Country Report – Spain

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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 Criminal Code has refrained from regulating confiscation of the instruments and gains of crime.

Traditionally, confiscation has also been 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 also present in the administrative legislation related to certain offences 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 Criminal Code,[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 persons–[4] generally orders **direct confiscation of instrumentalities and gains:**

- For malicious criminal 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] It establishes the following: "*1. Any penalty imposed for a smuggling offense shall entail the confiscation of the following goods, assets 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 assets, 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, assets 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, assets 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 Spanish Criminal Code: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf

[4] 2010 Reform introduced in Spain the criminal liability of legal persons, regulated, among others, in Articles 31 bis ff and 33.7 (penalties) CP.

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

- And <u>in cases of imprudent criminal offences</u> 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 Criminal Code's general part, which requires the punishment of the individual. Thus, acquittal constitutes an absolute limit for this kind of confiscation.[6]

There is no doubt that Article 127 respects the European standards: it 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]

In this respect, the issue of "gains" is particularly relevant:[12] referred, in principle, to any illicitly obtained patrimonial advantage, 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 "proceeds" employed internationally and by the European Directive.

The reference to "*whatever transformations (...) undergone*" applies not only to gains, but also to assets, goods, means and instruments.[13] Furthermore, it is 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 surrogate 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, the 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 that belonged "*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 such situation is nowadays Article 127 *quarter* (confiscation from a third party). No specific regulation establishes the treatment of confiscation of the instruments that belong to a third person in the moment of commission (or preparation).[17] Leaving aside the cases of intentional contribution, the most problematic issue

[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] It is still present in Article 5.3 of Organic Law 12/1995 on Smuggling.
[17] Blanco Cordero, 2021, 795.

concerns negligent contributions that were 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 entail 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. There are two reasons that can apparently justify it: the respect for the principle of proportionality or rewarding the prior and complete satisfaction of civil liabilities. However, the need for the revision of the second reason is underlined in the literature, 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 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, in addition to Article 127.3, Organic Act 1/2015, 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 it imperatively, the prevision is facultative in Article 127 *septies*.

Surrogate confiscation of other assets of an equal value raises other debates in the literature:

- On the one hand, the dangerous nature of the instrument –widely qualified as the justification for confiscation of instruments–[25] is a condition that is in principle not easily transmissible to the equivalent good or assets, since they will usually not have this character; as a consequence,

[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 generally authorized 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 to be proved; and, in relation to drug trafficking, it 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. Therefore, the non-dangerousness is not 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.

surrogate confiscation of instruments finds difficult justification from the dangerousness perspective.[26] Thus, it resembles 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 of other gains of an equal value, its nature will also 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 in Spain it results applicable 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 activate surrogate confiscation. However, such reasons should only include those circumstances that are imputable to the individual at least by negligence.[29]

3. Additional references to confiscation can be found in the special Part of the Criminal Code, in connection with particular crimes and offences: money laundering (Article 301.5), criminal offences concerning organization of the territory and 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 Criminal Code introduced for the first time in Spanish Criminal Law the possibility of confiscating goods of legal persons and a direct reference to "illicitly obtained profits".

Confiscation of other assets of an equal value also began first in connection with 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, notwithstanding the transformation experienced by them and even if transmitted to a third party, unless if this one received them in good faith.

II. By virtue of the last reforms of the Criminal Code, **extended confiscation** –in a broad sense, including also non-conviction confiscation and confiscation from a third party, see *infra*– has found its place in Spanish Criminal Law in a permanent and progressive process of broadening 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 and prior criminal activity.

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

[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.

"*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 transcribed above. It is a very disputable list,[34] since it is not limited to crimes of terrorism or related to criminal organizations[35]. It is much broader than what is required by the EU Directive, including offences of very different nature and gravity that should not be assimilated to the most serious crimes,[36] and even preparatory acts, raising thus the issue of proportionality. At the same time, it forgets others that could deserve to be included for this purpose, such as illegal financing 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 liable to generate an economical gain,[39] particularly in the field of patrimonial delinquency[40] committed by not so powerful offenders.[41]

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[33] Díez Ripollés, 2020, 837. However, several authors argue that, due to its systematic position, extended confiscation is also applicable to cases of negligent offences (f.i. negligent money laundering)(Blanco Cordero, 2017, 466; even if it deserves to be considered 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.
[39] Gorjón Barranco, 2016, 137.
[40] Vidales Rodríguez, 2015, 407.
[41] Gorjón Barranco, 2016,

Basic extended confiscation allows confiscation of goods or assets, whose legal origin cannot be accredited, and it is determined that they were 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 aspects"[42] (see *infra*).

Section 2 of Article 127 *bis* declares that the provisions set forth in Section 3 of Article 127 –surrogate extended confiscation of other assets of an equal value – shall also apply, being considered a widely disproportionate possibility and beyond the Directive 2014/42/EU.[43]

Section 4 of Article 127 *bis*, with little respect for the principle of taxativity,[44] adds a provision that is not included in the Directive and that, allegedly,[45] is 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 expressly included 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 and prior criminal activity. It is regulated in the Criminal Code 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 it requires "*well-founded prima facie evidence that the subject has obtained gains over € 6,000 from his criminal activity"*, a quantitative restriction that is not present in respect of the other modalities of confiscation.[47]

According to Article 127 *quinquies* Section 1 (final paragraph): *"Significant prima facie evidence includes:*

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

[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.

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-year period prior to the commencement of the proceedings in 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 similar provision 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 also be applicable if the previous judicial decision already ordered confiscation, either ordinary or extensive.

Furthermore, admission of surrogate confiscation of other assets of an equal value 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 perspective of the principle of proportionality, due to the possible absence of direct 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?

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

The possibility of applying confiscation to the gains originated by previous drug trafficking activities 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 session of the *Tribunal Supremo* admitted the extension of confiscation to the gains coming from activities that were previous to the concrete drug trafficking submitted to the Court if it was demanded by the accusation, it counted with enough

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

evidence on the previous activity, and the origin of the assets –not belonging to a third party who is not responsible for the offence– could not be justified by the suspect. This gave rise to a new jurisprudential line reflected in numerous jurisdictional decisions since the turn of the century.[51]

On the occasion of the Criminal Code reform implemented by Organic Act 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 Criminal Code. 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*".

However, it was not until the reform adopted by Organic Act 1/2015 that extended confiscation was fully and explicitly ratified in Spanish Criminal Code, together with "autonomous" confiscation (non-conviction confiscation) and confiscation from a third party. Referring to the need to take into consideration Directive 2014/42/EU, Point VIII of the Preamble underlined the new approach, in line with ECHR Decision 696/2005 (*Dassa Foundation vs. Liechtenstein*) concerning the nature of such not "*properly penal*" forms, but "*civil or patrimonial*". And, concerning extended confiscation, it insisted on 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 from good credit in the specialized literature. Experts have usually underlined –before and after 2015 reform– that it is difficult that this kind of confiscation can comply with basic principles of criminal law and particularly of criminal procedure, such as the principle of fair trial and presumption of innocence. They also underline the risk that it might restore the old general confiscation of property, already prohibited by Article 304 of the Cadiz Constitution (1812).[52]

In any case, as in other countries, those who defend the full legitimacy and usefulness (from the criminal policy perspective) of the new forms of confiscation –particularly in relation to the proceeds and gains– reject, in line with repeated Decisions of the ECHR, their punitive nature. As a consequence, they proclaim that there is no need to apply the principles of *ius puniendi*, at least to the modalities of confiscation of proceeds and gains, considering extended confiscation fully acceptable,

[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.

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*, the 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 when 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 Court (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, the main issue in the debates of the Second Chamber of the *Tribunal Supremo*. Several Decisions of the *Tribunal Supremo* declared that neither an exhaustive identification of the specific operations of drug trafficking (STS 1049/2011), nor strict evidence of the direct connection of the objects subject to confiscation and the specific acts prosecuted (STS 1061/2022) were needed in order to apply it "against assets possessed prior to the act for which he was convicted". In this sense, as demanded in money laundering (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, there are still few 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 due to 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).

However, 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, based on well-founded objective evidence, it can be determined 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, replacing his inference by the one foreseen by the legislator*". Thus, they should not be taken 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*", since the individuals concerned enjoy the "*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?

In Spain, it is commonly assumed that the origin of extended confiscation can be found, as in other countries, in relation to the fight against drug trafficking. The 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 basic principles concerning the fight against organized crime. As already explained, in the absence of a legal regulation, in 1998 the Supreme Court –by way of a non-jurisdictional decision– opened the door to the legitimation of a practice that had been increasingly authorized by lower tribunals at the demand of special prosecutors.

The Constitutional Court (*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 penalty *stricto sensu* (accessory penalty) since the first Spanish Criminal Code (1822) and with the only exception of the 1928 Criminal Code, that included confiscation among security measures (Article 91.3), even if the specific content of the regulation was similar to previous legislation. However, in 1995 the new Criminal Code transferred confiscation from the Title of punishments (Title III, Book I), to Title VI ("ancillary consequences"). They constituted a new category of reactions to the criminal offences, created *ex nov*o by the new Criminal Code. Together with confiscation (Articles 127-128), the following are also considered ancillary consequences:

- the ancillary consequences for entities without legal personality (Article 129),[56] and
- the legal regime of taking and analysing biological samples to obtain DNA and its registration, with respect to individuals convicted of having perpetrated 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 individuals (Article 129 *bis*).

The legal nature of the various "consequences" is very discussed.[57] Some authors reject their penal nature and take into account that they are established in order to face cases of objective dangerousness. Thus, they consider that they are preventive reactions that have an administrative

[55] Blanco Cordero, 2008, 98 ff.
[56] Since the 2010 reform, penalties for criminally liable legal persons are listed in Article 33.7 of the Criminal Code.
[57] Díez Ripollés, 2020, 831 ff.

nature, whose implementation must respect the constitutional guarantees due to their condition of sanctions.

However, the majority of experts accept them as part of the penal field. There are three main alternatives in this context 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 innocuating purpose (special prevention);
- defending that they integrate a separate category, a position formally supported by the fact of their integration in a separate title in the first Book of the Criminal Code, different from Title III (punishments) and Title IV (security measures).

Even if some paragraphs of Book II of the Criminal Code, concerning 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*. Therefore, they require in their application, as "reactions of a penal nature", the respect of "similar penal guarantees".

Concerning confiscation, which is legally excluded from the Title of punishments *stricto sensu*, the doctrinal (and jurisprudential) debate oscillates between its consideration 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.

Even if they accept that this solution is correct concerning confiscation of instruments –since it aims at putting an end to the situation of objective dangerousness generated by them–, an increasing number of authors understand that this option should be revised in regard to confiscation of gains,[60] which does not consist in the restriction of a legitimate right[61] and whose basis does not take into account the objective dangerousness (or not) of these gains, but it pursues a different purpose, more civil or patrimonial: neutralising and preventing the consolidation of the illegitimate patrimonial increase related 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, according to the Preamble, "*the 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.

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[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.

Attributing a "civil nature to the extended forfeiture (…) is the easiest option to try to avoid the requirements of basic procedural rights".[63] In this sense, relevant authors warn about such "label fraud"[64] and defend that the questionable sanctioning nature of some modalities of confiscation should not affect their condition of "legal consequence of the offence of a penal nature", since, together with 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), causing its revocation (Article 86.1 d) or the refusal of parole (Article 90.4),[66] and, eventually, operate as an obstacle to the punishment of a tax fraud offense.[67]

In short, its "confused legal nature" should not make us forget its "clearly punitive objective".[68] Assertions like those included in the Preamble, deserve being criticized for this reason, since, as part of the penal intervention applicable by penal courts, the following requirements should be fully respected in this regard:[69]

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

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 Criminal Code 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 Criminal Code 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 assets, 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 lawful income of 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 Criminal Code 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] the 2015 reform broadened the scope of application of non-conviction confiscation, which before was limited to the cases of exemption or

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[63] Díaz Cabale, 2016, 25.
[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] 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 Criminal Code (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 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.*"

Therefore, the scope of application of non-conviction confiscation is, on the one hand, broader than Article 4 of the 2014/42/EU Directive, which limits the States' duty in this field to cases "of illness or absconding of the suspect or accused person" (art. 4.2). On the other hand, the Directive uses an imperative language, but the content of Article 123 *quáter* appears as facultative, which is a more appropriate solution from the perspective of 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, in line with the Preamble of the reform and increasing authors, insists on the civil nature of the action of non-conviction confiscation, which is directed to "*avoid illicit enrichment*"; and, as a consequence, it 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 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 proved.*"

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.*
>
> *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*

[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.

transferred to avoid confiscation, when the goods or assets were transferred for free or for a price below real market value."

The literature has raised many doubts concerning the constitutionality of several elements[77] and the proportionality[78] of Article 127 *quáter*, which transposes Article 6 of Directive 2014/42/EU, substituting former Article 127.1 of the Criminal Code, that excluded from confiscation goods, assets and gains legally acquired by a third party in good faith. In the new autonomous[79] modality, judges are allowed to confiscate goods, assets 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. Surrogate confiscation is only admitted by the Directive referring to proceeds, not to instrumentalities. 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 parties who act in good faith, a formula that was substituted –at least partially– by the very ambiguous reference[80] to the "degree of suspicion" required to a "diligent individual". Thus, it transforms certain elements of the Directive in *iuris tantum* presumptions against the third party'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 "*receptación civil"* consisting in receiving proceeds of crime free of charge, which generates the obligation to restore them (Article 122 Criminal Code),[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 a starting point, to apply extended confiscation, since, according to Article 127 *bis* and Article 127 *quinquies*, in a similar way to direct confiscation, basic and reinforced extensive confiscation require, first, a penal conviction due to the commission of an unlawful act.

However, a penal conviction is not required for the prior criminal single acts or activity that allow to extend 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 127 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".

Is a reversed burden of proof applied by extended confiscation?

The issue of the reversion of the burden of proof in relation to extended confiscation is mainly raised due to the indicators and presumptions included by the Criminal Code in order to facilitate the judicial

[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.

decision.[84] Notwithstanding the fact that the Constitutional Court validated extended confiscation, as explained *supra*, it has been widely criticized since 2010 with regard to the presumption of innocence.[85]

According to the doctrine of the Constitutional Court (STC 219/2006, STC 220/2006 and STC 126/2011)[86] and repeated case law, the use of indicators with this purpose can be legitimate if certain conditions are met: 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, the 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, the following is the open catalog of aspects to be evaluated in order to decide if it is accredited or not that "*the goods or assets were obtained from a criminal activity, and their legal origin*" (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 surprisingly forgets to mention 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 also included in 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 "*to the effects outlined in 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*, experts consider that they cannot be understood but as *iuris tantum* presumptions, thus admitting evidence to the contrary.[90]

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[84] When there is not sufficient evidence to convict someone, for instance, for 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.
[90] Blanco Cordero, 2017, 484.

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 place from the first moment: it allowed extended confiscation without an exhaustive identification of the specific previous activity or the evidence of a direct connection between the objects subject to confiscation and the specific prosecuted acts. The issue was emphasized 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, in a manner consistent 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*", within 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 from 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 Criminal Code and other legislation and not in a comprehensive manner 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*, drove Spanish legislation to adopt Act 41/2015, which introduced a set of articles (Article 803 *ter* a. ff) in the newly created Title III *ter* (Book IV) LECrim, that established a special "criminal proceeding under a civil external" coverage,[95] within the 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 if the perpetrator cannot be prosecuted.

Due to the fact that LECrim guarantees to all participants the respect for 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.), who can benefit for his investigation from the Asset Recovery and Management Office,[96] the judicial

[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.
[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 confiscation. Act 1/2015 transferred the regulation of the Asset Recovery and

police or other authorities and civil servants. The Public Prosecutor's Office may also 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 new Title III *ter* regulates the intervention in the penal process of third parties potentially affected by confiscation,[97] in a similar way to the third parties who are civilly liable, but benefitting from more guaranties than in the civil process of execution.[98]

The right to a hearing is fully recognized (Article 803 *ter* 1. b). Non-attendance is not, as such, a breach of the obligation to attend, but the lack of 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 it does not stop the process: it will continue without the participation of the person declared to be in default until the resolution that puts an end to the process is adopted, 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 serious problem of the processes of non-conviction confiscation is whether the person in a situation of default can answer and participate in the process by their 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 that were 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 previously considered "figure of little relevance" has undergone a vertiginous transformation 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 with regard to penalties fades[103] inside a "legislative maelstrom"[104] aimed at assuring the frequently weak evidence available in order to attain all the goods (or equivalents) connected to criminal activities, even when they are in the hands of third parties who are not criminally responsible. This evolution has been qualified as a "paradigm of the modern Criminal Law"[105] –where "the ends justify the means, even when these violate

Management Office to a new Fifth Additional Provision of LECrim, and this has been developed by Royal Decree 948/2015.

[97] Rodríguez-García / Orsi, 2020, 555 ff.

[98] Díaz Cabiale, 2016, 68. From a critical perspective, concerning the limited remedies recognized to participating third parties. 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.

[105] Gorjón Barranco, 2016, 127 ff.

fundamental rights and constitutional principles, and efficiency is above guarantees"–[106]and it is specially present in the regulation of extended confiscation (in a broad sense), which has never been fully accepted by the literature and often results in conflict with fundamental criminal law and criminal procedure principles and guarantees.

1. In Spain the regulation of confiscation deserves many critics from the perspective of the **principle of legality**.

Maintaining 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 legal certainty[109] since, they

- make difficult the adequate understanding of their contents[110] and/or the appropriate distinction of the scope of application with regard to other forms of confiscation;[111] and even
- lead to 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. The legislation in force does not reflect an adequate respect for the principle of **proportionality**, not only concerning extended confiscation *stricto sensu* (alone or combined with surrogate confiscation of other assets of an equal value), but also with regard to non-conviction confiscation and confiscation from a third party. In this sense, several provisions are particularly worrying 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 money 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 to assure the respect for the principle of proportionality.[113] According to it, the judge or court of 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 there is no doubt that confiscation of gains must also respect the constitutionally recognized principle of proportionality.[117] Furthermore, the principal 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] deserved to be also included in order to assess proportionality.[119]

3. Concerns related to the **non-retroactivity** of the new (and more severe) forms of confiscation have also been raised in Spain on the occasion of the new legal reforms, particularly in relation to the

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[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, such as in Article 127 *bis* 2. Blanco Cordero, 2017, 473.
[112] Planchadell Gargallo / Vidales Rodríguez, 2018, 80 ff.
[113] Hava García, 2015, 214.
[114] According to the case-law, only if the civil liability is sufficiently settled, the good 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.

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, the 2015 reform did not explicitly permit to take into account for this purpose the conducts committed before its entry into 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**, not only does it raise the issue of the risk, often mentioned in the literature, of reintroducing the general confiscation of property –rejected already in the XIXth Century–, but 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– seems a possible violation of the right of property (together with 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 the 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 parties in good faith were excluded from confiscation in Spain until the 2015 reform, when the corresponding provision disappeared from the Criminal Code. 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, the fact that the suspect has to prove the lawful origin of the assets in order to reverse 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 element of 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 also frequently mentioned, and the problem is aggravated by the debates concerning the legal nature of (extended) confiscation and the admission (or not) of lowered standards of evidence. In this sense, the best way to require the full respect for the guarantees of the penal process is probably to accept the confiscation's nature of legal consequence of the offence that serves a clear punitive purpose and that has relevant functions in the penal system.

6. Most of the doctrinal critics concerning the **presumption of innocence** in the field of extended confiscation are related to the non-conviction confiscation[126] and to the (widely questioned)[127] presumptions, particularly the ones contained in Article 127 *bis* and Article 127 *sexies*. Notwithstanding that the Criminal Code requires that the evidence is objective and well-founded,[128] the system –and not only where new presumptions are absolute or cumulative–[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]

[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 in Article 127 *sexies*. Corcoy Bidasolo, 2015, 454.
[130] Rodríguez-García / Orsi, 2020, 550.
[131] Blanco Cordero, 2017, 188.

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

In fact, since the silence of the accused is not enough to overcome the presumption of innocence or as an indication of the subject's guilt, the reversal of the burden of proof seems difficult to reconcile with a strict respect for 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 apply extended confiscation) were obtained from an offence, but not from one of those listed in Section 1 of Article 127 *bis*, the only alternative available will be either to lose the patrimonial element or to admit the offence committed;
- with regard to confiscation from a third party, in case that they do not prove that even a diligent person would not have suspected the goods' unlawful origin, they will tacitly assume a culpability that can result in penal consequences.

Furthermore, not justifying the legality of all the elements involved entails 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] Such possibility was admitted (if necessary) by the Constitutional Court (STC 219/2006 and 220/2006),[137] which requires to be extremely cautious both at the legislative level and its implementation. Nevertheless, cautiousness does not characterize present legislation concerning (extended) confiscation.[138]

7. Finally, the respect for the **principle of culpability** is also considered a serious problem with regard to non-conviction confiscation (that can appear in connection to extended confiscation);[139] and the overlap of various modalities of confiscation with criminal receiving ¿of stolen goods?, money laundering,[140] or even with the offence whose conviction permits the seizure of the goods, deserves important 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] The case-law only punishes (self)money laundering if the possession or use of the goods seeks to hide their unlawful origin or to aid 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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