Country Report - Portugal

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1. Introduction: How is extended confiscation understood in the Portuguese legal order?

1.1. Historical background

Guided by the humanist principles of the Enlightenment,[1] the Portuguese Constitutions of the 19th century and the first half of the 20th century expressly prohibited the penalty of confiscation.[2] This prohibition was linked to the principle of guilt and the personal nature of punishment, asserting that no criminal sanction should affect any person (e.g., family members) other than the one found guilty.

Nevertheless, the Penal Codes enacted during this period allowed for the forfeiture ("*perda*") of specific assets directly connected to the crime,[3] such as the objects employed in its commission (*instrumenta sceleris*), and the items obtained (*quaesita sceleris*) or generated as a result of it (*producta sceleris*).[4] In accordance with the constitutional ban, forfeiture was not considered a penalty but rather an automatic effect of the conviction,

[1] See Beccaria 1767, 69: "[t]he law which ordains confiscations sets a price on the head of the subject, with the guilty punishes the innocent, and by reducing them to indigence and despair, tempts them to become criminal".

[2] Liberal Constitution of 1822 (Article 11), Constitutional Charter of 1826 (Article 145, §19), Constitution of 1838 (Article 22), Republican Constitution of 1911 (Article 3, §23), Constitution of the "Estado Novo" of 1933 (Article 8, §12).

[3] Penal Code of 1852 (Article 64) and Penal Code of 1886 (Article 75). Given this constitutional prohibition, the Portuguese legislator avoids the term "confiscation", preferring the designation "perda" (which will be translated as "forfeiture").

[4] For example, respectively, the axe used to commit a murder, the stolen watch and the banknotes produced by the counterfeiter.

serving a secondary or subsidiary role – it would only be applicable when neither the victim nor an uninvolved third-party had any right to restitution.

The constitutional prohibition was lifted from the Portuguese legal system in 1976.[5] Meanwhile, there was a growing international interest in confiscation as a tool of criminal policy, particularly in the prevention of profit-driven offences. Reflecting this trend, the 1982 Penal Code enhanced traditional forfeiture mechanisms, which were further expanded by the 1995 penal reform and, in 2017, with the transposition of Directive 2014/42/EU.[6] Extended confiscation was introduced by Law No. 5/2002, of 11 January, in the specific context of combating organised and economic-financial crime.

1.2. General regime of confiscation

The general confiscation regime, which applies to all offences regardless of their nature or severity, is regulated in the General Part of the Penal Code (Arts. 109 to 112-A).[7] This regime is primarily structured around the traditional tripartite division of criminal instrumentalities, products, and profits. However, it also incorporates more innovative mechanisms, including value-based confiscation, non-conviction based confiscation, and third-party confiscation. Separate legislation, not covered in this analysis, regulates special confiscation regimes for specific types of crimes, such as offences against public health, drug trafficking, cybercrime, and tax crimes.[8]

[5] The original version of the 1976 Portuguese Constitution expressly permitted "the confiscation of assets directly or indirectly obtained from criminal activity, as an effect of the penalty, without the offender being entitled to any compensation" (Article 88). The rule was rooted in the prevailing socialist ideology of the time, which aimed to bolster the fight against activities deemed detrimental to the national economy. Due to its strong ideological underpinnings, the provision was eliminated in the 1st constitutional revision (see J. N. Duarte 2023, 46).

[6] See, respectively, Decree-Law No. 48/95, of 15 March, and Law No. 30/2017, of 30 May. Law No. 32/2010 of 2 September, enacted in the context of the fight against corruption, introduced some minor changes to the legal regime.

[7] The legal provisions referenced, unless otherwise specified, pertain to the current Penal Code.

[8] Decree-Law No. 28/84, of 20 January (offences against the economy and public health), Arts. 9, 46 and 76; Decree-Law No. 422/89, of 2 December (illegal gambling), Arts. 116 and 117; Decree-Law No. 15/93, of 22 January (drug trafficking), Arts. 35 to 39; Law No. 15/2001, of 5 June (tax crimes), Arts. 18 to 20; Law No. 5/2006, of 23 January (weapons law), Article 94; Law No. 109/2009, of 15 September (cybercrime law), Article 10; Decree-Law No. 63/85, of 14 March (usurpation and counterfeiting offences), Article 201; Decree-Law No. 110/2018, of 10.12 (unfair competition and other industrial property offences), Article 329.

a) Forfeiture of instruments, products and profits

The **forfeiture of instrumentalities** (*instrumenta sceleris*) refers to "objects used or intended to be used" the commission of an unlawful act ("facto ilícito-típico"). It encompasses only those items that, "by their nature or the circumstances of the case", prove to be dangerous or could potentially be used in future offences (Article 109[1]). Although the term "objects" suggests a certain idea of tangibility, confiscation can also cover non-corporeal items, such as malicious computer programs.[9]

For instruments to be forfeited it is not necessary that they have actually been used to commit a crime; it is sufficient that they were intended to be used for that purpose. A modified car that robbers planned to use as a getaway vehicle can be confiscated, even if the police thwart the theft or if a different means of escape is used. Nor is it necessary for the crime to have been completed or for someone to be convicted of committing it. The pistol pointed with the intent to kill can be confiscated even if the perpetrator never fires it and cannot be held responsible for being unaccountable.

However, the objects must be dangerous to be subjected to confiscation, meaning they must reveal a special aptitude for facilitating crimes, either due to their intrinsic characteristics (revolvers, false keys, drugs) or the specific circumstances of the case (e.g., 3D printer used to counterfeit currency). Common items that are not particularly suited for criminal use cannot be forfeited, even if they played a crucial role in a specific offence – for example, the pen used to forge a document or the flat where a rape occurred.[10] Confiscation of non-dangerous instrumentalities would imply either a punitive purpose or a mere symbolic or superstitious rationale that is unacceptable under the rule of law, especially considering the principle of proportionality.

[9] See Correia 2012, 67-68; J. N. Duarte 2023, 107, 111-113; against: J. Dias 1993, 617.

[10] See J. Dias 1993, 621. Under certain circumstances, cars or houses can prove to be dangerous instruments and can therefore be confiscated – e.g., a modified speedboat used to facilitate the transport of drugs, a car customised for illegal racing, a house built to be used as a prostitution parlour and prevent the people who live there from escaping. In these scenarios, only the principle of proportionality can prevent confiscation (cf. Article 18[2] of the Portuguese Constitution).

Considering the requirements on which the forfeiture of instrumentalities depends, there has been a broad consensus in Portuguese legal doctrine on its classification as a "penal reaction analogous to a security measure".[11] It is not a matter of punishing a guilty perpetrator (as in penalties), nor of reacting against the dangerous agent of an unlawful act (as in security measures). Rather, it is about protecting society from the danger posed by the object used to commit an offence, thereby preventing its use in the commission of future crimes. However, recent changes introduced by Law No. 30/2017, which transposed Directive 2014/42/EU, have cast doubt about the validity of this classification. First, the legislator established a special regime for organised and economic-financial crime that expressly mandates the confiscation of all instrumentalities, even if they are not dangerous (Article 12-B[1] of Law No. 5/2022).[12] Second, the confiscation of instrumentalities *in specie* has been replaced by the confiscation of the equivalent value, thus indicating that the true rationale of the mechanism is not the purpose of removing dangerous assets from circulation, but of depriving the perpetrator of the corresponding portion of their wealth.[13]

Products of crime (*producta sceleris*) can also be forfeited. These are objects that did not exist prior to the commission of the crime but were created as a result of it (Article 110[1]a). Examples include counterfeit currency, forged documents, photographs or films containing child pornography, and non-consensual recordings of private conversations.

The original version of the Penal Code established a separate regime for the forfeiture of products of crime, similar to that for instrumentalities, therefore limiting confiscation to dangerous objects. However, European legislation does not separate the concept of products of crime, incorporating it into the broader category of "proceeds". Consequently, the domestic law, after the transposition of the Directive 2014/42/EU, regulates the confiscation of products in the same manner as the confiscation of profits, applying

[11] For example, J. Dias 1993, 627 s.

[12] This difference between the general confiscation regime and the special regime for organised and economic-financial crime is not explained by the supposed greater dangerousness of the instruments used in the commission of the latter crimes, but by the intention to scrupulously respect the definition of "instrumentalities" in Article 2[3] of the Directive 2014/42/EU, which refers to "any property used" without restricting the concept to "dangerous" objects (see Caeiro 2018, 32).

[13] See below "d) Value-based confiscation".

identical requirements. As a result, the confiscation of products of crime can no longer be considered a penal reaction analogous to a security measure; it now serves the same purposes and has the same nature as the confiscation of proceeds in general.

Finally, the legislator addresses the **forfeiture of profits of crime**, a concept that includes both pre-existing objects obtained directly through criminal activity (the so-called *quaesita sceleris*) and all economic benefits derived from the commission of the offence, regardless of their nature (Article 110[2]b). Profits encompass tangible objects, intangible assets, rights, benefits derived from goods, or savings achieved due to the crime – for example, a stolen watch, stolen electricity, a building permit obtained through corruption, the use of an illegally occupied property, or the value of unpaid taxes.[14] Conversely, non-pecuniary benefits reflecting moral satisfaction or other forms of personal gratification cannot be confiscated.[15]

The current legislative approach clarifies that indirect economic benefits from criminal activity are also subject to confiscation. This includes both the direct fruits of criminal goods (e.g., interest earned from scam proceeds) and gains resulting from "possible transformation or reinvestment", regardless of the number of intermediary transactions (Article 110[3]) – for instance, dividends from investment funds purchased with money from corruption or the sale of jewellery made from stolen gold.[16] However, since Portuguese law explicitly limits confiscation to "economic advantages",[17] an actual gain must be demonstrated. Thus, the Court must deduct any costs and expenses incurred by the perpetrator in preparing or committing the crime,[18] along with any destruction or loss

[14] The examples were taken from J. N. Duarte 2023, 115-116.
[15] For example, the sexual pleasure obtained by the rapist, the moral satisfaction achieved by someone who assaults a person to avenge a previous offence or obtains by coercion their public retractation (J. N. Duarte 2023, 116).
[16] The current wording was introduced in 2017 by the law transposing the Directive. Until then, confiscation only covered assets directly resulting from criminal activity and those acquired by exchange or transaction with them, being therefore limited to first-degree indirect benefits.
[17] In Germany, the expression "pecuniary advantage" was replaced by the formula "anything obtained", a change that was interpreted as enshrining the gross principle (see Country Report Germany, 3).
[18] For example, the costs of hiring operatives or chartering boats in drug trafficking or the "share" that those who ordered a stolen product keep for themselves.

of the obtained assets.[19] These provisions underscore that confiscation is not intended as a punitive or repressive measure but rather aims to eliminate the financial benefit from the crime and, consequently, restore the legality of the perpetrator's assets.

The legislator also encompasses in the broad category of profits the **"reward given or promised to the perpetrator of a criminal offence"** (Article 110[2]). Such rewards can be confiscated even if they have not yet been transferred to the person hired to commit the crime and, therefore, have not enriched the addressee of the promise or resulted in any gain for the individual offering it (especially if the crime has not been committed and the instigator has not derived any benefit or satisfaction from it).[20] For example, if someone promises money to a hitman as a reward for committing a murder, the money can be confiscated even if the killer never carries out the crime and the instigator never intends to honour the agreement. Similarly, if a corruptor offers a valuable painting to a public official, who rejects the bribe and does not perform the corrupt act, the painting can still be confiscated. In these instances, the forfeiture of rewards does not serve the same purposes typically associated with confiscating the profits of crime. It does not aim to restore the balance of assets disrupted by the crime or to remove economic benefits derived from it. Nor does it address the neutralisation of dangerous instruments, as in most cases there is no inherent quality in any reward (beyond its general value) that specifically encourages criminal behaviour. Consequently, confiscation of rewards from the giver should be viewed more as a criminal penalty, and thus, it should only be applied when the guilt of the instigator is proven beyond a reasonable doubt.[21]

[19] If a stolen car is immediately destroyed in a road accident or fire, confiscation – including confiscation by value – becomes inadmissible. More uncertain, however, is whether the loss of criminal proceeds through gambling or disastrous stock market investments would prevent confiscation, just as their dissipation on socially harmful goods or services (such as drugs, alcohol, or prostitution) does not. Even if these activities ultimately result in a loss of property, the use of illicit money in gambling or stock market investments still represents a benefit that the perpetrator would not otherwise obtain without committing the crime.

[20] Caeiro 2022, 18.

[21] The provisions of the Portuguese Penal Code only require the commission of an unlawful act as defined by law ("facto ilícito típico"), which may not necessarily have been completed – whether "already committed or to be committed" (Article 110[2]). J. N. Duarte (2023, 123-6) concludes from this wording that the commission of (non-punishable) preparatory acts for a future offence is sufficient to legitimise confiscation. If this view were accepted, confiscation would be a mechanism of a purely police or administrative nature, justified by the risk that the delivery of a reward could be followed by the execution of criminal acts. In such a scenario, only seizure – not confiscation – would be justified.

b) Non-conviction based confiscation

Non-conviction based confiscation has a longstanding tradition in Portuguese law. From its original version, the Penal Code has permitted the forfeiture of dangerous instruments or products without requiring the conviction of the perpetrator. This means confiscation could occur even if the perpetrator was **unaccountable or acted without guilt/culpability**, or the conditions for punishment were not met (e.g., the perpetrator voluntarily withdrew or died, the offence is amnestied, the procedure is time-barred, the victim did not file a complaint). One interpretation of the rules suggests that **identifying or determining the perpetrator** of the offence might not even be necessary, allowing the Public Prosecutor to order the confiscation of dangerous objects even when deciding to close the proceedings.[22]

In 1995, this principle was extended to profits, specifying that the commission of an unlawful act described by law ("facto ilícito típico") would suffice for confiscation. The transposition of the Directive 2014/42/EU did not introduce significant changes in this regard. The legislator has only clarified that confiscation is still applicable even in cases of the **perpetrator's death or absconding** (Arts. 109[2] and 110[5]). If the conditions for third-party confiscation are met, the defendant's property can be forfeited even if they cannot be convicted for lack of evidence of an unlawful act. This means that a final acquittal – formally confirming penal innocence – does not preclude confiscation.

c) Third-party confiscation

The Portuguese Penal Code has long included provisions for the forfeiture of objects owned by third parties. Originally, the law differentiated between dangerous and non-dangerous objects. The former would be subject to compulsory confiscation, with compensation provided to the third-party owner, unless the owner had benefited from the crime or acted in bad faith in using, producing, or acquiring the items. Non-dangerous proceeds could only

[22] However, J. Dias (1993, 620) argues that this perspective is untenable, as it would sever the connection between confiscation of dangerous objects and criminal law, effectively reducing the former to a police or administrative measure.

be confiscated if they belonged to the perpetrator or the beneficiary of the crime – defined as the person on whose behalf the crime was committed and who profited from it.

Under the current legal framework, a unified regime governs the confiscation of assets not owned by the "agents or beneficiaries" of the crime. For third-party assets to be confiscated, the owner must have contributed in a reprehensible manner to the use or production of the property, benefited from the illegal act, acquired the property after the act, aware of their criminal origin, or received assets to deliberately avoid confiscation (Article 111[2]). The burden in on the Prosecutor to prove that these requirements are fulfilled. Third-party holders are ensured procedural powers and the minimum prerogatives needed to defend their property rights, namely "the exercise of adversarial proceedings and the right to testify" (Article 347-A of the Code of Criminal Procedure [CPP]).

As can be observed, the rationale for third-party confiscation focuses not on the dangerousness of the assets but on the **reprehensible behaviour of the holder** and their indirect connection to criminal activity. The fact that confiscation only operates if the assets are held by offenders, beneficiaries and third parties who know or should know of the unlawful origin of the proceeds shows that there is a personal, *quasi-sanctioning*, element involved in confiscation.[23] Offenders and third parties' forfeiture are not mutually exclusive: if the holder of the assets and the perpetrator gained from the crime, they are both subject to confiscation.

d) Value-based confiscation

The practice of replacing in-kind confiscation with "forfeiture of the substitute in value"[24] has a long history in Portugal. Initially, this form of confiscation was restricted to rewards or benefits that either belonged to third parties[25] or could not be seized in their original form (e.g., services rendered). However, in 2017, the legislature extended this approach to

[23] Caeiro 2022, 18.
[24] J. Dias 1993, 636.
[25] Confiscation *in specie* of objects (from third parties) is replaced by the payment of the corresponding value (by the perpetrator).

include the confiscation of instruments, allowing their value to be forfeited as well (Article 109[3]).

This legislative change raises questions about the preventive nature traditionally associated with confiscation. On one hand, the dangerousness of the objects in question does not transfer to the value they represent, making it difficult to justify this measure as analogous to a security measure. On the other hand, the confiscation of instrumentalities by value also lacks the preventive nature associated with the forfeiture of proceeds and benefits, as it is not intended to eliminate illicit gains (the instruments, by definition, predate the crime). In a State governed by the rule of law and guided by the principle of proportionality, the confiscation of non-dangerous instruments, if permitted, can only be understood as a form of **"accessory penalty, intended to specifically censure the criminal use of those assets"**.[26]

1.3. Extended confiscation

Extended confiscation was introduced in Portugal by Law No. 5/2002, of 11 January, which established special measures to combat organised and economic-financial crime. It was enshrined in the Portuguese legal system twelve years before the Directive 2014/42/EU and even preceded the approval of the Framework Decision 2005/212/JHA, that imposed, for the first time, a duty on the EU Member States to adopt measures of this nature.

The inspirational reference for the Portuguese solution of extended confiscation was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention), which urged States to "consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation" (Article 5 [7]). Following this model, Law No. 5/2002 presumes that

[26] Caeiro 2018, 36; cf. also: Monte 2023, 109. If confiscation were considered a penalty, it could not be applied if the perpetrator were unknown, had not been found, had died, or if their guilt had not been established, as stated in Article 109[2]. For this reason, some legal scholars believe that this contradiction in the rules is the result of an oversight that should be corrected through an abrogating interpretation—effectively treating as unwritten the rule that allows for the confiscation of instruments to be replaced by the forfeiture of their value (see J. N. Duarte 2023, 132-134).

all the property of a person convicted for one of the (listed) offences of a particular type, that is found disproportionate to their lawful income, has a criminal origin. It is then up to the holder of the assets to prove their lawfulness if they wish to avoid confiscation. The scheme is based on a rebuttable presumption of the criminal origin of disproportionate assets and the ***reversal of the burden of proof***. This does not simply exempt the Public Prosecutor from proving a specific connection between the assets to be confiscated and the commission of a particular crime. The Prosecutor does not even have to provide concrete evidence that the inconsistent property comes from broad criminal activity. It is sufficient that the requirements necessary to "activate" the presumption are met and that the accused cannot rebut it by proving the lawful origin of the assets identified as liable to confiscation.

a) Requirements: "Activating" the presumption

The conditions on which the "activation" of the presumption depends are listed in Article 7 of Law No. 5/2022:

Conviction for a crime from the "catalogue" (i.e., listed in Article 1[1] of Law No. 5/2002). Extended confiscation targets profit-driven crimes typically committed within the context of stable criminal organisations (such as arms or drug trafficking, bribery, money laundering, counterfeiting currency, and human trafficking). Successive legislative reforms have progressively expanded the list of offences that qualify for this special confiscation measure, transforming it from an exceptional tool for combating only the most serious crimes into a nearly universal instrument. Even so, to leave out "small-scale crimes", the legislator expressly requires, in some cases, the offence to have been committed in an organised manner (e.g., pimping, smuggling, trafficking and tampering with stolen vehicles).

Confiscation can only be ordered if the Court hands down a conviction. If the perpetrator dies, disappears or is unaccountable, if the proceedings are time-barred or guilt/culpability is excluded or cannot be proven, confiscation is precluded. In short, any reason that excludes punishment (for a predicate offence), also prevents extended confiscation.

***Disproportion between the value of the convicted person's assets and their lawful income*.** The property to be considered includes not only the assets owned by the defendant but also those under their control or to their benefit, i.e., over which the defendant exercises *de facto* powers typical of an owner, even if their legal ownership cannot be determined or if such assets are held by front companies or financial intermediaries. Also accounted for are assets that the convicted person has received in the five years prior to acquiring the defendant's status, even if their disposal remains unknow, as well as those that in the same period were transferred to third parties either free of charge or for a negligible price (cf. Article 7[2] of Law No. 5/2002). The consideration of property that the defendant had in the five years prior to the start of the proceedings but no longer has (because it was disposed of in favour of third parties or its trace was lost) can only be explained by the likelihood that the crime under investigation fits into a criminal lifestyle or broader criminal activity, which however could not be proven.

Probability of previous criminal activity? Portuguese Courts, supported by some legal scholars, have taken the view that no specific suspicion is necessary that the convicted person was previously involved in other similar criminal activity: the conviction for crimes of a certain kind and the inconsistency of the property values allow the presumption that there was broader criminal activity and that the asset discrepancy stems from it.[27] This "double presumption" is not accepted by some academics, who consider it necessary for the Public Prosecutor to gather a "set of circumstances (indications) that give predominance to the probability that the convicted person had such an activity"[28] (proof by a preponderance of the evidence).

b) The reversed burden of proof

Once the above-mentioned prerequisites are met, the criminal origin of the disproportionate assets is presumed, and it is up to the targeted individual to prove otherwise (Article 9 of Law No. 5/2002). The most obvious way to rebut the presumption is to demonstrate that the assets result from lawful income or a non-criminal profitable

[27] In the doctrine, see Godinho 2003, 1343; Correia 2012, 110-111; Borges 2017, 219-222; Faria 2022, 31-34.
[28] Caeiro 2011, 314-318; cf. also: Cunha 2017, 41.

activity unknown to the Public Prosecutor (e.g., inheritance, lottery winnings, stock market investment, prostitution). It is irrelevant whether the income has been taxed: anyone who has not scrupulously declared all their income is committing a tax fraud offence, but if the accumulated assets have a lawful origin, they cannot be confiscated.

Another way to avoid confiscation is to prove that the property entered the possession of the convicted person five years or more before they have been formally declared a defendant or that those assets were acquired it with income obtained during that same period. In this case, determining the specific origin of the assets and their legality becomes irrelevant. The existence of a significant time gap between the acquisition of the assets and the arousal of suspicion weakens the presumption that the disproportionate property value results from criminal activity related to the one being proved. On the other hand, proving the specific origin of the assets could become excessively burdensome for the defendant. The time limitation is, therefore, a consequence of the principle of proportionality.

c) Portuguese law versus *the Directive 2014/42/EU*

When comparing the solution described above with that provided by Directive 2014/42/EU, two fundamental differences emerge.

Firstly, Portuguese law mandates **value-based confiscation** of disproportionate property, rather than the direct confiscation of specific assets presumed to have an illicit origin (*in specie* confiscation) – which could then be replaced, as a subsidiary measure, by confiscation of the equivalent value.[29] The Court's decision refers primarily to a sum of money that the convicted person must pay to the State under threat of coercive enforcement on any of their (lawful) assets (Article 12).

Secondly, in Portuguese law the **disproportion between the value of the convicted person's assets and their lawful income** is a mandatory requirement, without which confiscation cannot be ordered, and not an indication that the Court can consider in its assessment of the possible criminal origin of the assets. It can thus be said that Portuguese rules on confiscation have a broader and, at the same time, more limited scope than those

[29] M. C. Dias 2018, 112; Cunha 2017, 13 s., who considers it a "legislative error".

imposed by the Directive.[30] It is *broader* because the Court does not need to be *satisfied* based on the specific facts and available evidence that the property in question is derived from criminal conduct (proof by a preponderance of the evidence or on the balance of probabilities); the conviction for offences of a certain type and the unexplained origin of the disproportionate property are deemed sufficient (proof by presumption). It is *more limited* because the Court cannot issue an extended confiscation order if there is no inconsistency in assets, even if all indications point to their criminal origin.[31] For example, suppose the police find 75,000 euros in cash on the shelves of the office of a high-ranking official arrested for bribery. This amount can only be confiscated if it is incompatible with the lawful income of the convicted person (extended confiscation) or if a concrete link between the crime committed and the money received is proven beyond any reasonable doubt ("classic" confiscation). In any event, it is not enough that the circumstances of the case (e.g., the bizarre way such a large amount was stored) raise suspicion that the money results from corrupt practices prior to the one charged.

2. Specific issues related to extended confiscation in the general context of confiscation legislation

2.1. How was the adoption of extended confiscation explained in the process of its introduction into the Portuguese legal order system (e.g., by legal amendments)?

The (early) introduction of extended confiscation mechanisms into the Portuguese legal system is a part of the global agenda for combating organised and profitable crime, according to which prevention cannot be effective without a complete removal of the economic benefits of criminal activity. "The common motto 'crime does not pay', which serves as a moral conclusion in stories where criminals are ultimately punished by manly or godly justice, has been elevated to one of the most important endeavours of

[30] Caeiro 2018, 33; Sanhudo 2022, 200-202; Faria 2022, 70 s.
[31] Correia 2014, 97.

contemporary criminal policy and transformed into the normative proposition 'crime shall not pay'".[32]

In fact, the **Explanatory Memorandum of the proposal that led to Law No. 5/2002** justified the adoption of extended confiscation by highlighting the "insufficiency" of classic penalties to combat organised and economic-financial crime. "The effectiveness of repressive mechanisms will be insufficient if, despite a criminal conviction for one of these crimes, the convicted person can still retain, in whole or in part, the profits accumulated during a criminal career" and possibly use them to "resume that criminal activity". It is not always possible to prove the criminal origin of the suspicious assets, creating "a situation in which fortunes of illicit origin remain in the hands of criminals". Extended confiscation seeks to overcome this evidentiary difficulty.

In addition to the 1988 Vienna Convention, the legislator drew on several international models when shaping the confiscation framework, including Italy's *confisca di prevenzione*, the UK's confiscation of the property from individuals with a "criminal lifestyle", and the French approach of punishing with a prison sentence those who cannot prove the origin of resources compatible with their standard of living. The legislator noted that the proposed model "does not go as far as some of the examples cited in comparative law".[33]

The approval of Law 5/2002 was notably free of in-depth academic or judicial debate. There was no formal consultation with invited experts in Parliament, nor were opinions solicited from representatives of the legal professions, a step commonly taken in other legislative processes. Some Members of Parliament raised concerns during the debate, particularly regarding the potential conflict between the reversal of the burden of proof and the principle of the presumption of innocence, but the proposal passed with minimal alterations. In short, extended confiscation was quietly and smoothly integrated into the Portuguese legal system. Significant academic and doctrinal discussions emerged only after the regime had been fully implemented.[34]

[32] Caeiro 2022, 2.
[33] See <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=18675>
[34] The first doctrinal critiques on extended confiscation come from Cunha (2002, 7 s.), J. Duarte (2002, 141 s.) and Godinho (2003, 1315 s.).

In spite of the differences between Portuguese and European regulations on extended confiscation, the **transposition of the Directive 2014/42/EU** did not prompt significant amendments to Law No. 5/2002. The draft bill to Law No. 30/2017 emphasised that the Directive "sets minimum standards, allowing Member States broader discretion in national law, particularly concerning rules of evidence".[35] Consequently, the decision was made to maintain the existing legal framework with minor adjustments, which focused primarily on the general confiscation regime – e.g., expansion of the concept of proceeds and confiscation of third-party assets. Regarding organised and economic-financial crime (Law No. 5/2002), the legislature focused on clarifying specific aspects of freezing and confiscation orders (Arts. 10 and 12 of Law No. 5/2002), extending the temporal scope of asset and financial investigations (Article 12-A of Law No. 5/2002), and introducing specific regulations for the confiscation of instruments (Article 12-B of Law No. 5/2002). The catalogue of crimes that allow for extended confiscation has been expanded once again (Article 1 of Law No. 5/2002).

In the context of the parliamentary discussion of Law 30/2017, opinions were sought from the Bar Association, the Public Prosecutor's Office and representatives of the judiciary. None of these organisations expressed significant concerns about the alignment of extended confiscation with constitutional principles. However, the Public Prosecutor's Office criticised the inadequacy of the Portuguese model in relation to the provisions of Article 5 of Directive 2014/42/EU, since it does not provide for the possibility of confiscating assets compatible with the convicted person's lawful income even if the available evidence points to the criminal origin of such property.

The recent adoption of the **Directive (EU) 2024/1260** is likely to bring about more significant changes in domestic law. In fact, the new Directive expands the range of offences subject to extended confiscation (Article 14(3)) and introduces the "confiscation of unexplained wealth linked to criminal conduct" (Article 16).[36] This confiscation mechanism, unfamiliar to Portuguese law and possibly inspired by German *Selbständige*

[35] <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=40914>
[36] On these modifications, considering the text of the Directive Proposal, cf. Sanhudo 2022, 219-225.

Einziehung, Spanish *decomiso autonomo*, or Italian anti-mafia *misure di prevenzione patrimoniali*, targets assets suspected to originate from criminal organisations. It applies particularly when investigations for crimes under Article 2(1) to (3) of the Directive are ongoing and a conviction has not (yet) been rendered. The Portuguese government has already announced the approval by the Council of Ministers of a new "Anti-Corruption Agenda", which includes the possibility of extended confiscation without conviction.[37] In implementing this measure, Portugal and the other Member States must exercise particular caution to ensure that the new confiscation tools adhere to principles such as legality, the presumption of innocence, and the right to a fair trial, as enshrined in the European Convention on Human Rights (ECHR).

2.2. Is there any case-law in Portugal related to extended confiscation (e.g., of Constitutional Court, Court of Appeals)?

In the years following the enactment of Law No. 5/2002, extended confiscation remained largely underutilized, resulting in a lack of significant case law. It was not until 2015 that the constitutionality of the legal regime was first brought before the Constitutional Court.[38] Notwithstanding some strong academic criticism, the **Portuguese Constitutional Court** has consistently upheld the view – in all its rulings on the matter and without a single dissenting opinion – that the presumption of the illicit origin of assets and the consequent reversal of the burden of proof do not violate the presumption of innocence. In its landmark case on the subject, the Constitutional Court grounded its reasoning in the non-punitive nature of the measure, emphasising that extended confiscation is not a penalty for the crime committed but rather a measure designed at "verifying an incongruous financial situation, whose lawful origin has not been determined". The conviction for a crime from the legal catalogue (reference crime) serves merely as a "triggering condition". Even though the confiscation process occurs within the broader context of criminal proceedings, its purpose

[37] <https://www.portugal.gov.pt/pt/gc24/comunicacao/noticia?i=perda-de-bens-processos-mais-rapidos-governo-avanca-com-medidas-contra-a-corrupcao>

[38] The Constitutional Court's first judgment on extended confiscation was Ruling No. 101/2015.

is not to "establish any criminal liability on the part of the accused". Consequently – the Court concluded – "the presumption of innocence and the right to silence do not apply in this [non-penal] procedure embedded within criminal proceedings" (Ruling No. 392/2015).[39]

The **ordinary Appeal Courts** have not departed from the Constitutional Court's understanding of the legal nature of extended confiscation, nor from its conclusion that the reversed burden of proof of the lawfulness of property is in line with the presumption of innocence. An example of this is the Supreme Court judgment of 14 March 2018, which described extended confiscation as a "non-criminal reaction", arguing that "its determination does not take into account factors related to (...) the seriousness of the offence, the severity of the penalty or the degree of the convicted person's participation". This autonomy from criminal matters also extends procedurally: confiscation is ordered at the end of an (incidental) procedure inserted into the (main) criminal proceedings, which "begins with an autonomous act (the liquidation)" and obeys "its own evidentiary rules".[40]

Despite not being referred explicitly to extended confiscation, the Supreme Court's Ruling No. 5/2024 resolved a longstanding judicial dispute regarding the relationship between forfeiture and victim compensation. The Portuguese Penal Code prioritizes the victim's claim for compensation over the State's right to confiscation (Article 110[6]). The issue at hand was whether a confiscation order could still be issued when there is a compensation claim. The Supreme Court ruled that confiscation is always compulsory and must be determined even if there is a victim, if the victim has made a compensation claim and if that claim coincides with the value of the crime's benefits. Not even the fact that the victim is the State (as in tax offences) impedes confiscation.[41] Since all victims (including the State) can waive their compensation rights, failing to order confiscation would effectively leave the removal of criminal gains to the discretion of the victim. This ruling does not result in

[39] This reasoning was repeated in Rulings No. 476/2015, and No. 498/2019. On this case law: Correia 2016, 207-221; Nunes, 1-77; Faria 2022, 44-47.

[40]<https://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/fae21d5a9e1b13fb80258255003bdb7c?OpenDocument>

[41] The Supreme Court accepted the view defended by Correia & Rodrigues 2017, 13 s.

double jeopardy for the offender; if the perpetrator has returned the victim's property or compensated for the harm caused, the corresponding amount is factored into the enforcement process. If not, the victim can still seek satisfaction from the confiscated assets (Article 130[2]).

2.3. Is there any specific experience by practitioners in Portugal which created a special attitude towards (extended) confiscation (e.g., organised crime, terrorism, drug crime, money laundering)?

Despite having received some doctrinal attention, extended confiscation remained largely dormant in judicial practice during the decade following the enactment of Law 5/2002. Contrary to the legislator's high expectations, extended confiscation became little more than a legal novelty without any effective application. There was a notable absence of thorough financial investigations, leaving the Public Prosecutor without the necessary information to identify and seize disproportionate assets. As a result, confiscation orders were exceedingly rare.[42]

Meanwhile, the growing international and European attention on asset recovery began to resonate with legal professionals in Portugal, spurred by two key developments. The first was the establishment of the **Asset Recovery Office (GRA)** by Law No. 45/2011, of 24 June.[43] Operating under the supervision of the Judiciary Police, this multidisciplinary body is equipped with the expertise and (hopefully) the necessary resources to conduct complex financial investigations, crucial for identifying and seizing the proceeds of crime. The second pivotal factor was the launch of the **Fenix Project** by the Prosecutor's General Office, in collaboration with the Judiciary Police, Spain's *Fiscalía General del Estado*, and the Dutch OM - B.O.O.M. The project aimed to heighten awareness within the judiciary about the critical importance of recovering criminal proceeds. It also sought to increase the frequency and economic impact of confiscation orders, particularly through the use of extended confiscation mechanisms, and to bolster both internal and international

[42] Correia 2016, 208.
[43] In compliance with the Council Decision 2007/845/JHA of 6 December 2007.

cooperation. To achieve these goals, the project developed a Good Practices Manual and established specialized communication channels.[44]

The last few years have been dominated by a permanent enthusiasm on the part of the Public Prosecutor's Office for confiscation and asset recovery mechanisms. This focus has manifested through the organisation of numerous training sessions, conferences, and collaborative publications.[45] The topic has also gained traction within academic circles, though scholars have generally approached the subject with a more **measured and cautious perspective**. The main concerns of the Portuguese authors who examine extended confiscation revolve around the need to ensure compliance of the Portuguese law with the Directive 2014/42/EU and to guarantee the effectiveness of confiscation without jeopardising the minimum procedural guarantees and the protection of fundamental rights.

In this regard, a significant part of the doctrine holds that the State should be required to prove (on the balance of probabilities) the previous criminal activity from which the incongruous assets are presumed to originate.[46] These authors claim that no amendment to the law is necessary to support this conclusion since this is the interpretation that best aligns with the notion that extended confiscation targets only "presumed proceeds of criminal activity" and, above all, the only one that conforms to the rules of a fair trial.[47] Another perspective suggests that while Portuguese legislation does not need to abandon the presumption of the unlawfulness of the defendant's assets, it would be advisable to strengthen the basis of the presumption, i.e., the underlying conditions upon which it rests.[48]

The option of confiscating the value of unexplained wealth raises concerns regarding the proportionality of its interference with the right to property. In fact, the value of the assets

[44] The results of the project are summarised in <https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/livrorecuperacaoactivos_final.pdf>
[45] Examples of which are Ferreira, Cardoso & Correia 2018; Ferreira, Cardoso & Correia 2021; e Martins & Correia 223.
[46] See Caeiro 2011, 314-318; Cunha 2017, p. 44.
[47] Antunes 2020, 598.
[48] Borges 2017, 234-236.

considered for extended confiscation include those the defendant owned during the relevant period but no longer possesses at the time of the Court's judgment. As a result, the defendant may be absolutely deprived of their assets, while the value subject to confiscation remains very high. From this viewpoint, Portuguese provisions may lead to results even more extreme than a system of *confiscation générale*, emphasizing the need for a safeguard or hardship clause similar to that provided for in the general confiscation regime (Article 112[2]).[49]

Conversely, some argue that the Portuguese system falls short in specific dimensions compared to what is envisaged in the Directive 2014/42/EU. These critics, often from the judiciary and the Public Prosecution Office, propose that the legislature introduces the possibility of confiscating even the assets proportional to the defendant's lawful income if the specific elements of the case and available evidence suggest their likely criminal origin.[50]

2.4. What is the legal nature of extended confiscation in Portugal?

The fact that the legislator categorises extended confiscation as a measure for preventing economic crime has not been overlooked in the doctrinal discussion about its legal nature. Part of the doctrine views extended confiscation as a **sanctioning instrument of a criminal nature**,[51] classified by some as a mere "penal effect of the conviction"[52] and by others as a "criminal penalty without an act" aimed at punishing, in a veiled manner, previous suspected criminal activity (that yet cannot be proven).[53]

Most scholars believe, however, that extended confiscation cannot be qualified as a penalty, nor even as a criminal sanction. The reason is that its "*causa efficiens* (…) is not a

[49] Sanhudo 2022, 199, 211; see also Correia 2012, 107.
[50] See Correia 2014, 98; Faria 2022, 78-79.
[51] In this regard, alongside the authors mentioned in the following notes, see Cunha 2017, 18-25; Matos 2017, 30-31; Sanhudo 2022, 208-213.
[52] A. Dias 2010, 39-41.
[53] Godinho 2003, 1347-1351.

concrete offence to which it could be attached, but rather a general concept of criminal activity". The requirement of the conviction for an offence of a certain kind "is only a means of *strengthening* the presumption of criminal origin of disproportionate and unjustified property and, at the same time, *limiting* its scope".[54] This line of thought (also supported by case law) regards extended confiscation as an ***administrative measure*** aimed at eliminating the presumed gains of suspected criminal activity[55] or even a ***civil institute*** with restitutive purposes designed to simply restore an ordering of property in compliance with the law.[56]

2.5. Which are the legal instruments for the protection of individual rights in Portugal?

Extended confiscation is ordered in the criminal proceedings where the responsibility of the asset holder for the "triggering offence" is decided. The Public Prosecutor calculates the amount to confiscate in the indictment or, if this is not possible, up to 30 days before the trial (Article 8[1][2] of Law No. 5/2002), based on the financial and asset investigation conducted by the Asset Recovery Office of the Judiciary Police. Once notified, the defendant has 20 days to present their defence and indicate evidence to be produced at trial (Article 9[4][5] of Law No. 5/2002). If the requirements are met and the defendant cannot prove the non-criminal origin of the assets, the Court issues a confiscation order in the conviction (Article 12[1] of Law No. 5/2002). Since the Portuguese extended confiscation regime is value-based and the confiscation order can only be enforced against the defendant's assets, the rights of third parties are not affected.

Regarding other types of confiscation, it is the responsibility of the Public Prosecutor to present, in the indictment, the facts necessary for the forfeiture to be ordered.[57] The

[54] Caeiro 2022, 16.
[55] Caeiro 2011, 308-313; Borges 2017, 223-225; Nunes 2017, 13-16.
[56] Rodrigues 2018, 53-55, Faria 2022, 53-60, Monte 2023, 127-132; against the classification of (any form of) confiscation as a restitutive mechanism of a private law nature: Caeiro 2022, 17-19.
[57] The facts to be presented are different depending on the specific type of confiscation involved. For the confiscation of instruments, it must be demonstrated that the objects were used or intended to be used in the commission of a criminal act and that they are considered dangerous. In the case of confiscation of products and profits, it is necessary to establish a concrete connection between the assets and the particular offence committed. When dealing with value-based confiscation, the net value of the benefits gained from

defendant is afforded the same opportunities for defence as those available in relation to the criminal charges. If all relevant facts are presented, it is accepted that the judge may order confiscation even if the Prosecutor has not explicitly requested it.[58]

When it comes to **assets belonging to or transferred to third parties**, the possibility of confiscation must be communicated to the owner, who must be given the opportunity to be heard and to exercise their right to a fair trial before any decision is rendered (Article 347-A of the CPP).[59] However, the legislator does not specify the terms under which the third party's procedural intervention is to be exercised. Key issues remain unclear, such as whether the owner of the assets must be notified of the indictment containing the relevant facts, whether the right to a fair hearing can be exercised at any time or only within a specific period (and what that period is), whether the third party has the right to legal representation, and whether they can present and request the production of evidence at the trial hearing.[60] In the absence of specific guidance, it is generally understood that the third-party owner holds the same status as the defendant, enjoying not only the right to make a statement but also the right to legal representation and to request the production of evidence.[61]

The same adversarial rights must be guaranteed to **the alleged perpetrator of an offence who cannot be tried** due to a cause of termination of the criminal proceedings, such as amnesty or the statute of limitations.[62] If punishment is not possible because of the perpetrator's death or absconding, the proceedings continue solely for the purpose of confiscating instruments, products, and profits (Articles 127[3] and 335[5] of the CPP). In such cases, a hearing for the affected individual is, by definition, not possible.[63] The

the crime must be quantified. Finally, for third-party confiscation, the illegal origin of the assets and the concrete reprehensible behaviour of their holder must be shown.

[58] See J. N. Duarte 2023, 102, referring, as an example, to cases in which it is necessary to dispose of seized assets (Article 374[3]c of the CPP).

[59] The drugs law (Decree-Law 15/93) provides for a special regime for the protection of the rights of bona fide third parties, which gives the owner of the property the initiative to file an incident in defence of their rights, indicating the means of proof to be produced.

[60] For an overview of the points not resolved by the law, see Bucho 2018, 231.

[61] Silva & Albuquerque 2023, 368.

[62] Silva & Albuquerque 2023, 368. Cf. also TEDH Case GIEM v. Italy (GC) de 28.06.2018.

[63] The legislator does not specify the formalities to be observed in these cases of non-conviction based confiscation. Criticising this omission, Bucho 2018, 246-247, and J. N. Duarte 2023, 150-151.

limitation period for these proceedings aligns with that of the corresponding criminal case (Article 112-A[2]).

To ensure the enforceability of the **extended confiscation** judgment, the Public Prosecutor can request the (preventive) freezing of the defendant's (lawful) assets at any time if there is a "well-founded fear of a reduction in defendant's property and strong indications of the crime" (Article 10[2] of Law No. 5/2002). The **freezing order** can be adjusted – either extended or reduced – if the value determined for confiscation exceeds or falls short of the initial estimate (Article 11[2] of Law no. 5/2002). Furthermore, the freezing will be lifted if the defendant voluntarily provides an economic bail deposit equivalent to the value of the assets (Article 11[1] of Law no. 5/2002).[64] The freezing order comes from a judge who decides without prior hearing of the defendant (Article 10[3]). Once executed, the order is notified to the defendant, who may then file an opposition or request the provision of a bail deposit. Both the freezing and the confiscation order can be appealed under the general terms.

Under the **general regime**, procedural legislation provides two distinct mechanisms to ensure the enforceability of the final confiscation order: the seizure of instruments, products, and profits (Article 178 of the CPP) and preventive freezing (Article 228 of the CPP).[65] The presence of these two mechanisms with similar objectives has led to uncertainty within the legal doctrine regarding their respective applications.[66] This uncertainty is exacerbated by the fact that the jurisdiction to decide and the preconditions for the decision for each mechanism are different. **Freezing orders** are issued by a judge upon the request of the Public Prosecutor and requires evidence of a *periculum in mora*

[64] Under Portuguese law, *bail* serves various precautionary purposes: when the goal is to prevent the defendant from fleeing or failing to appear, it is referred to as "prison bail" or simply "bail"; if the aim is to prevent the dissipation of assets, it is known as "economic bail".

[65] The option to issue a freezing order to ensure the enforceability of confiscation was introduced by Law 30/2017. In the original version of the Code of Criminal Procedure, the scopes of seizure and freezing orders were distinctly defined: seizure was intended to preserve objects that could either serve as evidence or be forfeited, while freezing orders were exclusively designed to secure the payment of fines, court costs, and compensation to the injured party.

[66] Andrade & Antunes 2017, 360 ss.; Pais 2019, 202 s.

situation (Article 228 of the CPP). **Seizure**, on the other hand, can be ordered by the Public Prosecutor based on indications that the assets are either instrumental to the crime or have criminal origins (Article 178 of the CPP). Police may even execute seizures without a warrant in urgent situations where there is a "well-founded fear of the disappearance, destruction, damage, disablement, concealment, or transfer" of property that could potentially be forfeited (Article 178[5] of the CPP).[67]

To explain these differences, doctrine suggests that seizure concerns instruments, products, and profits directly related to the crime, including those belonging to third parties, and aims to ensure the enforceability of confiscation in kind. In contrast, preventive freezing is focused solely on the defendant's lawful assets and is intended to ensure the enforceability of value-based confiscation.[68] If the aim is to guarantee the payment of a sum rather than the delivery of specific assets, the freezing order can be substituted by the provision of a bail deposit (Article 228[5]).

2.6. Does – in your opinion based on the answer to the above-mentioned questions / the literature in Portugal – extended confiscation comply with the following principles?

As seen above, the Portuguese law ensures those affected by "ordinary" and extended confiscation the minimum procedural guarantees laid down in Article 8 of Directive 2014/42/EU – that is, "the right to an effective remedy and a fair trial in order to uphold their rights".[69] Nevertheless, there is a controversy in the legal literature regarding the compatibility of extended confiscation with some fundamental principles of criminal law and procedure.

Extended confiscation can be seen as a penalty or at least as a penal reaction, either for the triggering offence or for the crimes that are suspected to be at the origin of the unexplained wealth (acquisition crimes). From the point of view of substantive criminal law,

[67] Seizures made by the police are subject to validation by a judicial authority within 72 hours (Article 178[6] of the CPP).
[68] Correia 2015, 524; Antunes 2020, 591.
[69] Concludes in this sense Antunes 2020, 593.

scholars who see extended confiscation as a reaction for the latter crimes argue that there is a potential violation of the **principle of guilt/culpability** arising from punishing someone based on mere status (being the holder of property disproportionate to their lawful income) or suspicion of (not proven) prior criminal activity.[70] Extended confiscation also raises concerns for those who view it as a criminal reaction to the crime for which the defendant is convicted. On the one hand, it may potentially violate the **principle of legality**, particularly in its requirement for criminal determinability, as the "penalty" is based on the individual's unexplained wealth and thus remains entirely indeterminate. On the other hand, the **principle of culpability** may also be compromised, given that the extent of the confiscation is not limited to the level of guilt for the specific offence.[71]

On a procedural level, there is a discussion on whether opting for a legal presumption of the illicit origin of the property contradicts the **right to a fair trial**, the **presumption of innocence**, the **principle of *in dubio pro reo***, and the **privilege against self-incrimination**.[72] Criticism focuses mainly on the peculiarity that Portuguese law dispenses with any concrete evidence of the criminal provenance of assets and shifts the burden of proving their lawful origin to the accused person, thereby resolving the doubt about the origin of the property to their disadvantage and making their silence or inactivity, in practice, unfavourable to them.

For most authors, however, the mechanism withstands constitutional scrutiny because "the target of the legal presumption is the origin of the property, not the responsibility of the concerned individual for the offences that have generated it (which might even have been perpetrated by third parties)".[73] This conclusion was echoed by the Portuguese Constitutional Court, which classified extended confiscation as "a measure associated with verifying an incongruous financial situation, whose lawful origin has not been determined" (Ruling No. 392/2015).

[70] Godinho 2003, 1357-1358; Sanhudo 2022, 213-216.
[71] A. Dias 2010, 39-41.
[72] In the view that there has been a violation of the privilege against self-incrimination, the presumption of innocence and the principle of *in dubio pro reo*: Godinho 2003, 1358-1359; Sanhudo 2022, 213-216. With doubts about the violation of the fair trial principle: Borges 2017, 225-236.
[73] Caeiro 2022, 16. Similarly: Caeiro 2011, 319-320; Correia 2012, 116-119.

Either way, critics maintain that extended confiscation entails a disproportionate restriction on the **right to property**.[74] The fair trial principle extends beyond criminal sanctions and applies across all judicial proceedings that may restrict fundamental rights. If extended confiscation relies on a presumption of unlawful origin of the property and the court's order is not based on convincing evidence that the assets stem from broad criminal activity, there can be a breach of the fair trial principle. Consequently, the deprivation of property may be seen as arbitrary.

Under the premise of the non-criminal nature of extended confiscation, the **principle of proportionality** plays a particularly important role. A violation of the principle of proportionality may arise from the fact that the law does not require extended confiscation to be linked to a conviction involving a specific type or severity of penalty. Thus, confiscation is possible even when the offender is sentenced to a fine or another non-custodial measure for minor offences.[75] Additionally, the method used to calculate the value of incongruous assets can further infringe on the principle of proportionality, while leading to excessive confiscation. The law mandates that the value of assets no longer in the defendant's possession be included in the calculation, a provision that could, in practice, result in the confiscation of all of the convicted person's current assets.[76]

Finally, there are those who refer to a possible violation of the **principles of legality** and the **protection of trust** because the legislator has not sufficiently clarified the requirements necessary to activate the presumption, particularly whether proof of prior criminal activity is necessary[77].

The doctrine and case law make no specific reference to potential violations of the other principles identified in the questionnaire, namely the **principle of non-retroactivity** of the more severe statute (which is, in any case, upheld by Portuguese law), as well as the **rights to defence** and the **right to privacy**.

[74] Cf. Borges 2017, 227-228; Torrão 2020, 2139-2165.
[75] Faria (2022, 28-29) considers, however, that an interpretative restriction of the scope of the provision, for reasons of appropriateness and proportionality, 'could mean the subversion of the objective pursued by the legislator of achieving a property order that complies with the law'.
[76] Sanhudo 2022, 199, 211; see also Correia 2012, 107.
[77] Cunha 2002, 21-23, 51.

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