/12/amendements/3338/333800238.asp>

case law in this area. In general, the judge will have to assess whether the person prosecuted has effectively and freely the use of it.

Thus, in two rulings of January 29, 2014, concerning the same case in which a couple was indicted on charges of failure to provide proof of resources, drug and weapons offenses, receiving stolen goods, forgery and use, the Criminal Division of the Court of Cassation validated: - the seizure of a building belonging to a real estate company in which the spouses were the sole shareholders, so that they had free disposal of this building (Cass. crim. 29 janvier 2014, n° 13-80.062);- the seizure of a business operated by a company in which the wife was the sole shareholder, so that the two defendants had free disposal of it (Cass. crim. 29 janvier 2014, n°3-80.063).

This has led the doctrine to speak of the "economic conception" of the notion of free disposal adopted by the Court of Cassation<sup>12</sup> and to see in it a reference to the situation of the person who, without being the owner of the goods, has, in reality, the economic control of them<sup>13</sup>.

What does good faith mean? The legislator has not defined the notion. It is the jurisprudence that has defined it. The owner of good faith is the one who was unaware of the facts committed by the convicted person who had the free disposal of the property.<sup>14</sup>

- The confiscation can only be pronounced on the condition that the convicted person has been able to explain the origin of the goods whose confiscation is envisaged and that he has not been able to justify their lawful origin. It is thus a reversal of the burden of proof. It is because the offences provided the perpetrator with a direct or indirect profit, that the entire patrimony of the perpetrator seems suspicious and there is a presumption of illegality on this patrimony that it is up to the interested party to reverse by providing proof of the lawful origin of his assets. The convicted person can freely provide proof of the lawfulness of his assets (there is no requirement as to the nature of the proof).
- Property whose origin could not be justified may be confiscated regardless of its date of acquisition. The commission of an offence punishable by a sentence of at least five years' imprisonment and having procured a direct or indirect profit creates a presumption of a link not with the offence being prosecuted, but more broadly with any criminal activity, which justifies the entirety of the person's assets being suspected.

## **2) Confiscation of property (Art. 131-21 Paragraph 6 CP):**

Art. 131-21 Paragraph 6 CP: "When the law that punishes the crime or the offence provides for it, the confiscation may also relate to all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, of which he has free disposal, whatever its nature, movable or immovable, divided or undivided."

This paragraph, which also essentially originated from the law of March 5, 2007 in order to bring French legislation into full compliance with the obligations resulting from Framework Decision No. 2005/212/JHA, provides for general confiscation of property, i.e. the

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<sup>12</sup> *Ascensi*, Droit et pratiques des saisies et confiscations pénales, 2019/2020, p. 180.

<sup>13</sup> *Cutajar*, Le nouveau droit des saisies pénales, AJ pén. 2012, 124.

<sup>14</sup> Cass. crim. 13 avril 1999, n. 97-85.443.

possibility of seizing all or part of the property belonging to the convicted person or of which he or she has free disposal, provided that the texts punishing the offense committed expressly provide for this.

The law of March 27, 2012<sup>15</sup> added the possibility of confiscating property that he is not the owner but of which he has free disposal, subject to the rights of the owner in good faith.

This penalty of confiscation of assets can be seen as particularly prejudicial to the right of ownership. Indeed, this penalty allows the criminal judge to order the confiscation of any property belonging to the convicted person or, subject to the rights of a bona fide owner, of which he has free disposal. It is not necessary to seek the existence of any link between the property liable to confiscation and the offence prosecuted. Confiscation is possible even if the convicted person proves the legal origin of the property.

This penalty is provided for the following offences:

- crimes against humanity (art. 213-1 of the penal code for natural persons and 213-3 of the penal code for legal persons);
- crimes against the human species (art. 215-1 of the penal code for natural persons and 215-3 of the penal code for legal persons);
- drug trafficking offenses (art. 222-49 of the penal code, for natural and legal persons);
- arms trafficking offenses (art. 222-66 of the penal code for natural persons);
- offences of trafficking in human beings and procuring (Article 225-25 of the Penal Code, for natural and legal persons);
- offenses of corruption of minors in an organized group or to the detriment of minors under 15 years of age and child pornography in an organized group (Article 227-33 of the Penal Code, for natural and legal persons);
- money laundering offenses (art. 324-7 of the penal code for natural persons and 324-9 of the penal code for legal persons);
- crimes or offenses constituting acts of terrorism (Article 422-6 of the Penal Code, for natural and legal persons)
- crimes and offenses of counterfeiting money (art. 442-16 of the penal code, for natural and legal persons);
- the offence of criminal conspiracy to commit crimes and offences punishable by 10 years' imprisonment and the offence of failure to provide proof of resources, aggravated under the conditions set out in Article 321-6-1 of the Criminal Code (Article 450-5 of the Criminal Code, for natural and legal persons);
- war crimes and offenses (art. 462-6 of the penal code, for natural and legal persons);
- the offense of aiding illegal entry and residence, aggravated by the circumstances of Article L. 622-5 of the Code on the Entry and Residence of Foreigners and the Right of Asylum (CESEDA) (Article L. 622-6 of the CESEDA for natural persons and L. 622-9 of the CESEDA for legal persons);
- offenses of recognizing a child or marriage for the sole purpose of obtaining a residence permit or French nationality committed in an organized group, as referred to in Article L. 623-1 paragraph 3 of the CESEDA (Article L. 623-2 of the CESEDA for natural persons and L. 623-3 of the CESEDA for legal entities);

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<sup>15</sup> LOI n° 2012-409 du 27 mars 2012 de programmation relative à l'exécution des peines (1)



- the crime of marriage contracted or child recognized for the sole purpose of obtaining or causing a foreigner to obtain a residence permit or French nationality (Art. L. 823-14 of the CESEDA for natural persons and L. 823-17 of the CESEDA for legal persons);
- the crime of marriage contracted or child recognized for the sole purpose of obtaining or causing a foreigner to obtain a residence permit or French nationality committed in an organized gang (Art. L. 823-14 of the CESEDA for natural persons and L. 823-17 of the CESEDA for legal entities);
- the offense of using the services of an employer of foreigners without a work permit (Art. L. 8256-5 of the Labor Code, only for individuals);
- the offence of employing unauthorized foreigners in an organized group (Art. L. 8256-8 of the Labor Code, only for legal entities).

### **3) Confiscation of objects qualified as dangerous or harmful by law or regulation, or whose possession is illegal (Art. 131-21 Paragraph 7 CP):**

Art. 131-21 paragraph 7 CP: "Confiscation is mandatory for objects qualified as dangerous or harmful by the law or regulation, or whose possession is illegal, whether or not these goods are the property of the convicted person."

This paragraph also essentially stems from the law of March 5, 2007, in order to bring French legislation into full compliance with the obligations resulting from Framework Decision No. 2005/212/JHA. No link whatsoever is required between the property liable to confiscation and the offence prosecuted, or even any offence. The objective pursued by the legislator here is more preventive than repressive.

Example of objects qualified as dangerous or harmful by the law or the regulation, or whose possession is illicit: Banknotes and counterfeit monetary instruments, narcotics, falsified goods...

Unlike the preceding hypotheses (paragraphs 3, 4, 5, 6) where the confiscation of the object remains optional for the court of judgment, the seventh paragraph of article 131-21 provides that the court is obliged to order the confiscation of objects qualified as dangerous or harmful, or the possession of which is illegal, even if the convicted person does not own them.

### **4) Confiscation of property specially designated by the text punishing the offence (Art. 131-21 Paragraph 4 CP)**

This paragraph was also introduced by the law of March 5, 2007 in order to bring French legislation into full compliance with the obligations resulting from Framework Decision 2005/212/JHA.

Art. 131-21 paragraph 4: "Confiscation may also involve any movable or immovable property defined by the law or regulation that punishes the offence.

The confiscation of certain property is sometimes incurred even though it is not related in any way to the offence being prosecuted, but on the grounds that it is specially designated by the text punishing the offence. Thus, any movable object defined by the law or the regulation can

be confiscated even if this object does not correspond to the general definition of the objects susceptible to confiscation.

The examples of application of this text are numerous in criminal law. It is advisable to refer to the texts repressing the offence to know which are the goods, especially designated by these texts, which are susceptible of confiscation.

Example:

- offence of trespassing in a school (Article 431-26 nr. 4 CP: The confiscation of one or more weapons of which the convicted person is the owner or of which he has free disposal);
- Offense of criminal participation in an armed gathering or provocation to an armed gathering (Article 431-7 nr. II 2 CP: Confiscation of one or more weapons owned or freely available to the convicted person);
- Offence of threatening to commit a destruction, a degradation or a deterioration leading only to a light damage, when it is repeated (Article R. 631-1 nr. 2 CP: The confiscation of one or more weapons of which the convicted person is the owner or of which he has the free disposition);
- Offence of provocation, defamation and non-public insults of a racist or discriminatory nature (Article R. 625-8-2 nr. 2 and 3 CP: nr. 2: The confiscation of one or more weapons of which the convicted person is the owner or of which he or she has free disposal; nr. 3 The confiscation of the thing that was used or intended to commit the offence or of the thing that is the product of it);
- Offenses against the physical or mental integrity of the person (Article 222-44 nr. 5 CP: The confiscation of one or more vehicles belonging to the convicted person; nr. 6 The confiscation of one or more weapons owned or freely available to the convicted person);
- Money laundering offence (Article 324-7 nr. 6 CP: Confiscation of one or more vehicles belonging to the convicted person; nr. 7 Confiscation of one or more weapons owned or freely available to the convicted person);
- The offence of receiving stolen goods (Article 321-9 nr. 7 CP: The confiscation of one or more weapons of which the convicted person is the owner or of which he has free disposal);
- The crime of enforced disappearance (Article 221-14 II nr. 2 CP: The confiscation of one or more weapons of which the convicted person is the owner or has free disposal).

**• RT 5: What are the legal instruments for the protection of individual rights in your EU Member State:**

**1) Appeals against confiscation:**

The remedies (appeal etc.) against confiscation orders are available under ordinary law. However, because the confiscated property may be the object of rights held by third parties who are not criminally prosecuted, certain specific rules have been laid down by the criminal chamber. The plea of ownership of a third party in good faith, which is likely to constitute an obstacle to confiscation, cannot be invoked by the person prosecuted: only this third party is

admissible to invoke his right of ownership. The third-party holder of the rights of the confiscated good is admissible either to intervene in the cause of appeal in the event of confiscation pronounced by the court of first degree, or to bring a contentious incident before the repressive judge in application of article 710 of the code of penal procedure.

## 2) AGRASAC

Law n° 2010-768 of July 9, 2010 created the Agency for the Management and Recovery of Seized and Confiscated Assets (AGRASC), whose operation was specified by decree n°2011-134 of February 1, 2011. The Agency started its activities on February 4, 2011. AGRASC is a public administrative institution under the joint supervision of the Minister of Justice and the Minister of Public Accounts. The Agency, which is in charge of the execution of the confiscation sentence on behalf of the Public Prosecutor, also aims to meet the indispensable need for the management of seized assets, when these require administrative acts (vehicles, buildings, businesses, boats, etc.). To this end, the Agency was conceived as a structure for legal and practical assistance to the courts and as a service provider. In addition to its general role of assistance, advice and guidance given to magistrates and investigators in matters of seizures and confiscations, the agency's mission is to improve the judicial treatment of seizures and confiscations in criminal matters.

**• RT 6: Does – in your opinion based on the answer of the above mentioned questions / the literature in your EU Member States – extended confiscation comply with the principles of:**

- Principle of legality

The principle of legality is respected. With regard to extended confiscations, the criminal judge can only order a confiscation if a special provision (an offence) provides for such a penalty or, in the case of article 131-21 paragraph 5, only if it concerns a crime or an offence punishable by at least five years' imprisonment.

- Principle of proportionality

The jurisprudential evolution of the criminal chamber of the Court of Cassation and the introduction of a proportionality control for article 131-21 paragraph 6 (seen above) goes in the direction of a greater protection. This proportionality control is likely to be implemented with respect to the right to property and the right to respect for private and family life.

It can only be assumed that such a control also applies to the confiscations provided for in paragraphs 4, 5 and 7. A clear position of the Court of Cassation would be welcome and necessary.

- The right of the persons concerned to an effective judicial remedy and the respect of the rights of the defense.

Thanks to the decision n° 2021-949/950 QPC of November 24, 2021 the procedural status of third party owners and non-convicted persons seems to be reinforced. The legislator will have to include in art. 131-21 provisions allowing the third owner to present his observations on this confiscation measure before the court of judgment. This evolution seems necessary in view of art. 16 of the declaration of 1789.

- Principle of individualization of the sentence

If, in general, the principle of individualization of the penalty prohibits confiscation of anything other than what the convicted person owns, it happens that, in the case of compulsory confiscation, objects qualified as dangerous or harmful by the law or the regulations, or whose possession is illegal, are confiscated, regardless of their owner (Art. 131-21 paragraph 7 CP).

- Property rights

Paragraphs 5 and 6 of Art. 131-21 of the Criminal Code may pose a problem in view of the right of ownership and must be strictly supervised. The proportionality control is a necessary step.

## **Part B – Common / Comprehensive Analysis of the Research Team on the basis of the outcomes of Part A**

- **RT 7:** How does the extended confiscation relate to the fundamental rights and general principles of EU law guaranteed by the Charter of Fundamental Rights and constitutional orders of EU Member States?

- **RT 8:** What are the limits of acceptable (not infringing on their essence) interference of instruments of crime prevention like extended confiscation with fundamental rights and general principles of EU law and constitutional orders of EU Member States?