Country Report – Spain

José Luis DE LA CUESTA
University of the Basque Country (UPV/EHU), San Sebastian

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

I. As in other legal systems, the presence of confiscation in Spanish historical legislation is constant: "since the beginning of codification" (1822 CP -Penal Code: *Código Penal*; Article 90)[1] no CP has refrained from regulating confiscation of the instruments and fruits of crime.

Confiscation has also been traditionally regulated by special criminal legislation: and, even if most of these provisions have already disappeared, we can still find specific references in the Military Penal Code and in Article 5 of Organic Law 12/1995 on Smuggling.[2]

Confiscation is equally present in the administrative legislation related to certain infringements of a non-penal nature. This is the case of Article 55 of Organic Act 7/2000 on rights and freedoms of foreigners in Spain and their social integration –for those engaged in non–criminal activities related to irregular immigration qualified as very serious infringements by Article 54, 1 b)– and Article 19 of Act 4/2009 on control of drug precursors.

Leaving aside these particular texts, the most developed regulation of confiscation is nowadays contained in Articles 127 ff of the Spanish 1995 CP,[3] repeatedly revised in the last 25 years, particularly, in order to give way to the different modalities of confiscation promoted by EU decisions and directives.

1. Article 127 –applicable both to natural persons and legal entities–[4] generally orders **direct confiscation of instrumentalities and gains:**

- For intentional offences:

> "1. *All penalties imposed for a malicious criminal offence shall lead to loss of the assets obtained therefrom and of the goods, means or instruments with which they were prepared or executed, as*

[1] Quintero Olivares, 2017, p.142.
[2] This one orders: "*1. Any penalty imposed for a smuggling offense shall entail the confiscation of the following goods, effects and instruments: a) The goods that constitute the object of the offense. b) The materials, instruments or machinery used in the manufacture, processing, transformation or trade of the stagnant or prohibited goods. c) The means of transport with which the commission of the offense is carried out, unless they belong to a third party who has not participated in it and the Judge or the competent Court considers that such accessory penalty is disproportionate in view of the value of the means of transport object of the confiscation and the amount of the smuggled goods. d) The profits obtained from the crime, whatever transformations they may have undergone. e) Any goods and effects, of whatever nature, that have served as an instrument for the commission of the offense. 2. If, for any circumstance, it is not possible to confiscate the property, effects or instruments indicated in the preceding paragraph, other property belonging to those criminally responsible for the crime shall be confiscated for an equivalent value. 3. The goods, effects and instruments of smuggling shall not be confiscated when they are of lawful commerce and are owned or have been acquired by a third party in good faith.(...)*"
[3] For an English translation of the whole Spanish Penal Code: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf
[4] 2010 Reform introduced in Spain the penal responsibility of legal persons, regulated, among others in Articles 31 bis ff and 33.7 (punishments) CP.

well as the gains obtained from the criminal offence, whatever the transformations these may have undergone."

- And in cases of negligence punished by imprisonment of more than one year:

"2. *In cases in which the Law foresees imposing a sentence of imprisonment exceeding one year for committing an imprudent criminal offence, the Judge or Court of Law may order the loss of the assets obtained thereby and of the assets, means or instruments with which this has been prepared or executed, as well as the gains from the criminal offence, whatever transformations they may have undergone*."

Seven other Articles follow and complete this first provision on "direct confiscation"[5] in the CP's general part, which follows the punishment of the individual: acquittal being thus an absolute limit for confiscation of this kind.[6]

No doubts presents the level of respect of the European standards by Article 127: this goes even beyond them in the imperative application of direct confiscation to all intentional offences,[7] remaining only facultative for those negligent offences punished by more than a year of imprisonment[8]. However, maintaining the traditional terminology[9] generates a distance with the Directive's references[10] and raises problems of interpretation that could have been prevented with the adoption of the Directive's terms.[11]

Particularly relevant is, in this respect, the issue of "gains":[12] referred, in principle, to any illicitly obtained patrimonial advantages, the terminology of Spanish legislation is certainly confusing. Debates in the literature focus not only on the issue of gross or net (preferably) nature of gains, but also on the non-coincidence of Spanish "gains" (more restrictive) with the broader term "products" employed internationally and by the European Directive.

The reference to "*whatever transformations (...) undergone*" applies not only to gains, but also to effects and instruments[13] and is furthermore understood as a way of legitimation of confiscation of indirect gains (*i.e.,* the proceeds of the property subject to confiscation), explicitly covered by Article 127.3, and of subrogate or chain confiscation.[14]

Obviously, certain limits are legally established in order to protect the rights of third parties and to prevent excesses. In this sense, concerning instrumentalities, case law usually requires a direct relation with the preparation or execution of the offence;[15] nevertheless, after the disappearance in 2015 of the exception for those assets, goods, means, or instruments belonging "*to a third party in good faith who is not responsible for the felony, who has acquired them legally*" (contained in the last sentence of precedent Article 127.1),[16] the only regulation applicable to this situation, nowadays, is Article 127 *quarter* (confiscation from a third party). No specific regulation establishes the treatment of confiscation of those instruments belonging to a third person in the moment of commission (or

[5] Díaz Cabiale, 2016, 25 ff.
[6] Seizure of the objects of illicit commerce and dangerous for security does not need to resort to penal confiscation. Díaz Cabiale, 2016, 3 (fn 1) and 13 f.
[7] On the imperative nature of confiscation of instruments and its doubtful compatibility with the principle of proportionality Blanco Cordero, 2017, 445 ff.
[8] Blanco Cordero, 2017, 436 f.
[9] Certainly confusing, Fabián Caparrós, 2017, 433.
[10] That also exists between CP and LECrim (the Act of Penal Procedure: *Ley de Enjuiciamiento Criminal*), Neira Peña / Pérez-Cruz Martín, 2016, 496.
[11] Blanco Cordero, 2017, 441; Díaz Cabiale, 2016), 8 f.
[12] Blanco Cordero, 2017, 448 and 452 f.
[13] However, on the products of the instruments, see Blanco Cordero, 2017, 454.
[14] Aguado Correa, 2015, 1009.
[15] But, not the strict necessity sometimes required in the literature, Blanco Cordero, 2021, 793.
[16] Which is still present in Article 5.3 of Organic Law 12/1995 on Smuggling.

preparation).[17] Leaving aside the cases of intentional contribution, the more problematic issue concerns negligent contributions not directly envisaged:[18] since the extension to cases of non-diligence of the third party[19] will be difficult to accept, as it would suppose a non-favorable analogic application of Article 127 *quáter*.

Furthermore, Article 128, applicable to all kind of confiscation, states:

> "*When those assets and instruments are of lawful trade and their value is not proportional to the nature or severity of the crime, or when the civil liabilities have been fully settled, the Judge or Court of Law may decide not to order the seizure, or may order only a partial one*"

Only assets or instruments of lawful trade can be the object of this judicial decision, not direct or indirect gains. Two are the reasons that apparently can justify it: the respect of the principle of proportionality or rewarding the prior and complete satisfaction of civil liabilities. However, the need of revision of the second reason is underlined in the litterature, because "the liquidation of forfeited assets is no longer necessarily intended to cover the civil liabilities of the convicted person".[20]

2. <u>Surrogate confiscation</u>[21] is also generally[22] foreseen "*if, for any circumstance, it were not possible to confiscate the assets*". Article 127.3 orders in this case confiscation by equivalent: i.e. the substitution of "*the assets stated in the preceding Sections*" by "*other assets corresponding to the equivalent value thereof, and to the gains that may have been obtained"*. The same solution is applicable, as well, "*in the case of confiscating certain goods, assets or gains, when their value is lower than at the time of acquisition.*"

Furthermore, the reform operated by Organic Act 1/2015, additionally to Article 127.3, included another[23] provision on surrogate confiscation in cases of impossibility of execution of the confiscation decision (Article 127 *septies*):

> *"If it were not possible to proceed with the confiscation, in whole or in part, due to the nature or status of the goods, assets or gains in question, or for any other reason, the Judge or Court of Law may, via a ruling, order the confiscation of other goods, even those of lawful origin, owned by the individuals criminally liable for the criminal offence, with a value equal to that of the part of the confiscation initially decreed and not carried out.*
>
> *The same shall apply in the case of confiscating certain goods, assets or gains, when their value is lower than at the time of acquisition."*

Authors underline an important inconsistency[24] between 127.3 and 127 *septies*: while the first one orders imperatively it, the prevision is facultative in Article 127 *septies*.

Surrogate confiscation by equivalent raises other debates in the literature:

- On the one hand, the dangerous nature of the instrument –extensively qualified as the justification of confiscation of instruments–[25] is a condition in principle not easily

[17] Blanco Cordero, 2021, 795.
[18] Blanco Cordero, 2021, 796 ff.
[19] As in the Decision of the first chamber of the Court of Justice of European Union (14th Jan 2021) C-393/19, n.58.
[20] Fabián Caparrós, 2017, 447.
[21] Introduced for the first time by Organic Act 15/2003. This authorized generally the court to impose it, even if no punishment could be pronounced against one of the prosecuted persons (exempted of criminal responsibility), if the illicit patrimonial situation was considered proved; and, in relation to drug trafficking, admitted confiscation of other goods, "even of licit origin", belonging to the responsible persons if the goods, means, instruments and gains had disappeared.
[22] Fabián Caparrós, 2017, 434.
[23] According to Corcoy Bidasolo (2015, 455), the only possible understanding is that this provision also applies to the modality of reinforced extended confiscation regulated by Article 127 *quinquies.*
[24] Gil Gil *et al*, 2018, 421.
[25] Nevertheless, Article 127 CP orders imperatively the confiscation of instruments; the non-dangerousness not being foreseen as a way of restriction of confiscation, the only available alternative to restrict it would be through Article 128 (principle of proportionality), Blanco Cordero, 2021, 795.

transmissible to the equivalent good or assets which usually will not have this character; as a consequence, surrogate confiscation of instruments finds difficult justification from the dangerousness perspective,[26] resembling more a pecuniary sanction than an ancillary consequence;[27]

- On the other hand, for those who consider that preventing and neutralizing illicit/unjust enrichment is the real purpose of confiscation by equivalent of gains, its nature will be again more a sanction than an ancillary consequence, requiring always that the impossibility of confiscation is not imputable to the individual.[28] In any case, as explained *infra*, surrogate confiscation of gains covers indirect gains (Article 127.3) and results applicable in Spain to extended confiscation and to confiscation from a third party (Article 127 *quáter*).

Neither Article 127.3 nor 127 *septies* restrict the reasons that, making confiscation impossible, may open the way to an activation of surrogate confiscation; these reasons should, however, only include those circumstances imputable to the individual at least by negligence.[29]

3. Additional references to confiscation can be found in the special Part of CP, in connection to particular crimes and offences: money laundering (Article 301.5), criminal offences concerning organization of the territory ad town planning (Article 319.3), forest fires (Article 355), offences against public health (Article 362 *sexies*), offences against road safety (Article 385 *bis*), criminal offences committed by civil servants against other individual rights (Article 541) and, particularly, drug trafficking (Article 374).

In fact, it was in the drug trafficking field where the efforts of expanding confiscation took initially place: in 1988, short before the approval of the UNO Wien Convention on narcotics, a reform of the ancient CP introduced for the first time in Spanish Criminal Law the possibility of confiscating goods of legal persons and a direct reference to the "illicitly obtained profits".

Confiscation by equivalent equally began first in connection to drug trafficking (Article 374.1 1995 CP), being later included in the general provision of Article 127 by Organic Act 15/2003: this one extended confiscation to the goods, means and instruments used to prepare the crime and to the gains, independently of the transformation experienced by them and even if transmitted to a third person except if this one received them in good faith.

II. By virtue of last reforms of the CP, **extended confiscation** –in a broad sense, including thus also non-conviction confiscation and confiscation from a third party, see *infra*– has found its place in Spanish Criminal Law in a permanent and progressively process of enlarging its field of application and scope.[30]

1. Extended confiscation *stricto sensu* presents "two parallel regimes"[31] in Spanish Criminal Code:[32]

- a "basic" one concerning the goods, assets and gains obtained from a previous criminal activity, and
- a "reinforced" modality, related to the convict's continuous, prior criminal activity.

[26] Castellví Monserrat, 2020, 244.
[27] Blanco Cordero, 2017, 431 f.;
[28] Blanco Cordero, 2017, 459.
[29] Blanco Cordero, 2017, 459, 462.
[30] Aguado Correa, 2015, 1018.
[31] Resulting in "numerous applicative problems" and "unsurmountable contradictions". Hava García, 2015, 215.
[32] Blanco Cordero, 2017, 462.

- Basic extended confiscation is regulated by Article 127 *bis* in line to Article 5 of Directive 2014/42/EU. Article 127 *bis* 1 states:

"*The Judge or Court of Law shall also order the confiscation of the goods, assets and gains pertaining to a person convicted of any of the following criminal offences when it is determined, based on well-founded objective evidence, that the goods or assets were obtained from a criminal activity, and their legal origin cannot be accredited:*

a) Criminal offences involving trafficking in human beings;

b) Criminal offences related to prostitution and the sexual exploitation and corruption of minors and criminal offences of sexual abuse and aggression against minors under the age of sixteen;

c) Computer-related criminal offences set forth in Sections 2 and 3 of Article 197 and Article 264;

d) Criminal offences against property and against the socio-economic order of a reiterated nature and in case of recidivism;

e) Criminal offences related to punishable insolvency;

f) Criminal offences against intellectual or industrial property;

g) Criminal offences of corruption in business;

h) Criminal offences of receiving stolen goods set forth in Section 2 of Article 298;

i) Criminal offences of money laundering;

j) Criminal offences against the Inland Revenue and the Social Security;

k) Criminal offences against workers' rights set forth in Articles 311 to 313;

l) Criminal offences against the rights of foreign citizens;

m) Criminal offences against public health set forth in Articles 368 to 373;

n) Criminal offences of counterfeiting of currency;

o) Criminal offences of bribery;

p) Criminal offences of misappropriation;

q) Criminal offences of terrorism;

r) Criminal offences committed within a criminal organisation or group."

This form of confiscation requires a conviction based upon the intentional[33] commission of one of the crimes included in the long list already transcribed: a very disputable list,[34] non restricted to crimes of terrorism or related to criminal organizations,[35] and much broader than required by the EU Directive, including offences of very different nature and gravity, which should not be assimilated to the most serious crimes,[36] and even preparatory acts, and raising thus the issue of proportionality. At the same time, it forgets others that could deserve being included for this purpose, as illegal finance of political parties,[37] smuggling or urbanistic offences;[38] furthermore, "founded reasons" point out that this kind of confiscation will be implemented "with special intensity" with regard to any offence

[33] Díez Ripollés, 2020, 837; however, several authors argue that, due to its systematic position, extended confiscation is equally applicable in cases of negligent offences (f.i. negligent money laundering)(Blanco Cordero, 2017, 466; even if it deserves being considerated disproportionate, Aguado Correa, 2015, 1015.
[34] Corcoy Bidasolo, 2015, 447.
[35] Gorjón Barranco, 2016, 135.
[36] Vidales Rodríguez, 2015, 397.
[37] Hava García, 2015, 217.
[38] Vidales Rodríguez, 2015, 396.

susceptible of generating an economical gain,[39] particularly in the field of patrimonial delinquency[40] operated by not such powerful offenders.[41]

Basic extended confiscation allows confiscation of goods or assets, whose legal origin cannot be accredited, and estimated obtained from a criminal activity; in order to help judges attain (or reinforce) their conviction on this circumstance Section 2 includes a list of "objective indicators"[42] (see *infra*).

Section 2 of Article 127 *bis* declares applicable Section 3 of Article 127 –surrogate extended confiscation by equivalent–, a possibility widely considered disproportionate and beyond the Directive 2014/42/EU.[43]

Section 4 of Article 127 *bis*, with little respect of the principle of taxativity,[44] adds a provision absent in the Directive and, theoretically,[45] devoted to guarantee the principles of proportionality and *non bis in idem*:[46]

> *"If the individual is subsequently convicted of criminal offences similar to those committed previously, the Judge or Court of Law shall assess the extent of the previous confiscation upon resolving the confiscation ordered in the new proceedings."*

And according to Section 5 (not included explicitly either in the Directive):

> *"The confiscation referred to in this Article shall not be ordered when the criminal activities from which the goods or assets were obtained have prescribed or have already been subject to criminal proceedings, resulting in an acquittal or a ruling for acquittal with the status of res judicata".*

- The reinforced modality of extended confiscation is related to those goods, assets and gains obtained from the convict's continuous, prior criminal activity. It is regulated in the CP by two additional provisions: Article 127 *quinquies* and Article 127 *sexies*.

  Article 127 *quinquies* establishes the following:

  "*1. Judges and Courts of Law may also order the confiscation of goods, assets and gains obtained from the convict's prior criminal activity, when the following circumstances are fulfilled, cumulatively:*

  a) That the convict is or has been convicted for any of the criminal offences referred to in Article 127 bis.1 of the Criminal Code;

  b) That the criminal offence was committed in the context of a continuous, prior criminal activity;

  c) That there is well-founded prima facie evidence that a significant part of the convict's assets was obtained through prior criminal activity.

  The provisions of the preceding Paragraph shall only apply when there is well-founded prima facie evidence that the subject has obtained gains over € 6,000 from his criminal activity.

Not foreseen by the Directive, this modality of extended confiscation is optional, and requires "*well-founded prima facie evidence that the subject has obtained gains over € 6,000 from his criminal activity"*, a quantitative restriction non-present in respect of the other modalities of confiscation.[47]

According to Article 172 *quinquies* Section 1 (final paragraph): *"Significant prima facie evidence includes:*

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[39] Gorjón Barranco, 2016, 137.
[40] Vidales Rodríguez, 2015, 407.
[41] Gorjón Barranco, 2016,
[42] Fabián Caparrós, 2017, 437.
[43] Blanco Cordero, 2017, 475 f. Also Roig Torres, 2016, 251
[44] Blanco Cordero, 2017, 475.
[45] However, following to Roig Torres, Blanco Cordero, 2017, 475.
[46] Vidales Rodríguez, 2015, 399.
[47] Blanco Cordero, 2017, 479.

1. A disproportion between the goods and assets in question and the lawful income of the convicted individual;

2. The concealment of the ownership or any power of disposal over the goods or effects via the use of natural or legal persons or bodies without legal personality, or tax havens or territories with no taxation that hide or hinder the identification of the true ownership of the assets;

3. The transfer of the goods or assets via transactions that hinder or prevent ascertaining their location or destination and that have no valid legal or economic justification."

Section 2 of Article 127 q*uinquies* additionally orders:

To the effects outlined in the preceding Section, it shall be deemed that the criminal offence has been committed in the context of a continuous criminal activity when:

a) The subject is convicted or has been convicted in the same proceedings for three or more criminal offences from which he has obtained direct or indirect economic gain, or for a reiterated criminal activity including, at least, three criminal offences from which he obtained direct or indirect economic gain, or;

b) When, during the six-year period prior to the commencement of the proceedings in which he was convicted for any of the criminal offences outlined in Article 127 bis of the Penal Code, he had been convicted for two or more criminal offences from which he obtained economic gain, or for a reiterated criminal activity including, at least, two criminal offences from which he obtained economic gain."

Reinforced extended confiscation constitutes "in practice a confiscation of any gross income received by the convicted person during the six years prior to the commencement of the proceedings under which he was convicted, as well as of any assets he may have used during that time to pay off debts".[48]

Although there is not a provision parallel to Section 4 of Article 127 *bis* with regard to reinforced extended confiscation, assessing "*the extent of the previous confiscation upon resolving the confiscation ordered in the new proceedings*"[49] must be equally applicable if the previous judicial decision already ordered confiscation, either ordinary or extensive.

Furthermore, admission of surrogate confiscation by equivalent in relation to reinforced extended confiscation is highly questionable since neither Article 127 *quinquies* nor Article 127 *sexies* contain a provision similar to Article 127 *bis* 3. However, and notwithstanding the doubts that it raises from the principle of proportionality, due to the possible absence of direct evidence in order to prove the illicit origin of the goods,[50] certain authors see in Article 127 *septies* an "open door" for this purpose.

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): before the transposition of Directive 2014/42/EU (if confiscation regulation existed)? / in the transposition procedure into the internal domestic law?

Admission of extended confiscation in Spain began long before the adoption of Directive 2014/42/EU.

The possibility of applying confiscation to the gains originated by previous activities of drug trafficking was initially rejected by the Supreme Court (*Tribunal Supremo*) in 1991 and 1993. However, on 5th October 1998 the Decision of a non-jurisdictional plenary of the *Tribunal Supremo* admitted the extension of confiscation to the gains coming from activities previous to the concrete

[48] Fabián Caparrós, 2017, 438.
[49] Blanco Cordero, 2017, 481.
[50] Roig Torres, 2016, 251.

drug trafficking submitted to the Court if, demanded by the accusation and counting with enough evidence on the previous activity, the origin of the assets –not belonging to a third person non-responsible of the offence– could not be justified by the suspect. This gave rise to a new jurisprudential line reflected in numerous jurisdictional decisions after the entrance in the new century.[51]

On the occasion of the CP reform implemented by Organic Ac 5/2010, EU Framework Decisions 2005/212/JHA and 2002/475/JHA were transposed and, as a consequence, a specific provision for extended confiscation in cases of criminal activities related to criminal organizations or groups, was included in the CP. The presumption of having been "*obtained by the criminal activity*" accompanied in relation to "*the property of each and every one of the persons found guilty of felonies committed within the criminal or terrorist organization or group or for an offence of terrorism that is disproportionate in relation to the revenue lawfully obtained by each one of those persons*".

It was, however, only by the Organic Act 1/2015 that extended confiscation was fully and explicitly ratified in Spanish CP, together to "autonomous" confiscation (non-conviction confiscation) and confiscation from a third party. Referring to the need of taking into consideration Directive 2014/42/EU, Point VIII of the Preamble underlined the new approach, in the line of ECHR Decision 696/2005 (*Dassa Foundation vs. Liechtenstein*) concerning the nature of these forms not "*properly penal*", but "*civil or patrimonial*". And, concerning extended confiscation, insisted in the fact that

> "*extended confiscation is not based on the full accreditation of the causal connection between the criminal activity and the enrichment, but on the finding by the judge, on the basis of well-founded and objective indicators, that there have been other criminal activities, other than those for which the subject is convicted, from which the assets to be confiscated derive. See that the requirement of full proof would determine not the confiscation of the goods or effects, but the conviction for those other criminal activities from which they reasonably derive.*
>
> *The extended confiscation is not a criminal sanction, but rather an institution by means of which the illicit patrimonial situation to which the criminal activity has given rise is put to an end. Its basis has, therefore, a rather civil and patrimonial nature, close to that of figures such as unjust enrichment. The fact that European Union legislation expressly refers to the possibility that the courts may decide on extended confiscation on the basis of indications, especially the disproportion between the subject's lawful income and available assets, and even through proceedings of a non-criminal nature, confirms the above interpretation.*"

Was (extended) confiscation seen as unacceptable / acceptable under certain (what?) conditions before the transposition of the Directive 2014/42/EU?

Extended confiscation has never benefitted of good credit in the specialized literature. Authors have usually underlined –before and after 2015 reform– the difficult complying of this kind of confiscation with fundamental principles of criminal law and particularly of criminal procedure, such as the principle of fair trial and presumption of innocence. The great risk of resulting in a revival of the old general confiscation of property, already prohibited by Article 304 of the Cadiz Constitution (1812),[52] continues equally to be very repeated.

In any case, as in other countries, those positions who openly defend the full legitimacy and utility (from the criminal policy perspective) of the new forms of confiscation –particularly in relation to the products and gains– rejet, in the path of repeated Decisions of the ECHR, their punitive nature, and, as a consequence, proclaim the non-need of application of the principles of *ius puniendi*, at least to the modalities of confiscation of products and gains, considering fully acceptable extended

[51] For instance, decisions of the *Tribunal Supremo* SSTS 1061/2002; 450/2007; 16/2009; 1049/2011; 600/2012; 575/2013…

[52] Berdugo Gómez de la Torre, 2017, 417.

confiscation provided that an adequate safeguard clause assures the protection against eventual incorrect assumptions or disproportionality.[53]

RT 2: is there any case-law in your EU Member State relating to confiscation (e.g., of constitutional court, court of appeals), which: referred to (extended) confiscation? / applied to (extended) confiscation? / rejected the (extended) confiscation? / formulate any additional criteria / conditions for the admissibility of (extended) confiscation? What are those criteria? Are those criteria are met in the current extended confiscation regimes?

As explained *supra*, case law began to accept the extension of confiscation to the gains coming from previous activities, when the suspect was not capable of justifying the origin of the assets, in the field of drug trafficking at the end of last century. It was in 1998 that a non-jurisdictional Decision of the *Tribunal Supremo* (5th October) revised the first jurisprudential position and opened the door to a new trend, validated later by the Constitutional Tribunal (STC 219/2006, STC 220/2006 and STC 126/2011).[54]

The nature and intensity of the evidence required in order to adopt the decision of extended confiscation was usually, before 2015, a main issue in the debates of Second Chamber of the *Tribunal Supremo*. Several Decisions of the *Tribunal Supremo* declared that neither an exhaustive identification of the concrete operations of drug trafficking (STS 1049/2011), nor strict evidence of the direct connection of the objects susceptible to confiscation and the concrete acts prosecuted (STS 1061/2022) were needed in order to decree "against assets possessed prior to the act for which he was convicted"; and, in this sense, as demanded in money laundering "with respect to the predicate or predicate offense" (STS 600/2012), sufficient proof of "criminal activity in a generic way", and respecting the accusatory principle", was considered enough (STS 209/2014).

Even if, naturally, few are still the precedents related to the new regulation (Organic Act 1/2015), the debate on whether or not the standard of proof for a forfeiture needs to be lower than that required for a strictly criminal conviction continues to be present after 2015, particularly nourished by the Preamble of 2015 reform, which insisted on the lower evidence demanded for extended confiscation: not to be identified with the full proof required for a criminal conviction (see also STS 632/2020).

Reacting, however, against this, STS 599/2020 declared that "*in the constitutional model of the criminal process nothing can be left* semi-proved". Thus, the "*extended confiscation is only justified –as required by art. 127 bis PC– when, by means of* objective and well-founded indications*, it can be proven that it is the proceeds of a crime committed prior to the one for which the conviction is handed down*". And, in this sense, it is to understand that "*these legal presumptions do not aspire –cannot aspire– to anticipate the Judge's valuative outcome, supplanting his inference by the one foreseen by the legislator*", and are to be taken not as "*true legal presumptions, which would alter the scheme on which the presumption of innocence is also built*", but as "*hermeneutical guidelines by means of which the legislator seeks to facilitate the decision-making task, without their very existence implying a subversion of the burden of proof*".

Similarly, SAN 6/2020 rejected that extended confiscation "*involves a reversal of the burden of proof*" or "*a breach of the presumption of innocence, because in any case the criminal activity and the basis of the applicable presumptions must be proven*", the individuals concerned enjoying full "*rights of participation and defense*".

[53] Castellví Monserrat, 2019, 53
[54] Blanco Cordero, 2008, 98 ff.

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?

It is commonly assumed that the origin of extended confiscation can be found in Spain, as in other countries, around the fight against drug trafficking. Purposes of efficacy in this field pushed practitioners and prosecutors to demand more and larger possibilities of confiscation to facilitate the activities devoted to "follow the money" and assure that "crime does not pay", two fundamental principles concerning the fight against organized crime. As already explained, in the absence of a legal regulation, in 1998 the Supreme Court –by the way of a non-jurisdictional decision– opened the door to the legitimation of a practice increasingly authorized by lower tribunals at the demand of special prosecutors.

Constitutional Tribunal (*see* STC 219/2006, STC 220/2006 and STC 126/2011) validated later this modality of confiscation.[55]

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

> **a criminal sanction (accessory or principal criminal penalty)? / a preventive measure without the nature of criminal sanction (security measure in a broad sense, administrative measure adopted within or outside criminal proceedings)? / a precautionary measure on a suspect's assets (civil measure in rem or a kind of *ante delictum* criminal prevention measure)? / a civil consequence of committing an offense, provided for by criminal law? / an autonomous (sui generis) instrument of another kind (e.g., a measure aiming at neutralisation of criminal profit and at the removal of illegal proceed)?**

1. Confiscation was traditionally conceived as a punishment *stricto sensu* (ancillary punishment) since the first Spanish CP (1822) and with the only exception of 1928 CP, that included confiscation among the security measures (Article 91.3), even if the concrete content of the regulation was similar to previous legislation. However, in 1995 the new CP transferred confiscation from the Title of punishments (Title III, Book I), to the Title VI ("ancillary consequences", a new category of reactions to the criminal offences, created *ex novo* by the new CP, where, together to confiscation (Articles 127-128), are equally included nowadays

- the ancillary consequences for entities without legal personality (Article 129),[56] and
- the legal regime of taking biological samples and analysis for obtaining DNA and its registration, with respect to persons convicted of committing a serious crime against life, integrity of persons, freedom, sexual freedom or indemnity, terrorism or any other serious crime that entails a serious risk to life, health or physical integrity of persons (Article 129 *bis*).

Legal nature of these various "consequences" is very much discussed.[57] Some authors, rejecting their penal nature and taking into account that they are established in order to face cases of objective dangerousness, consider that they are preventive reactions with an administrative nature, whose implementation must respect constitutional guarantees due to their condition of sanctions.

[55] Blanco Cordero, 2008, 98 ff.
[56] Since 2010 reform, punishments for legal entities declares criminally responsable are listed in Article 33.7 PC:
[57] Díez Ripollés, 2020, 831 ff.

More extended is, however, the doctrinal line that accepts them as part of the penal area. Three are the main alternatives in this frame concerning their nature:

- maintaining their punitive nature and identifying them with punishments;
- qualifying them as security measures: *i.e.* reactions to the dangerousness reflected in the commission of an offence with an inoculator purpose (special prevention);
- defending that they integrate a separate category, a position formally supported by the fact of their integration in an own and separate title in the first Book of the CP, different from Title III (punishments) and Title IV (security measures).

Even if the some paragraphs of Book II of the CP, concerning the particular offences, name them as measures, most authors[58] defend the third position and recognize them as reactions inspired by predominant preventive considerations (special negative prevention and general prevention),[59] different from punishments, security measures and civil responsibility *ex delicto*, and requiring in their application, as "reactions of a penal nature", the respect of "similar penal guarantees".

Concerning confiscation, excluded legally from the Title of punishments *stricto sensu*, the doctrinal debate (and in jurisprudence) oscillates between its consideration either as a security measure (in a broad sense) or as a third category –the position advocated by the majority–, even if its strict features and limits continue submitted to a long debate.

An increasing position, accepting that this solution is correct concerning confiscation of instruments –since it aims to put an end to the situation of objective dangerousness generated by them–, understand that this option should be revised in regard to confiscation of gains,[60] which does not consist properly in the restriction of a legitimate right[61] and whose fundament does not take into account the objective dangerousness (or not) of these gains, pursuing a different purpose, more civil or patrimonial: neutralising and preventing the consolidation of the illegitimate patrimonial increment connected to the offence.[62]

2. As a modality of confiscation, the same debate applies to the nature of extended confiscation, whose penal condition was explicitly questioned, as evoked *supra*, by the Preamble of Organic Act 1/2015, following the path of several ECHR's Decisions (particularly, Decision 696/2005, *Dassa Foundation vs. Liechtenstein*).

According to the Preamble, extended confiscation does not require conviction: it "*is not based on the full accreditation of the causal connection between the criminal activity and the enrichment, but on the judge's finding, on the basis of well-founded and objective evidence, that there have been other criminal activities, other than those for which the subject is convicted, from which the assets to be forfeited derive*". Thus, for the Preamble, "*extended confiscation is not a criminal sanction, but rather an institution that puts an end to the illicit patrimonial situation to which the criminal activity has given rise. Its basis has, therefore, a rather civil and patrimonial nature, close to that of figures such as unjust enrichment*"; and "*the fact that European Union regulations expressly refer to the possibility that the courts may decide on extended confiscation on the basis of indications, especially the disproportion between the subject's lawful income and available assets, and even through proceedings of a non-criminal nature*" is taken as a confirmation of this position at the European level.

Attributing a "civil nature to the extended forfeiture (…) is the easiest option to try to escape the requirements of fundamental procedural rights".[63] In this sense, relevant authors warn in order to

[58] And case law, Díaz Cabiale, 2016, 26 (and fn 63).
[59] Gil Gil *et al,* 2018, 417.
[60] Blanco Cordero, 2017, 469.
[61] Castellví Monserrat, 2020, 235.
[62] Castellví Monserrat, 2020, 234.
[63] Díaz Cabale, 2016, 25.

prevent this "label fraud"[64] and defend that the questionable sanctioning nature of some modalities of confiscation should not affect to their condition of "juridical consequence of the offence of a penal nature", since, together to the purpose of neutralizing an illicit situation, the aim of preventing further crimes is always present in them.[65] Furthermore, they can produce effects in the execution of punishments: conditioning the suspension of the execution of imprisonment (Article 80.2 3rd), provoking its revocation (Article 86.1 d) or the refusal of parole (Article 91.4),[66] and, eventually, operate as an obstacle to the punishment of a tax fraud offense.[67]

Short, its "confused juridical nature" should not make forget its "objective clearly punitive".[68] Assertions like those included in the Preamble, deserve being criticized in this sense, since, as part of the penal intervention applicable by the penal courts, the requirements of

- connection to the author of (or participant in) a previous commission of a criminal act, and
- appreciation in the course of the penal process with full respect of the penal guarantees

should be fully respected in this regard.[69]

Is there only one type of extended confiscation or are there in fact several different instruments with a common name?

As explained *supra*, different Articles of the present CP refer to the two modalities of expanded confiscation *stricto sensu*: basic extended confiscation (Article 127 *ter*) and reinforced extended confiscation (Article 127 *quinquies* and 127 *sexies*).

Furthermore, Book II of the CP contains several references to confiscation, particularly (although not exclusively), in relation to drug trafficking.

In the special criminal legislation,[70] Article 5.4 of Organic Law 12/1995 on Smuggling, as amended by Organic Law 6/2011, explicitly refers to extended confiscation in the following way:

> *The Judge or Court shall extend the confiscation to the effects, goods, instruments and proceeds from criminal activities committed within the framework of a criminal organization or group. For these purposes, the assets of each and every one of the persons convicted of crimes committed within the criminal organization or group, the value of which is disproportionate to the income legally obtained by each of said persons, shall be understood to derive from the criminal activity.*

Does a non-conviction-confiscation exist in your EU Member State?

1. Article 127 *ter* regulates this modality of "autonomous confiscation",[71] included for the first time in the CP by Organic Act 15/2003.

Conceived more as an ancillary consequence of the offence than as an ancillary consequence of the punishment[72] and subsidiarily in respect of direct confiscation,[73] 2015 reform enlarged the field of application of non-conviction confiscation, which was limited before to the cases of exemption or

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[64] Berdugo Gómez de la Torre, 2017, 408; particularly, taking into account that "boundaries are not so clear-cut", Matellanes Rodríguez, 2017, 471.
[65] Díez Ripollés, 2020, 833. Also Díaz Cabiale, 2016, 27.
[66] Castellví Monserrat, 2020, 236.
[67] Furthermore, it can produce effects in the execution of punishments: conditioning the suspension of the execution of imprisonment (Article 80.2 3rd), provoking its revocation (Article 86.1 d) or the refusal of parole (Article 91.4)(Castellví Monserrat, 2020, 236); and, eventually, operate as an obstacle to the punishment of a tax fraud offense. Planchadell Gargallo / Vidales Rodríguez, 2018, 48 f.
[68] De la Mata Barranco, 2017.
[69] Aguado Correa, 2015, 1016.
[70] Leaving aside Article 23 of the Military CP (Organic Act 14/2015), extending to "*the Military Courts* (…) *the security measures and accessory consequences provided for in the Criminal Code*".
[71] A usual way of naming it in the doctrine and, mainly, by case law: f.i., Decision of the *Audiencia Nacional* SAN 6/2020.
[72] Díaz Cabiale , 2016, 25 f.
[73] Aguado Correa, 2015, 1025.

extinction of the criminal responsibility. Referring to "*the confiscation outlined in the preceding Articles*" (also basic extended confiscation, but not the reinforced one),[74] it foresees nowadays:

> "*1. The Judge or Court of Law may order the confiscation outlined in the preceding Articles even if no sentence has been handed down, when the unlawful financial position has been demonstrated in adversarial proceedings and in any of the following cases:*
>
> *a) That the subject is deceased or suffers from a chronic illness impeding his trial and that there is a risk that the criminal offences may prescribe;*
>
> *b) He is in a situation of default, preventing a trial within a reasonable period of time; or*
>
> *c) No sentence is handed down as the individual is exempt from criminal responsibility or said responsibility has been finalized.*
>
> *2. The confiscation referred to in this Article may only be adopted against individuals who have been formally accused or against defendants for whom there is circumstantial evidence of criminality when the situations outlined in the preceding Section have prevented criminal proceedings from continuing.*"

The field of application of non-conviction confiscation is thus, on the one hand, broader than Article 4 of the Directive 2014/42/EU, which concentrate the states duty in this field only to cases of illness or absconding of the suspect or accused person (art. 4.2). On the other hand, the Directive employs an imperative language, but the content of Article 123 *quáter* appears as facultative, a solution more appropriate from the principle of proportionality.[75]

As SAN 6/2020 rightly states, "*rather than a confiscation without a conviction, it is a confiscation without a conviction in the main proceeding. It is directed against the accused or defendant against whom there are reasonable indications of criminality when, for the above reasons, it has not been possible to continue the criminal proceedings*". The same Decision, following the trend of the Preamble of the reform and increasing authors, insists in the civil nature of the action of non-conviction confiscation, which is directed to "*avoid illicit enrichment*"; and, as a consequence, declares that "*the guarantees established for the exercise of* ius puniendi *do not apply in the process in which it is substantiated*".[76]

Non-conviction confiscation is regulated by the special criminal legislation as well. Article 5.5 of Organic Law 12/1995 on Smuggling, as amended by Organic Law 6/2011 authorizes the judge or Court to "*order the confiscation provided for in the preceding paragraphs of this Article even when no penalty is imposed on any person because he is exempt from criminal liability or because it has been extinguished, in the latter case, provided that the illicit patrimonial situation is demonstrated.*"

2. Confiscation from a third party is also foreseen by Spanish legislation. According to Article 127 *quáter*:

> "*1. Judges and Courts of Law may also order the confiscation of the goods, assets and gains referred to in the preceding Articles that have been transferred to third parties, or others of an equal value, in the following cases:*
>
> *a) In the case of assets and gains, when they were acquired with full knowledge that they were obtained from a criminal activity or when a diligent individual would have had reasons to suspect their unlawful origin, given the circumstances of the case;*
>
> *b) In the case of other goods, when they were acquired with full knowledge that such an acquisition would hinder their confiscation or when a diligent individual would have had reasons to suspect that such an acquisition would hinder their confiscation, given the circumstances of the case.*

[74] Blanco Cordero, 2017, 495. Against the application of this modality to extended confiscation, Vidales Rodríguez, 2015, 401

[75] Blanco Cordero, 2017, 495.

[76] Regulated by Article 803 *ter*-e to Article 803 *ter*-s LECrim.

> *2. It shall be assumed, unless evidence to the contrary is produced, that the third party knew or had reasons to suspect that the goods in question were obtained from a criminal activity or that they were transferred to avoid confiscation, when the goods or assets were transferred for free or for a price below real market value.*"

Rejected in the literature –that sees many doubts concerning the constitutionality of several elements[77] and considers it disproportionate–,[78] Article 127 *quáter* transposes Article 6 of the Directive 2014/42/EU, substituting former Article 127.1 PC that excepted from confiscation goods, assets and gains legally acquired by third persons in good faith. In the new autonomous[79] modality, judges are allowed to confiscate instruments and gains "*referred to in the preceding Articles that have been transferred to third parties*", as well as "*others of an equal value"* in the circumstances described: a possibility, the surrogate one, only admitted by the Directive referring to products, nor for the instruments. In the light of the literal text of Article 127 *quáter*, confiscation from a third party is applicable to the modalities regulated "*in the preceding Articles*": i.e. non-conviction confiscation and basic extended confiscation.

Contrary to the Directive, Article 127 *quáter* does not mention the protection of third persons in good faith, a formula substituted –at least partially– by the very ambiguous reference[80] to the "degree of suspicion" required to a "diligent person". This further transforms certain elements of the Directive in *iuris tantum* presumptions against the third's good faith: as a result, a third party who acquires the property free of charge (donation) may be involved in criminal proceedings if he does not prove the absence of bad faith.[81]

Furthermore, Article 127 *quáter* coexists with the so-called civil receptacy (*receptación*) consisting in receiving property proceeds of crime free of charge, which generates the obligation to restitute them (Article 122 PC),[82] and it facilitates the confiscation of assets of individuals who have committed a money laundering offense, whether intentional or negligent, without the need to proceed criminally against them. [83]

Is the proof of guilt of the offender required to apply extensive confiscation?

The proof of the offender's guilt is required, as departing point, to apply extended confiscation, since, according to Article 127 *bis* and Article 127 *quinquies*, similarly to direct confiscation, basic and reinforced extensive confiscation require, first, a penal conviction due to the commission of an unlawful act.

A penal conviction is however not required for the prior criminal single acts or activity that allow extending confiscation to other "*goods, assets and gains*"; these should not "*have prescribed or have already been subject to criminal proceedings, resulting in an acquittal or a ruling for acquittal with the status of res judicata*" (Article 127 *bis* 5).

Article 172 bis 4 adds:

> *"If the individual is subsequently convicted of criminal offences similar to those committed previously, the Judge or Court of Law shall assess the extent of the previous confiscation upon resolving the confiscation ordered in the new proceedings".*

[77] Berdugo Gómez de la Torre, 2017, 421.
[78] Blanco Cordero, 2017, 461.
[79] Rodríguez-García / Orsi, 2020, 547.
[80] Which could allow confiscation based on a light negligence. Hava García, 2015, 221.
[81] Blanco Cordero, 2017, 509 f.
[82] Fabián Caparrós, 2017, 444; Quintero Olivares, 2017, p.145
[83] Blanco Cordero, 2017, 510.

Is a reversed burden of proof applied by extended confiscation?

The issue of reversion of the burden of proof in relation to extended confiscation is mainly raised due to the indicators and presumptions included by the CP in order to facilitate the judicial decision.[84] Notwithstanding the fact that Constitutional Tribunal validated extended confiscation, as explained *supra*, these raise much critic, since 2010, as encountering the presumption of innocence.[85]

According to the doctrine of Constitutional Tribunal (STC 219/2006, STC 220/2006 and STC 126/2011)[86] and reiterated jurisprudence, the use of indicators with this purpose can be legitimate respecting certain conditions: they must be fully accredited, plural (or exceptionally one, but of a singular accrediting power), interrelated and concomitant to the fact to be proved; furthermore, in order to prevent any arbitrary, absurd or unfounded decision, jurisprudence requires that the fact must be deduced from these indicators as a reasonable inference, and the explicit reasoning of the judgment must express which are the facts or indications on which the inference judgment is based.[87]

Concerning basic extended confiscation, this is the open catalog of aspects to be evaluated in order to decide if "*the goods or assets were obtained from a criminal activity, and their legal origin*" is accredited or not (Article 172 *bis* Section 2):

> *"1st. The disproportion between the goods and assets in question and the lawful income of the convicted individual.*
>
> *2nd. The concealment of the ownership or any power of disposal over the goods or effects via the use of natural or legal persons or bodies without legal personality, or tax havens or territories with no taxation that hide or hinder the identification of the true ownership of the assets.*
>
> *3rd. The transfer of the goods or assets via transactions that hinder or prevent ascertaining their location or destination and that have no valid legal or economic justification.*

Only the first one (which curiously forgets mentioning the gains) reflects the content of the Directive: the other two elements –frequently employed in relation to money laundering offences–[88] are not foreseen by it.[89]

The same list of elements is equally included by Article 127 *quinquies* in relation to reinforced extended confiscation, in order to serve for "*significant prima facie evidence*". And Article 127 *sexies* adds the following presumptions "*for the purposes of the provisions of the preceding article"*:

> *1st. It shall be presumed that all of the goods acquired by the convict within the six years prior to the date of opening of criminal proceedings were obtained from his criminal activity.*
>
> *To this effect, it shall be understood that the goods were acquired on the earliest date on which it can be demonstrated that they were in the possession of the subject.*
>
> *2nd. It shall be presumed that all of the costs incurred by the convict during the period of time outlined in the first Paragraph of the preceding Sub-Paragraph, were paid with funds obtained from his criminal activity.*
>
> *3rd. It shall be presumed that all of the goods outlined in Sub-Paragraph 1 were free of encumbrances when acquired.*

Since admitting presumptions *iure et de iure* would clearly go against the presumption of innocence and the right of defense, notwithstanding the "imperative" formula employed by Article 127 *sexies*, authors consider that they cannot be understood but as *iuris tantum* presumptions, admitting thus

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[84] When there is not sufficient evidence to sentence, for instance, to an offence of money laundering. Fabián Caparrós, 2017, 439.
[85] Gil Gil *et al*, 2018, 422.
[86] Blanco Cordero, 2008, 98 ff.
[87] Blanco Cordero, 2017, 472; see also Planchadell Gargallo / Vidales Rodríguez, 2018, 57 ff.
[88] Aguado Correa, 2015, 1023.
[89] Blanco Cordero, 2017, 475.

evidence to the contrary.[90]

In any case, the last paragraph of Article 127 *sexies* states:

> "*The Judge or Court of Law may decide that the preceding presumptions are not to be applied in relation to certain goods, assets or gains when, given the specific circumstances of the case, they prove to be incorrect or disproportionate."*

Are there any other evidence rules / lowered standards of evidence relating to extended confiscation?

As already commented *supra*, lowering the standards of evidence in relation to extended confiscation took already place from the first moment, allowing extended confiscation without an exhaustive identification of the concrete previous activity or the evidence of a direct connection between the objects susceptible of confiscation and the concrete prosecuted acts. The issue was accentuated in the Preamble of Organic Act 1/2015, which refers to the applicability of indications and presumptions, explicitly defending the lower evidence required for extended confiscation, consistently with its non-penal nature.

However, according to more recent case law (see, f.i., STS 599/2020) the admissibility of indications and presumptions should never be understood as a way of legitimation of lower standards of evidence and/or for the subversion of the burden of proof, but as instruments "*to facilitate the decision-making task*", inside due process, where *"in any case the criminal activity and the basis of the applicable presumptions must be proven*" in full respect of the "*rights of participation and defense*" of the individuals concerned (SAN 6/2020).

RT 5: What are the legal instruments for the protection of individual rights in your EU Member State: at each stage of the confiscation procedure? / in the substantive legal basis for adjudication? Are considered as sufficient to protect individual rights and freedoms?

Confiscation is generally adopted –provisionally[91] or as a definitive ancillary consequence– in the course of a penal process, benefitting of all the procedural rights and guarantees constitutionally recognized and commonly required by European standards. Correspondent procedural provisions –"scanty and scattered"–[92] were traditionally contained partly in the CP and other legislation and not mainly in the LECrim.[93]

The need to complete this "deficient and fragmentary regulation",[94] at least to cover autonomous (non-conviction) confiscation regulated by Article 127 *ter*, pushed Spanish legislation to approve Act 41/2015 introducing a set of articles (Article 803 *ter* a. ff in the newly created Titel III *ter* (Book IV) LECrim, establishing a special "criminal proceeding under a civil external envelope",[95] competence of the penal judge (Article 803 *ter* f.), in order to allow deprivation of the ownership of the assets derived from the crime even though the perpetrator cannot be prosecuted.

Guaranteed by LECrim to all participants the respect of constitutional rights to the effective judicial protection and due process (Article 803 *ter* i.), the action of confiscation in the process of autonomous confiscation corresponds exclusively to the Prosecutor (Article 803 *ter* h.), which can take profit for

[90] Blanco Cordero, 2017, 484.
[91] Díaz Cabiale, 2016, 18 ff.
[92] Díaz Cabiale, 2016, 7.
[93] Díaz Cabiale, 2016, 7.
[94] Díaz Cabiale, 2016, 7.
[95] Díaz Cabiale, 2016, 32. See also 52 ff.

his investigation either of the Asset Recovery and Management Office,[96] the judicial police or other authorities and civil servants. The Public Prosecutor's Office may equally request financial institutions, public agencies and registries, and individuals or legal entities to provide, within the framework of their specific regulations, the list of assets or rights of the foreclosed party of which they are aware (Article 803 *ter* q.).

Chapter I of the new Title III *ter* regulates the intervention in the penal process of third persons potentially affected by confiscation,[97] in a similar way to the third persons civilly liable, but benefitting of more guaranties than in the civil process of execution.[98]

The right to audience is fully recognized (Article 803 *ter* 1. b). Non-appearance is not, as such, a breach of the obligation to appear, but the non-exercise of a right, perfectly reversible at any stage of the process (that will not go backwards). It cannot be automatically assimilated to a *ficta confession* but does not stop the process that will continue without the participation of the person declared in default until the resolution putting an end to the process, that will be notified.[99]

According to Article 803 *ter* k., "*if the defendant declared in default in the suspended proceeding does not appear in the autonomous forfeiture proceeding, a court-appointed attorney and counsel shall be appointed to represent him*". This is an important provision, required by Article 8.7 of the EU Directive: in fact, a very serious problems of the processes of non-conviction confiscation is if the fugitive can answer and participate in the process by the way of his legal representatives.[100]

Last but not least, according to Article 803 *ter* u. LECrim the process of autonomous confiscation can be used to extend the original confiscation to other instrumentalities and gains not detected when the first confiscation was declared.[101]

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: ***legality? / legal specificity of a statute? / proportionality? / non-retroactivity of the /more severe/ statute?/ protection of the citizen's trust in the state and law? / the right to private property? / the rights to defense?/ the rights to a fair trial? / the presumption of innocence? / the right to privacy? and other relevant rights – what sort of?***

The transformations of the previously considered "figure of little relevance" have been vertiginous in the last decades in Spain, resulting in a "qualitative jump" in the conception, function and limits of confiscation,[102] whose dependence or accessory nature of the punishment fades[103] inside a "legislative maelstrom"[104] devoted to assure the frequently weak evidence available and to allow attaining all the goods (or equivalents) connected to delinquent activities, even if they are in the hands of third persons non-criminally responsible. This evolution has been qualified as a "paradigm of the modern Criminal

[96] The Asset Recovery Office was incorporated by Organic Act 5/2010 (Article 367 *septies* LECrim), as an essential element for an adequate implementation of the confiscation. Act 1/2015 transferred the regulation of the Asset Recovery and Management Office to a new Fifth Additional Provision of the LECrim, and this has been developed by Royal Decree 948/2015.
[97] Rodríguez-García / Orsi, 2020, 555 ff.
[98] Díaz Cabiale, 2016, 68. Critically concerning the limited remedies recognized to participating third persons. Rodríguez-García / Orsi, 2020, 564.
[99] Pérez Ureña, 2017.
[100] Blanco Cordero, 2017, 499.
[101] Díaz Cabiale, 2016, 29.
[102] Quintero Olivares, 2017, p.142 f.
[103] Fabián Caparrós, 2017, 429.
[104] Rodríguez-García / Orsi, 2020, 570.

Law"[105] –where "the ends justify the means, even when these violate fundamental rights and constitutional principles, and efficiency is above guarantees"–[106]and has found a particular expression in the regulation of extended confiscation (in a broad sense), which has never been regarded with sympathy by the literature and results often in conflict with fundamental criminal law and criminal procedure principles and guarantees.

1. Many critics deserve in Spain the regulation of confiscation from the perspective of the **principle of legality**.

The maintaining of the traditional terminology, not coincident with the Directive's one, and the lack of precision, contradictions, overlapping and technical mistakes of many provisions has been clearly underlined in the literature,[107] as contrary to the principle of legality[108] and to the juridical security[109] since, they

- make difficult the adequate understanding of their contents[110] and/or the appropriate distinction of the field of application in regard to other forms of confiscation;[111] and even
- provoke the confusion between extended confiscation and other figures such as concealment, receiving, specific concealment of property, simulated granting of a contract and, particularly, money laundering.

2. Legislation in force does not show an adequate respect to the principle of **proportionality** not only concerning extended confiscation *stricto sensu* (alone or combined with surrogate confiscation by equivalent), but also with regard to non-conviction confiscation and confiscation from a third party. Particularly worrying are in this sense several provisions and, specially, the accumulation of the punishment for the prosecuted offense, the confiscation of the assets that lack licit justification, the penalty for a possible laundering offense and, even, other penal consequences related to organized crime.[112]

Certainly, the purpose of Article 128 (see also Article 127 *bis*.4) is assuring the respect of the principle of proportionality.[113] According to it the judge or court law[114] is competent to "*decide not to order the confiscation"* or to *"order only a partial one*" if "*their value is not proportional to the nature or severity of the criminal offence, or when the civil liabilities have been fully settled*".[115]

However, Article 128 only focuses on confiscation of "*assets and instruments of lawful trade*",[116] and no one doubts that also confiscation of gains must respect the constitutionally recognized principle of proportionality.[117] Furthermore, the main or secondary relationship between the objects to be confiscated and the committed offence, as well as the situation of the indigence of the affected person,[118] should have deserved being also included in order to evaluate proportionality.[119]

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[105] Gorjón Barranco, 2016, 127 ff.
[106] Aguado Correa, 2015, 1032.
[107] Planchadell Gargallo / Vidales Rodríguez, 2018, 52
[108] Hava García, 2015, 2014.
[109] Díez Ripollés, 2020, 843.
[110] See for instance, concerning a "relevant part of the patrimony", Blanco Cordero, 2017, 481.
[111] This is particularly the case regarding the lists included in some provisions, like Article 127 *bis* 2. Blanco Cordero, 2017, 473.
[112] Planchadell Gargallo / Vidales Rodríguez, 2018, 80 ff.
[113] Hava García, 2015, 214.
[114] According to case-law, only if the civil liability is sufficiently covered, the god has enough entity and the offence is not a serious one. Corcoy Bidasolo, 2015, 456.
[115] Planchadell Gargallo / Vidales Rodríguez, 2018, 81 f.
[116] Castellví Monserrat, 2020, 234 f.
[117] Aguado Correa, 2015, 1053.
[118] See Directive 2014/42.
[119] Díez Ripollés, 2020, 847, 849.

3. Concerns related to the **non-retroactivity** of the new (and more severe) forms of confiscation have equally been raised in Spain on the occasion of the new legal reforms, particularly in relation to the provision of Article 127 *sexies* focusing on the acquisitions or payments by the convicted person in the last six previous years.[120] In any case, 2015 Reform did not explicitly authorize taking into account for this purpose the conducts committed before its entrance in force, and for this to be effective a normative covert should be required even if confiscation is assimilated to the civil restitution ordered in cases of non-justified enrichment.[121]

4. With regard to the **right of property** –leaving aside the issue of the risk of a hidden revival of the (already in the XIXth Century rejected) general confiscation of property, often mentioned in the literature– the broad scope of application of confiscation from a third party in Spain (Article 127 *quáter*) –that is not characterized as accessory or dependent but of a principal nature– appears a possible source of violation of the right of property (together to a breach of the principle of proportionality).[122]

Furthermore, by Decision of the first chamber (14th Jan 2021) C-393/19, n.58, the Court of Justice of European Union has established that the confiscation of an asset belonging to a *bona fide* third party entails a disproportionate reduction of the right to property that would not be protected by the Charter. Goods belonging to third persons in good faith were excluded in Spain from confiscation until 2015 Reform, when the corresponding provision disappeared from the CP. Nowadays, in the absence of explicit regulation, different questions are raised, particularly concerning negligent contributions, since it is widely considered that either negligence or the non-diligent lack of knowledge by the third party should at least be required in order to impose confiscation.[123]

Finally yet importantly leaving in the suspect hands the proof of the lawful origin of the assets in order to disprove presumed evidence –something very difficult (if possible) to reconcile with the criminal law based on the guarantee of the rule of law–[124] is included as another relevant contribution to the present crisis of the right of property.[125]

5. The incompatibility between extended confiscation and the **rights to defense and to a fair trial** is equally frequently raised, and results aggravated by the debates concerning the juridical nature of (extended) confiscation and the admission (or not) of lowered standards of evidence. In this sense, underlying the confiscation's nature of juridical consequence of the offence serving to a clear punitive purpose and with relevant functions in the penal system frame is probably the best way in order to require also here the necessary full respect of the guarantees of the penal process.

6. Most of the doctrinal critics concerning the **presumption of innocence** in the field of extended confiscation connect to the non-conviction confiscation[126] and to the (widely questioned)[127] presumptions particularly contained in Article 127 *bis* and Article 127 *sexies*. Notwithstanding the legal requirement of objectiveness and well-foundation,[128] the system –and not only where new presumptions are absolute or cumulate–[129] is widely considered against fundamental rights, constitutional principles (such as proportionality and culpability) and "the rules of the accusatory play"[130] and contrary to the presumption of innocence,[131] particularly when presumptions and

[120] Blanco Cordero, 2017, 479 f; Planchadell Gargallo / Vidales Rodríguez, 2018, 53.
[121] Cordoy Bidasolo, 2015, 450.
[122] Aguado Correa, 2015, 1033.
[123] Blanco Cordero, 2021, 797 ff.
[124] Gorjón Barranco, 2016, 143.
[125] Rodríguez-García / Orsi, 2020, 569
[126] Matellanes Rodríguez, 2017, 473.
[127] Aguado Correa, 2015, 1045.
[128] Matellanes Rodríguez, 2017, 469.
[129] As it happens in Article 127 *sexies*. Corcoy Bidasolo, 2015, 454.
[130] Rodríguez-García / Orsi, 2020, 550.
[131] Blanco Cordero, 2017, 188.

indicators are used as support of "automatic" decisions, against the "very essence of the jurisdictional process".[132]

In effect, the silence of the accused not being enough either to overcome the presumption of innocence or as an indication of the subject's guilt, reversal of the burden of proof seems difficult to reconcile with a strict respect of the right to remain silent and not to testify against oneself, on the one hand.[133]

On the other hand, individuals must often face difficult alternatives in this field:[134]

- if the assets involved effectively in order to extended confiscation have an origin in an offence, but not of those listed by Section 1 of Article 127 *bis*, the only alternative available will be either losing the patrimonial element or recognizing the offence committed;
- in regard of confiscation from a third party, in case of not proving concretely that even a diligent person would not have suspected the goods' illicit origin, he will assume tacitly a culpability that can result in penal consequences.

Furthermore, not justifying the legality of the whole elements involved will generate the risk of prosecution for money laundering.[135]

Certainly, confiscation is not the only field where the lawful origin of the assets has to be proven by the suspect in order to disprove evidence,[136] a possibility admitted (if necessary) by the Constitutional Tribunal (STC 219/2006 and 220/2006)[137] which requires being extremely cautious both at the legislative level and its implementation. Nevertheless, caution does not characterize present legislation concerning (extended) confiscation.[138]

7. Finally, the respect of the **principle of culpability** is equally considered very problematic with regard to non-conviction confiscation (that can appear in connection to extended confiscation);[139] and overlapping of different modalities of confiscation with criminal receiving, money laundering,[140] or even with the offence whose conviction authorizes the seizure of the goods, deserves hard critics in the light of the ***non bis in idem*** **principle**.[141]

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[132] Neira Peña / Pérez-Cruz Martín, 2016, 504.
[133] Planchadell Gargallo / Vidales Rodríguez, 2018, 71 ff.
[134] Planchadell Gargallo / Vidales Rodríguez, 2018, 73 f.
[135] Planchadell Gargallo / Vidales Rodríguez, 2018, 74.
[136] Matellanes Rodríguez, 2017, 469.
[137] Planchadell Gargallo / Vidales Rodríguez, 2018, 64.
[138] Planchadell Gargallo / Vidales Rodríguez, 2018, 60.
[139] Planchadell Gargallo / Vidales Rodríguez, 2018, 75.
[140] Case-law only punishes (self)money laundering if the possession or use of the goods pursues hiding their illegal origin or helping the participants in the previous offence (STS 331/2017). Castellví Monserrat, 2020, 239.
[141] Planchadell Gargallo / Vidales Rodríguez, 2018, 76, and 78 f.
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