Co-funded by the European Union

**Project: 101046613 – RINSE – JUST-2021-JTRA**

# RINSE

## Research and INformation Sharing on freezing and confiscation orders in European Union

# D 2.4 – FOCUS GROUP MEETINGS

Report on the results of the focus group meetings, highlighting major practical obstacles to effective international judicial cooperation in the specific legal field.

G.R.A.L.E.
Research and consulting s.r.l.

Napoli (IT),
September 2023

RINSE is a project co-funded by the Justice Programme of the European Union, GA no. 101046613. The contents of this publication are the sole responsibility of the project's implementing team and the European Commission cannot be held responsible for any use which may be made of the information contained therein.

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Gerechtelijke Opleiding

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Institut de Formation
Judiciaire

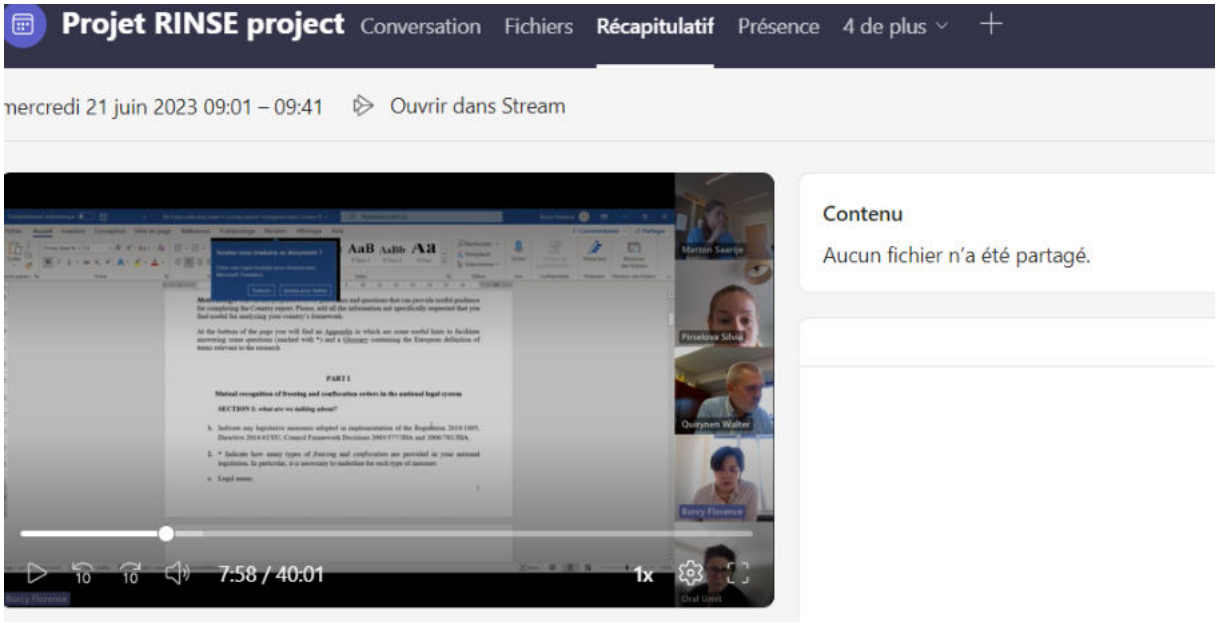
**RINSE - FOCUS GOUP MEETINGS : Report (IFJ/IGO)**

In order to comply with the task set out in the workpackage 2 of the project, we have identified the national experts as a priority.

First of all we contacted the director of the national central authority for seizure and confiscation (OCSC) in charge of this matter. The deputy director of this institution was designated as the Belgian contact point for the steering committee of the project.

In order to fill in the country data report, he referred to other experts in this matter we have contacted : a deputy general prosecutor at the court of appeal in Ghent and an expert of the Ministry of Justice.

After having submitted the questionnaire to our stakeholders, we organized on 21 June a first online meeting (see picture) in order to discuss some points of the questionnaire an coordinate their contribution.




Mr. Quirynen (OSCS), Ms. Matton (General Prosecutor Office in Ghent), Ms Pirselova (Ministry of Justice), Ms Oral and Ms Borcy took part of this meeting.

After this meeting, as recommended by Mr Quirynen, we also contacted an expert from the Ministry of Finance, Mr. Tom Boelaert in order to ask him to contribute to some specific parts of the questionnaire.

At this stage of the project, we would like to point out that one of the major practical obstacles was to find the competent contact persons for this very specific topic and to get their input in reasonable delay.

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*RESEARCH AND INFORMATION SHARING ON FREEZING AND CONFISCATION ORDERS IN EUROPEAN UNION*

*A PROJECT FINANCED BY THE JUSTICE PROGRAM OF THE EUROPEAN COMMISSION AND LEADED BY THE UNIVERSITY OF CAMPANIA VANVITELLI*

**Work Package 2.4 Focus Group meetings**

# FOCUS GROUP REPORT

## I. Focus group leaders

These focus groups have been leaded by both University of Toulouse Jean Jaurès and Crim'HALT.

**Fabrice Rizzoli**, doctor in political science on the Italian mafias and specialist in the social use of confiscated properties, he is a researcher within the COESO project (Social Use of Confiscated Properties, of which the acronym is USBC in Italy) and RINSE (Seizing in Europe).

**François Fameli**, specialist in the social and solidarity economy. He is the author of a dissertation on the social use of confiscated properties in Italy, submitted to the Jean Jaurès University of Toulouse, which is a partner for the RINSE research.

**Charlotte Saumagne**, doctor in private law at the University of Pau : thesis on confiscation.

## II. Participants in the three focus groups

### A. Focus group organized at the Agency for Management and Recovery of Seized and Confiscated Assets (AGRASC), Paris - France

**Arnaud de Laguiche**, magistrate - Head of the AGRASC real estate department (Public Prosecutor at the National Financial Pole).

**Sylvie Marchelli**, magistrate deputy operational director AGRASC (Vice-prosecutor of the Republic near the judicial court of Paris).

**Marion Camaro**, Magistrate - Deputy head of the legal and financial department (Substitute public prosecutor at Nanterre's court).

**Sara Brimbeuf**, lawyer and specialist in illegal financial flows at Transparency International and professor at IRIS sup.

**Charlotte Saumagne**, doctor in private law at the University of Pau: thesis on confiscation.

### B. Focus group organized at the Ajaccio - Corsica Judicial Court

**Cécile Cathala**, magistrate at the Ajaccio Judicial Court.

**Louise Bolufer**, magistrate, substitute placed at the Court of Appeal of Bastia in charge of seizures and confiscation.

**Nicolas Mingant**, magistrate, deputy, in charge of criminal litigation.

**Caroline Barras**, police detective in Gendarmerie replacing Colonel André (gendarmerie).

**Warrant Officer Gatelier** police detective in Gendarmerie

**Laurent Dorval** police detective, financial investigation special group (interministerial Research Groups are the investigation : GIR).

**Valérie Marchand**, police detective, deputy prosecutor in charge of eco-fi litigation.

**Séverin Villenave**, police detective, specialised assistant (seconded from public finances).

**François Meunier**, police detective (PJ) Ajaccio police station.

**Gérard Legay,** police detective (PJ) specialist in confiscation.

### C. The focus group organized in Marseille at the headquarters of the local branch of AGRASC

**Audrey Jouaneton**, coordinating magistrate of the Regional Branches of the South Zone (Marseille-Lyon-Bordeaux) at AGRASC.

**Pascal Gand**, magistrate, 1st Deputy Vice-President at 6th correctional chamber of the Judicial Court of Marseille, specialised in Interregional Court (economic, public health and environment).

**Pascal Robion**, police detective, referent investigator for the Marseille AGRASC branch.

**Emilie Almero**, magistrate, deputy prosecutor for the Interregional financial jurisdiction of Marseille in charge of money laundering litigation.

**Carine Bonnevie-Savy**, magistrate, referent investigator of the AGRASC office in Bordeaux.

**Nathalie Roche**, magistrate, investigating judge at the Judicial Court of Marseille.

**Jean-baptiste Corti**, police Commissioner and head of the GIR (interministerial Research Groups are the investigation = financial investigation special group) of Marseille.

## III. Research distribution rules

All of the different focus groups listed above followed the same procedure:

### A. Distribution and signature of consent forms

The focus groups gave their signatures for every consent form given at the beginning of the exchanges and previously signed by the participants.

The consent given relates to:

The exchanges that took place within the framework of the focus groups were recorded with a voice recorder in order to establish this report.

The exchanges were not filmed. But photos were taken of these meetings.

Vocal files will not be published.

The final report, given by the 4 partners using the focus group data collection, is considered as "SENSITIVE".

This report, as well as the names of the participants (and their e-mail addresses), will only be sent to research partners and officials of the European Commission. The names of the participants will not be published on the website.

### B. Rules applicable to the focus group leaders

The leaders commit not to use the information collected outside the writing of the report or not to quote the author of comments collected during the focus groups.

### C. The objective of this focus group

The aim of the focus groups is to dress the state of play of the French procedure for the seizures and recovery of assets taken from crime.

### D. The method

The hosts lead the discussion among the participants. Their interactions depend on the richness of the content exposed.

## IV. The results from the focus groups

### A. About the penalty of seizures in France

Unanimously, the three focus groups underlined that the Article 131-21 of the Penal Code, which governs the confiscation in France, is a **"well-constructed"** and **"extensive"** judicial tool, which offers significant confiscation possibilities.

Article 131-21 of the Penal Code provides:

"The complementary penalty of confiscation is incurred in the cases provided by the law or the regulations. It is also incurred as of right for crimes and for infractions punishable by a prison sentence of more than one year, except for press offences.

The confiscation covers all movable or immovable property, whatever its nature, divided or not, having served to commit the infraction or which was intended to commit it, and of which the convicted is the owner or, subject to the rights of the owner in asset faith, of which he has free disposal.

It also applies to all property which is the direct or indirect object or product of the infraction, with the exception of property which may be returned to the victim. If the product of the infraction has been mixed with funds from lawful origin for the acquisition of one or more assets, the seizure may relate to these assets only up to the estimated value of this product.

The confiscation may also relate to any movable or immovable asset defined by the law or the regulations which punishes the infraction.

If it is a crime or a misdemeanour punishable of at least five years of imprisonment, and having procured a direct or indirect profit, the seizure also applies to movable or immovable assets, whatever its nature, divided or not, belonging to the condemned person, or, subject to the rights of the owner in asset faith, of which he has free disposal, when neither the condemned person nor the owner, put in a position to explain himself on the property whose confiscation is considered, could not justify the origin.

When the law punishing the crime or the misdemeanour does provide it, the confiscation may also relate to all or part of the asset belonging to the convicted person, or, subject to the rights of the owner in asset faith, of which he has free disposal, whatever its nature, movable or immovable, divided or not.

Confiscation is mandatory for objects qualified as dangerous or harmful by law or any regulation, or whose possession is unlawful, whether or not these assets are the property of the convicted person.

The complementary penalty of seizure applies under the same conditions to all incorporeal rights, whatever their nature is, divided or joint.

Confiscation can be ordered by value. Confiscation under value may be executed over all assets, whatever its nature, belonging to the condemned person, or, subject to the rights of the owner in asset faith, of which he has free disposal. For the recovery of the sum representing the value of the confiscated object, the provisions relating to judicial constraint are applicable.

The confiscated object is, unless there is a specific measure providing for its destruction or attribution, vested in the State, but it remains encumbered, up to the amount of its value, with real rights lawfully constituted for the benefit of third parties.

When the object confiscated is a vehicle which has not been seized or impounded during the procedure, the convicted person must, on the injunction made by the public prosecutor, return this vehicle to the service or to the organisation in charge for its destruction or alienation".

The article 131-21 of the Penal Code offers a wide range of seizure mechanisms. It allows the confiscation of the outcome and instrumentalities of the infraction, but also offers to magistrates the possibility, when the law punishing an infraction or crime so provides, of confiscating all or a part of the property belonging to the convicted person (Article 131-21, paragraph 6 of the Penal Code).

However, it was noted unanimously, that this article remains **insufficiently used**, **underused**.

Some figures were brought in the different focus groups:

On a national scale: **approximately 32% of seized assets are permanently confiscated**, that is only one third of seized assets.

The management and recovery agency for seized and confiscated assets has gone from 10 to 200 building confiscations per year within ten years.

At the level of the Ajaccio Judicial Court: **approximately 50% of the seized assets are definitively confiscated, during 2019-2020 periode** (the figure given in the context of the focus group is not an official figure, it resulted from an internal study). It is important to note that there is a will of the Ajaccio Public Prosecutor's Office to emphasise the sanction of confiscation.

It is important to note that **confiscation in equivalent value** is one of the most effective means of confiscation in France. It allows the confiscation of a sum of money or a asset in place of the said profit up to what has been estimated as the product of the infraction. **It represents almost 50% of the French confiscations**.

The figures presented seem to be inconsistent with the French legal framework, which allows the confiscation of detached assets from the main infraction, the confiscation of property on which there is only a presumption of unlawfulness or the confiscation of asset whose person sentenced to free disposal (that is the confiscation of the assets of third parties).

Faced with this observation, several explanations were given by the participants during the focus group:

- **Reluctance to issue other forms of confiscation than those that allow for the confiscation of products and instrumentalities linked with the infraction.**

In the French juridical tradition, **confiscation is attached to a penal conviction**. So, on one hand, it is culturally linked to the need to join property to an offence. And on the other hand, it is linked to the acknowledgment of guilt of the creator of the offence who owns said property.

Paragraphs 5 and 6 of article 131-21 of the Penal Code offer a wide spectrum of seizure and confiscations. But there is a reluctance from magistrates to confiscate more than the product of the infraction. It is not in the French judicial culture.

Confiscation, as it has been developed these past years, arises against respect for a certain number of legal principles, such as the principle of proportionality or individualization of the criminal sanction, which has the effect of limiting the scope of the article 131-21 of the Penal Code.

The focus groups underlined the fact that the law case from the Court of Cassation, but also from the European Court of Human Rights, in particular through the application of the **principle of proportionality**, tends to limit the spectrum of the article 131-21 of the Penal Code.

- **The lack of awareness and of training from magistrates in the legal possibilities offered by article 131-21 CP.**

Despite a training at the National School of Magistracy with court auditors and the possibility of carrying out an internship for magistrates within the Agency for the Management and Recovery of Seized and Confiscated Assets, it emerged from the focus groups that a small part of the magistrates, but also of the investigation services are interested in confiscation.

In France, **confiscation is an optional additional penalty**[1]. Its pronouncement is left to the discretion of the magistrates. Consequently, there is a major interest in raising their awareness so that they understand the interest of pronouncing a confiscation sentence and in training them in the pronouncement of a confiscation sentence.

The focus groups showed that one of the main advantages of the confiscation penalty is its **symbolic dimension**, particularly to the offender.

Currently, convicted persons can call conviction decisions with the aim of removing the confiscation sentences. This leads to the following idea: confiscation disrupts delinquency.

However, appeals may have the negative consequence of reversing first instance judgments and purely and simply removing the final sentences.

To avoid this, some focus group participants explained that they voluntarily concealed the confiscation sentence, because its pronouncement could represent a great risk during the appeal, and **favouring the penalty of a fine** (even if it was recalled that the sentences of small fines may not be recovered).

This was highlighted in the three focus groups, confiscation is a **difficult and technical procedure**, which can lead professionals not to use this sanction which constitutes a **significant additional workload in a judicial environment which lacks time, human and material resources**.

The focus groups emphasized the need for human and specialized resources for the confiscation procedure to be effective. In France, **assistant lawyers** – whose role is to provide assistance to magistrates – **specialized** in seizure and confiscation have been recruited, but their number remains limited.

The discussions emerged about the need to put **competent and specialized personnel** in place around the magistrates, as well as **investigators dedicated to asset investigations** in order to guarantee the full effectiveness of the confiscation penalty.

They currently regret that the lack of training and interest in this sanction is at the origin of a large number of appeals which reverse the decisions of the first instance.

[1] Even if cases of compulsory confiscation exist: confiscation is compulsory for slumber merchants, but also for traffic offences in a state of legal recidivism.

It is interesting to note that on the other hand, the defence lawyers have largely seized and plead the non-proportional nature of the confiscation penalties.

Indeed, the focus groups recalled that **the right to property is a right protected by the Constitution**. Thus, case law verifies with importance **the proportional nature** of the sanction imposed[2].

The proportional nature of the confiscation penalty is analysed with regard to the acts committed and the income and the assets of the convicted person.

It is sometimes judged as a **double patrimonial sentence**, in particular when it is imposed simultaneously with a fine.

Whereas this constitutional protection has the consequence of making the adoption of a sanction of confiscation without a criminal conviction unlikely in France.

However, French law has put in place a procedure for the restitution of seized assets in which the Public Prosecutor's Office may refuse to return property even though the procedure has not resulted in a conviction.

Some professionals interviewed linked it to a confiscation mechanism without criminal conviction, because since the adoption of the law of June 3, 2016, the refusal to return assets applies to the instruments and direct and indirect outcome of the offence, until the end of the procedure, the trial court did not pronounce on the confiscation of the seized assets, as well as on the restitution.

The article 41-1, paragraph two of the Code of Penal Procedure relative to the restitution of property requested during the investigation or when no court has been seized, or when the court seized has exhausted its jurisdiction, provides motives for non-restitution of the seized assets: "*there is no need for restitution when this is likely to create a danger for persons or assets, **when the seized property is the instrument or the direct or indirect product of the offence** or when a specific provision provides for the destruction of objects placed in the hands of justice*".

The case law of the Court of Cassation has held that a proportionality control should be applied in the event of non-restitution. This control must be made with regard to the personal situation of the applicant and the seriousness of the offence.

It emerged from the focus groups that the non-return of the seized assets offers an interesting possibility to the magistrates not to return a seized asset when the trial court has not stated it. This article makes it possible to confiscate the asset even though the trial court has not condemned the offender to a penalty of confiscation.

[2] Even if the Court of Cassation affirmed that the principle of proportionality "cannot apply to the confiscation of property which, in its entirety, is the product or the object of the offenses of which the defendant has been declared guilty" (Crim. 7 Dec. 2016, no. 16-80.879). It then specified, under the visa of Article 1 of Protocol No. 1 to the European Convention of Human Rights, that "the judge who pronounces a measure of confiscation of all or part of an asset" must, between others, “assess the proportionate nature of the infringement of the right to property” (Crim. March 8, 2017, no. 15-87.422). This case law was subsequently confirmed (Crim. June 27, 2018, No. 16-87.009). This requirement has also been raised for seizures where the criminal chamber requires the reasons for the seizures (Crim. June 27, 2018, No. 17-84.280).

However, the participants insisted on the **heaviness of this new litigation in their workload**, because of the obligation which allows them to justify the non-restitution with regard to the provisions of the article 41-1 of the Code of Penal procedure, but also the personal situation of the applicant and the seriousness of the offence.

The focus groups highlighted the fact that the confiscation sentence can lead to the emergence of multiple appeals: on the sentence itself, but also on the decision of non-restitution. This constitutes additional steps that overload the work of the courts.

An important element must be clarified: **the appeal is suspensive**. This means that the appeal suspends the execution of the first judgement. Therefore, it suspends the execution of the confiscation penalty.

## B. About the procedure for recovering assets of criminal origin in France

### a. Identification and tracking of assets of presumed illicit origin

The focus groups have stated **several difficulties** during the survey phase. Among these difficulties can be cited the evaluation of the amount of the result of an offence, the identification or the traceability of the outcome of an offence.

The patrimonial and financial investigation, as well as the investigation of the "patrimonial environment" of offenders are **new angles in criminal investigations** in France, which could partly explain the difficulties presented above.

Indeed, the focus groups concluded that the "**profession of heritage investigator**" is a new profession. There is a need to recruit and train more investigators so that these types of surveys are properly carried out.

**The specialization** of investigation services is an important element to take into consideration in the practice of asset investigations, seizures and confiscations. The Marseille focus group showed that the investigation services specialized in the fight against organized crime or economic and financial crime, in particular, created more investigations for the purposes of confiscation.

It emerged from the focus groups that the Interministerial Research Groups are the investigation (GIR) services on which the seizure procedures in France are based.

This focus group explained that in terms of narcotics or common law delinquency, there are only a few confiscations (contrary in case of financial offenses). The nature of the offence is what primarily mobilizes the investigation services, also as the manifestation of the truth. **The question of the result of the offence often arises at the end of the procedure**.

It was also mentioned the fact that **asset investigations generally intervene lately within the procedure**, which considerably reduces the efficiency of their work.

It should be remembered that in France, there is no dissociation between traditional criminal procedure – which tends to reveal the truth – and the procedure for confiscating and recovering the outlooks of crime. Consequently, the procedure for confiscating and recovering the outlooks of the crime is subject to the time deadline that frames the traditional criminal procedure.

The penal procedure is governed by the concept of "reasonable time", thus in 2018 a correctional procedure lasted on average 9 months between the moment the Public Prosecutor's Office was seized of the file and the judgement or even the dismissal. The procedure may take longer if any instruction is required. In 2018, the delay was of 43 months. However, the focus groups recalled that these deadlines are **too short** to carry out a property or financial investigation allowing a complete inventory to be made of the property environment of the offender or to identify, trace and locate the instruments and /or products of the offence. On this issue, the **concept of post-conviction forfeiture** was discussed as a possible palliative to this difficulty.

Among the difficulties to be dealt with during the investigation phase, the question of seizable and/or confiscable property arises? What are the criteria for targeting a property?

There are the **legal criteria** resulting from article 131-21 of the Penal Code. The instrumentalities and outlooks of the offence could be seized and confiscated, equally for the offences concerned, the assets for which there are doubts regarding their lawful origin. Also, all or part of the assets may be seized and confiscated when the law which punishes an offence or a crime provides for it.

Among the legal criteria, it must be specified that any property – movable asset, intangible and tangible – can be seized or confiscated.

However, the focus groups raised the following question: **should all assets be seized and confiscated?** Or, on the contrary, is it possible to make choices since the investigation stage?

Among the participants, two groups are opposed on this question. Some, including in particular those who work within the Agency for the Management and Recovery of Seized and Confiscated Assets, believe that not all assets are seizable and confiscable.

The example of companies and businesses has been given many times. One of the arguments being that these assets immediately lose value once they have been seized and/or confiscated. It is more difficult to save jobs when there are seizures. These seizures are not profitable and may eventually become an excessive burden for the State. In addition, seizing and confiscating this type of property requires the recruitment and training of Ad'hoc administrators. It was mentioned in the focus groups that there is a mistrust with the judiciary in its ability to save jobs and big and complex economic structures.

The AGRASC does not currently have enough competent personnel and necessary skills to take in charge of this type of asset, plus value it over time. The following idea was raised: it should be possible to go through the commercial courts in order to have reorganizations recorded and to involve legal representatives, who have the competence to manage this type of assets.

The idea is that the sanction of confiscation remains a sanction for the offender and does not become a sanction – in particular, a financial sanction – for the State.

Finally, some professionals, for their own reasons, expressed their reluctance to seize and confiscate animals.

However, shares as social parts have been confiscated.

Other participants, including magistrates and prosecutors at the Judicial Courts, expressed their disagreement with this AGRASC guideline. For them, **the meaning of the penalty must be preeminent over economic/budgetary imperatives**.

What must be seized and confiscated as a matter of priority are the instruments and products of the offence as they **deprive the offender of the profits derived from his offense**, regardless of the final financial cost.

The penalty of confiscation has **an important symbolic charge**. Thus, some professionals have explained that they do not hesitate to confiscate, even if the asset has little value, preferring in these cases to destroy it because of too low value and a high management cost. The confiscation of vehicles was cited as an example, since in the event of a legal recidivism in terms of traffic offences, the vehicles are necessarily confiscated.

It is interesting to note that the penalty of confiscation fuels the debate around the meaning of the criminal penalty. Within the discussions, the parallel has been made with the custodial sentence, which is not treated as a sentence that should be economically profitable.

The focus groups – in particular Marseilles' – noted the interest that there could be in **updating the data available into the justice system concerning the assets of the offender**, when the latter is summoned before the trial court.

There may be an interest in reassessing the assets of the defendant when they are judged, particularly in cases where extended confiscation or confiscation of all or parts of the assets is incurred.

However, this actualization work might not be difficult to implement. Two major obstacles need to be noted: the difficulty in re-contacting the investigation services for the purpose of updating the financial situation of the person concerned, also as determining who is competent to relaunch this type of investigation.

### b. About the seizure procedure with a view to a possible subsequent confiscation

Searches and seizures are parts of the investigative acts most regulated by the Code of Penal Procedure. The verbal procedures, authorizing searches – often carried out as part of a procedure aimed at establishing the truth and not confiscating – delimit the field of property likely to be seized.

In most cases, seizures related to assets linked to the commission of the offence.

However, it is often in the context of searches that investigators will be able to observe that the persons concerned by the search have, in their possession, assets whose economic value is greater than the income that they can declare. However, these assets cannot be seized.

On this issue, the focus groups - particularly those conducted within the judicial courts - have shown the need to **strengthen communication between magistrates and the investigation services during searches**, in particular to allow investigators to have a wider field of action and to extend the scope of seizable assets at their findings.

There is a desire for "**willingness to make legal instruments more flexible/adaptable**", in particular to guarantee that the asset targeted during the search does not disappear. But this would mainly prevent assets from being unnecessarily referred within the verbal procedures. Indeed, it is not uncommon for magistrates to rework downwards the list of assets seized in the context of investigations. And this, because of the legal impossibility of seizing these assets. Part of the assets seized gives rise to restitution.

### c. About the management of assets seized in the context of penal procedure

The French legal framework **tends to facilitate the management of seized assets**. So, French law provides for the possibility of selling the seized asset when it is not useful to establish the truth[3], the possibility of assigning property to judicial services during the procedure[4] and the possibility of destroying the property[5].

However, it is essential to remember that the seizure does not dispossess the defendant of his right of ownership over the asset. This phase can present the significant risk of giving the defendant a right to reparation/compensation if the value of the property has been depreciated, deteriorated during the procedure, on the one hand, and if the latter was released/acquitted, on the other hand.

On this point, the focus groups – in particular those carried out within the judicial courts – have shown that the professionals who have taken up this issue wish to

[3] Article 41-5, paragraph 2 of the Code of Penal Procedure for seized movable property.
Article 706-152 of the Code of Penal Procedure for seized real estate.
[4] Article 41-5, paragraph 3 of the Code of Penal Procedure.
[5] Article 41-5, paragraph 4 of the Code of Penal Procedure.

develop strategies at the local level, enabling them to overcome this type of obstacle. It is in this context **that non-possessory seizure** was discussed[6].

But, in general, the focus groups explained that there was an imperative to acquire significant means to guarantee **adequate management of the seized assets**, mainly when there is dispossession in order to prevent the State from subsequently financially compensating the owner of the property, if the latter were to be returned to it.

It is interesting to note that the professionals interviewed have a reflection about the use of seized assets in the context of a penal procedure. They see it as a strong message sent to crime, especially when property is reallocated to police and gendarmerie services, or even to judicial services. It is important to note that in France **the assets are not reallocated to the services which direct the investigation which led to the seizure**.

But they also perceive the risks, especially if the successful procedure finally gets a dismissal, a release or an acquittal.

Finally, it was recalled that **the sale** of seized and confiscated assets is a **sensitive stage**. There is a risk that the assets offered for sale will be bought by the entourage of the convicted person. The following example was given: the sale of a confiscated assetwill, more precisely a shisha bar, the equipment of which was resold at auction and bought back through nominees by the convicted person.

### d. About the reuse of confiscated property

In French law, the principle is that the sums confiscated resulting from the sale of movable or immovable property are in principle – once the deduction done of the sums due to the main public or private bodies – **integrated into the general budget of the State**.

One of the focus groups specified that it would be interesting to **know the destination of the sums transferred to the general budget of the State**. Knowing how confiscated funds are used is an important communication tool, especially if these funds are benefits to civil society.

[6] It is provided for in article 706-158 of the Code of Penal Procedure.

There are exceptions to this principle:

The agency must ensure that it finances the assistance fund receiving the proceeds from the confiscation of movable or immovable assets of subjects found guilty of drug trafficking offences. This is the **Interministerial Mission of fight against drugs and addictive behaviour**. The agency can also make contributions to the State in order to finance the **fight against delinquency and crime and to finance the prevention of prostitution and the social and professional support of prostitutes**[7]. The Agency make contribution to the “witness protection program”

French law allows **victims** to obtain from the Agency for the Management and Recovery of Seized and Confiscated Assets that the sums due **as compensation titled for their damages**, be paid to them by deduction from the funds or from the value liquidation of the property of its debtor, under certain conditions. The confiscation of which has been decided by a final decision and of which the agency is the custodian[8]. However, participants mentioned that this article was little used in practice. It is a mechanism whose use is strictly regulated by law and also little known to legal professionals.

**The assignment of confiscated property to an investigation or judicial service** is provided by the article L 2222-9 of the General Code of Property of Public Persons. It provides that "movable property whose ownership has been transferred to the State during criminal proceedings following a final judicial decision may be assigned, free of charge, under the conditions determined by interministerial decree, to judicial services or to police services, gendarmerie units, customs administration services or services of the French Biodiversity Office when these services or units carry out judicial police missions”. But immovable properties are excluded from the assignment of confiscated property to an investigative or judicial service.

During the focus groups, participants – both magistrates and investigators – have recalled the importance of this tool in the face of delinquency and of providing the investigation and judicial services with effective tools. For instance, vehicles or computer equipment have been mentioned.

Finally, the article 4 of the law of April 8th of 2021 opened up the **possibility of reallocating confiscated property for social purposes**. Article 706-160 now provides that “the agency may make available, where applicable free of charge, real estate the management of which has been entrusted to it pursuant to ‘1°’ of this article for the benefit of associations whose activities fall as a whole within the scope

[7] Article 706-161, paragraph 3 of the Code of Penal Procedure.
[8] Article 706-164 of the Code of Penal Procedure.

of ‘b’ of ‘1’ of the article 200 of the General Tax Code as well as associations, foundations recognized as being of public utility and organizations benefiting from the approval provided for in article L 365-2 of the Construction and Housing Code. The terms of this provision are defined by regulation”.

It emerged from the focus groups that **the conditions for reusing assets are strict, which limits the possibilities (only 4 social reuse for 2000 assets confiscated in 2022)**.

**Following the particular case of social use of property confiscated in France thanks to international “informal” cooperation before the law[9].**

Should be remembered the first case of social use in France at the beginning of 2021. Here are the facts: an apartment confiscated from an Italian national. The usual practice during confiscation after the request of a third country is to sell the property and that the two countries share the gain of the sale. Here the property was estimated at 600,000 euros. In early 2018, the prosecutors Reggio Calabria, Giovanni Bombardieri, called Pascal Gand (participant of the focus group in Marseille), a French magistrate posted in Rome. Italy gives France the accommodation on the condition that the asset will only be reused for social purposes, as already provided by Italian law. In January 2021, the apartment was made available to an association which makes it a social refuge for a victim of human trafficking, still leaving in. On April 8th, the French law passed.

Participants highlighted the fact that few properties meet the criteria. In addition, the time limits for reallocating property are extremely short (one year from the final confiscation decision). For example, some assets are encumbered or need to be emptied of their occupants. However, in France, a decision of confiscation does not constitute a title of expulsion.

In practice, the assets are made available to the associations, but the latter must take all the costs in charge.

France now has a few examples of the social reuse of confiscated assets. In Marseille, a villa located in the northern districts of the city was confiscated in a drug trafficking affair. The property was made available to an association which comes to

[9] Link : https://www.lemonde.fr/societe/article/2021/10/15/comment-l-appartement-parisien-d-un-mafieux-calabrais-est-redevenu-francais_6098437_3224.html

the victims of delinquency and domestic violence. AGRASC partly financed the upgrading of the property, as it had been vandalized before it was made available.

This is the fourth property reused for social purposes in France. In January 2023, a building in Coudekerque-Branche, in the suburbs of Dunkirk, was confiscated from a slum landlord (confiscation became mandatory for this type of offence) and entrusted to the association *Habitat et Humanisme* to be transformed into social housing.

All the focus groups paid tribute to the adoption of such a system in France. For them, the message sent to civil society is very much positive: such a device has an educational role with the public. Indeed, it makes it possible to communicate on the sanction of confiscation and its interest.

### C. About the role of the French agency for the management and recovery of seized and confiscated assets

One of the major assets of the Agency for the Management and Recovery of Seized and Confiscated Assets is the establishment of a **centralised, specialised and multidisciplinary agency** (706-159 to 706-165 of the Code of Criminal Procedure).

It proves to be a support for magistrates, particularly in terms of **training and advice** on the writing of acts of investigation, instruction or judgement on issues related to seizures and confiscations. **She also plays an advisory role to investigators**. One of the Agency's main strengths lies in the fact that it is multidisciplinary. It is interesting to note that investigators send their seizure reports upstream to the Agency for the Management and Recovery of Seized and Confiscated Assets or to one of its eight local branches to validate the conformity of the said report.

The fact that the Agency for the Management and Recovery of Seized and Confiscated Assets is a specialised and centralised agency makes it a strong player in proposals for the purpose of improving the French procedure for the confiscation and recovery of the outcomes of crime in general.

On the other hand, the orientation of seizure and confiscation procedures towards economically profitable assets is the subject of debate among investigators and magistrates. Some of them would prefer the meaning of the sentence to prevail rather than its profitability.

It is interesting to note that the agency AGRASC itself, especially regarding the project of reuse of confiscated assets for social purposes, faces this financial obstacle. One of the participants explained that the **budgetary cost of the measure** was opposed to the symbolic nature of the social reuse of assets. The social reuse of confiscated assets is not a profitable operation, but it has a strong symbolic function.

## D. About the use of European instruments for the mutual recognition of freezing and confiscation decisions in France

The focus group participants explained that magistrates in France make only a little use of repressive mutual assistance and judicial cooperation. But an upward trend is starting to gradually remain.

The focus group participants noted the improvement in European judicial cooperation tools, in particular the freezing certificate revised by the 2018 regulations. This document common to all countries makes it quite easy to request the freezing of property in a member country of the European Union.

The principle of mutual recognition facilitates exchanges between the judicial authorities of the Member States. So, communication is done from judge to judge in the space of the European Union.

This communication from judge to judge can be the source of difficulties in domestic law. For example, it obliges AGRASC when real estate is seized and/or confiscated to manage land registration. However, when magistrates carry out this type of confiscation in the context of a request for repressive assistance or judicial cooperation, land registration is often omitted, which can undermine the procedure for confiscation and recovery of the property in question.

The focus groups also identified major obstacles during the survey. Deadlines for executing a request for mutual law enforcement assistance or judicial cooperation are sometimes not respected. Indeed, they are too long and do not fully guarantee the seizure and this, contrary to the European provisions which stipulates in this matter that "the executing authority takes the decision relating to the recognition and execution of the freezing order and **executes this decision without delay and with the same rapidity and the same degree of priority as in a similar case at the national level after having received the certificate of freezing**"[10]. In cases of extreme urgency, "*when the issuing authority has indicated in the freezing certificate*

[10] Article 9.1 of Regulation (EU) 2018/1805 of the European Parliament and of the Council of the 14th of November 2018 on the mutual recognition of freezing and confiscation orders.

*that an immediate freezing is necessary insofar as there are legitimate grounds to believe that the assets in question are about to be frozen. removed or destroyed, or when it is necessary for the purposes of an investigation or proceedings in the issuing State,* ***the executing authority shall decide on the recognition of the freezing order no later than 48 hours after receiving it****. The executing authority takes the concrete measures necessary for the execution of the decision no later than 48 hours after the executing authority has made its decision*"[11].

On the other hand, mutual assistance works well with a certain number of States such as Luxembourg, Spain, Portugal or even Hungary.

It is interesting to note that some professionals resort to international letters rogatory, even between countries of the European Union, making it possible to apply confiscation sentences on French territory without penal conviction.

However, it should be noted that now with the adoption of Regulation (EU) 2018/1805 of the European Parliament and of the Council of the 14th of November 2018 about the mutual recognition of freezing orders and confiscation orders can be recognized and executed a confiscation decision without penal conviction on French territory, even though France does not recognize this type of confiscation mechanism in its legislative arsenal, on the condition that the decision is given in the frame and context of the penal procedure[12].

## E. Opened reflexion within the framework of the focus groups conducted in France

French law has adopted interesting judicial instruments such as extended confiscation allowing the confiscation of assets that are not related to the offence prosecuted or the confiscation of all or part of the assets of the convicted person, as well as the confiscation property of which the convicted person has free disposal. These instruments must now be used, apprehended by the magistrates. They are currently too little used for the reasons mentioned above.

The focus groups highlighted the need in France to **change the paradigm**, to impose a change in culture, which can only be achieved through awareness raising and training, right from the survey stage.

[11] Article 9.3 of Regulation (EU) 2018/1805 of the European Parliament and of the Council of the 14th of November 2018 on the mutual recognition of freezing orders and confiscation orders.
[12] Articles 1.1 and 2, 2° of the Regulation (EU) 2018/1805 of the European Parliament and of the Council of the 14th of November 2018 about the mutual recognition of freezing and confiscation orders.

One of the major changes is the possibility of confiscating a asset belonging legally to a third party, but of which the convicted person has free disposal. French criminal procedure has no legal status for this third party. He is neither a witness, nor a victim, nor accused or implicated. There is therefore a need to integrate these new parties into the procedure.

Currently, criminal procedure imposes and focuses on the need and imperative to characterise the nature of the offence. The question of the outcomes/profits of the offence comes in a second step, and if it is addressed, it is dealt with by the investigation services.

It should be kept in mind that the trial court can only confiscate assets that have been the subject of the investigation. However, if the asset investigation is incomplete or not carried out properly, this will have an impact on the pronouncement of the sentence of confiscation.

In addition, if no seizure is made, there is a risk of disappearance of assets targeted in the investigation.

Therefore, there is a need, an imperative for the heritage investigation to become culturally as important as the classic criminal investigation.

But the heritage investigation will only be carried out if, and only if, the magistrate in charge of the survey requests it. The work must be done with the investigation services, but also, and above all, with the judicial services that drive these investigations.

The Ajaccio Judicial Court is a reference. It is a desire of the Public Prosecutor's Office to increase confiscations within the jurisdiction of the Judicial Court, which perhaps explains the figure of 50% of seized assets actually confiscated.

One of the paths explored within the framework of the focus groups is the need to act on the financial aspect of offences linked to organised crime, such as tax evasion or concealed work.

The idea is to operate "surgical strikes" in the patrimonial environment of an offender to “dry him up” financially, as well as his surroundings. This method makes it possible to target the outcomes of an offence other than the offence officially targeted by avoiding the pitfalls associated with the construction of penal cases for drug trafficking or organised crime.

But this logic makes it necessary to focus on the profits of the offence rather than on the narcotic products put into circulation. This is what some focus group participants want to put in place.

Finally, one of the major ones will be the management of active cryptos, which remains the only competence of the Agency for the Management and Recovery of Seized and Confiscated Assets.

## F. The specific case of the recovery of ill-gotten gains (frome international corruption)

In this regard, a law was adopted in 2021, which its scope is still limited. Judicial cooperation in this area is unlike European mutual recognition procedures of the **diplomatic channel**.

There are few results in France despite a large number of prestigious assets.

Recovery in matters of corruption has a different meaning since it is an obligation for States to return looted property to populations who are victims of acts of corruption or embezzlement of public funds.

Repatriation of amounts related to confiscation should in principle be additional to development aid but through separate procedures and legal frameworks.

Among the difficulties listed, the purchase as a reparation by the convicted person with the help of nominees was mentioned or the difficulty of verifying that the sums paid back are used for what they were repatriated. The following example was given: sales of assets seized in the United States were supposed as enough to feed a fund for vaccination in Equatorial Guinea. To date, no funds have been donated. In addition, the assignment would have been decided without any further consultation with the authorities of the concerned country.

**"RINSE: Research and Information Sharing on Confiscation Orders in the European Union"**

## Focus Group Meeting:

# Implementation of EU Regulation 2018/1805 and Directive 2014/42 in Greece: Practical Obstacles in the Greek Institutional and Legislative Framework, Lessons Learned and Best Practices

Thursday, July 6th, 2023, 17:30

**Venue:** Achaiou 16 str, Athens
European Public Law Organization (EPLO)

# Minutes

## I. PARTICIPANTS:

| Name | Position | Organization |
|---|---|---|
| Ioannis Androulakis | Assistant Professor of Criminal Law & Criminal Procedure | National and Kapodistrian University of Athens |
| Ilias Anagnostopoulos | Professor of Criminal Law & Criminal Procedure | National and Kapodistrian University of Athens |
| Panagiotis Maniatis | Public Prosecutor | Court of First Instance of Athens |
| George Voulgaris | Public Prosecutor at the Department of Extraditions and Legal Assistance | Court of Appeal of Athens |
| Alexandros Tsagkalidis | Criminal Defense Attorney | Bar Association of Athens/EPLO |
| Andrea De Maio | Lawyer, Director of Department of Technical Cooperation | EPLO |
| Lola Lyberopoulou | Director of EU & International Projects | EPLO |
| Lea Stavrou | Lawyer, Program Officer at the Department of Technical Cooperation | EPLO |
| Konstantinos Karagiannis | Director, Procurement Officer | EPLO |

### 1. MEETING LOCATION

The Focus Group took place at the premises of the European Public Law Organization (EPLO) at Achaiou 16 str, Athens.

## 2. MEETING DURATION

The Focus Group lasted 3 hours. Started at 17:30 pm and finished at 20:30 pm (Greek Timezone).

## 3. THE MEETING AGENDA

| | |
|---|---|
| **17:30-17:45** | • Welcome remarks by the Project Director<br>• Brief Introduction on the project and the scope of the Focus Group<br>• Introduction of participants |
| **17:45-18:45** | • Presentations by the participants |
| **18:45-20:30** | Group Discussion on:<br>• Technical and legal aspects of freezing, seizure, confiscation, asset disposal<br>• Compliance of the Greek framework with the parameters set by the Regulation 2018/1805 and the Directive 2014/42<br>• Current best practices<br>• Greek case law<br>• Major practical obstacles to effective international judicial cooperation in the field<br>• Practical implementation measures in relation with CoE and ECHR<br>• Awareness level of professionals involved in asset tracing and identification, freezing and seizure, confiscation and international asset disposal<br>• Training requirements for judicial and legal professionals: identification of main needs and areas for improvement |

## 4. OPENING OF THE MEETING

**Mr. Andrea De Maio**, the Project Director, took the floor and greeted everyone thanking all the participants for their presence. He described the overall objective of the project and stated that this discussion will be focused on the implementation of EU Regulation 2018/1805 and Directive 2014/42 in Greece and on the practical obstacles in the Greek Institutional and Legislative Framework. **Ms. Lea Stavrou**, the Project Officer decribed briefly the agenda and the structure of this Focus Group which aims to contribute to the preliminary analysis and best practices identification in alignement with the Work Package 2 of the Project.

## 5. PRESENTATIONS AND DISCUSSION

- ***Technical and legal aspects of freezing, seizure, confiscation, asset disposal***

**Mr. Ioannis Androulakis,** focused his presentation on the Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in EU. He presented:

- a review of the European framework: the Convention of Warsaw on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005), the Council Framework-Decisions 2003/577/JHA 2006/783/JHA, and 2009/299/JHA.

- the above FW Decisions and the Directive 2014/42/EU that replaced them, were all transposed to the Greek legislation by the Law 4478/2017 which subsequently amended the Greek Criminal Code (GCC).
- the latest amendments on art.68 of GCC regarding the Confiscation as a criminal sanction. He explained that objects or assets, which i) derive from an offence, as well as their value or any assets acquired directly or indirectly through them, or ii) were used or intended to be used, in any manner, as a whole or in part, to commit such an offence, are subject to confiscation, provided that they belong to the perpetrator or to any of the participants
    - in case the abovementioned objects or assets were mixed with other lawfully obtained property, such property is subject to confiscation up to the value of the mixed objects or assets.
    - the value confiscation under which if the objects or assets, no longer exist, have not been found or are impossible to confiscate, the court may decide to confiscate assets of equal value belonging to the convicted defendant. The value is calculated by the court at the time of issuance of its decision.
    - when confiscation cannot be imposed, due to the fact that the objects or assets cannot be located or they are not sufficient or they belong as a whole or partly to a third party, against whom confiscation cannot be ordered, the court may impose a monetary sentence against the defendant. The value confiscation precedes the Monetary sentence. The Monetary sentence was provided by Greek legislation since 2008.
    - third party confiscation under which objects or proceeds of crime are subject to confiscation, following a conviction, even if they belong to a third party, provided that such party was aware at the time of their acquisition i) that they may derive from a felony or a misdemeanour committed with intent and ii) that the purpose of their transfer to the third party was to hinder confiscation.
    - the imposition of confiscation to a not convicted third party has been criticized as not being in alignment with the provisions of the Charter of Fundamental Rights of the European Union-Charter, of the European Convention on Human Rights-Convention and of the Greek Constitution.
    - overall, he noted that the above recent amendments in the Greek legislation are positive but attention should be drawn to the case of third-party confiscation without conviction and to the extended confiscation.

- ***<u>Cross – border freezing and confiscation orders</u>***

**Mr. Ilias Anagnostopoulos,** focused on the occurring issues by cross – border freezing and confiscation and the importance of the current framework of the Regulation 2018/1805. More specifically:

- discussion over a recent judgement of 2021 by the Greek Court in regard to a request transmitted by the Romanian authorities to Greece for the freezing of a boat at a Greek port. The case was initiated in 2016.
- during the long period of freezing, the value of the frozen asset was reduced by 40%. The Greek Court ruled that the imposed freezing was against the principle of proportionality, was not necessary and did not serve the purpose of the sanction.

- the legal basis on that case was not Regulation 2018/1805, which entered into force in 2020. Participants discussed the potential development of that case study under the current framework of the Regulation.
    - Currently the competent Greek executing authority would make a reasoned request to the issuing authority of Romania to limit the period for which the property is to be frozen.
    - The management of frozen and confiscated property would be governed by Greek law, as the executing State.
    - Greece would manage the frozen or confiscated property with a view to preventing its depreciation in value, being able to sell or transfer the confiscated boat.
- the Greek Law 5042/2023 for the management of frozen and confiscated assets deriving from criminal offences, could have also been taken into account as far as the disposal of the confiscated boat by the Greek Authorities is concerned.

- ***International Judicial Cooperation***

**Mr. Georgios Voulgaris** also underlined the fact that the necessity for the Regulation 2018/1805 responds to the fact that the criminal offences are usually of transnational nature.

- Instances were observed were freezing orders were transmitted via a European Investigation Order.
- According to the Regulation, the executing state shall determine the process under which the freezing or the confiscation shall be executed.
    - Unfortunately in Greece, the competent authority and the process for the recognition and execution of the orders have not been defined yet.
    - there is ambiguity in regard to which legal framework should be enforced, meaning either Law 4478/2017 (that transposed the Directive 2014/42) or Law 4489/2017 for the European Investigation Order.
    - Another theory suggests that the Greek Code of Criminal Procedure should apply mutatis mutandis with or without taking into consideration the provisions of law 4478/2017.
- The execution of a freezing order under both the Regulation and the European Investigation Order could create some serious interpretive problems.
    - Participants discussed on the example of the recent infamous case of the Greek member of the European Parliament against whom the Belgian Authorities issued a freezing order under the context of the European Investigation order.
- when a court judgement has been ruled in absentia many issues are raised in regard also to the implementation of the European Arrest Warrant and to the recognition and execution of freezing and confiscation orders.
- in order to enhance cross-border judicial cooperation, the national courts of the MSs and the international courts (Court of Justice of the European Union-CJEU, European Court of Human Rights-ECHR) should avoid issuing ambiguous decisions.

**Mr. Maniatis**, intervened also highlighting the most frequently encountered problematic aspects of the international cooperation between the Greek and foreign judicial authorities in terms of the Regulation and also providing feedback from his expertise and tenure as Deputy National Member for Greece at European Union Agency for Criminal Justice Cooperation (Eurojust).

- ***Provisioned rights by the Regulation 2018/1805 for the affected persons***

**Mr. Tsagkalidis** explained with further details the obligation of the executing authority to inform the affected persons, and the legal remedies in the executing State against the recognition and execution of a freezing or confiscation order. He presented:

- the grounds for non-recognition and non-execution of freezing and confiscation orders. Regarding the principle of ne bis in idem, he pointed out that according to CJEU, the art. 50 of the Charter includes also penalties that should actually be considered as of penal nature regardless of their typical classification in the national jurisdiction. The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal law penalties. Of course the penalties must refer to the same offence.
- case law examples from the CJEU : Garlsson Real Estate (C-537/16), Menci (C-524/15), Di Puma & Consob (C-596/16, C-597/16),
    - the Court ruled that the principle of ne bis in idem is not violated when the imposition of two simultaneous sanctions of criminal law nature, as a result of two parallel procedures that are interconnected in a substantial and timely manner
- The privilege or immunity under the law of the executing State that would prevent the freezing of the property concerned or of rules on the determination or limitation of criminal liability that relate to the freedom of the press or the freedom of expression in other media, of typical errors in the confiscation or freezing certificates, the principle of territoriality.
- the violation of fundamental rights as grounds for non-recognition and non-execution,
    - the right to property should, in principle, not be relevant because freezing and confiscation of assets necessarily imply an interference with a person's right to property and because the necessary safeguards in that respect are already provided for in the EU law.
- As a last remark he addressed the issue of the rights of affected persons that would make it impossible under the law of the executing State to execute the confiscation order and the person against whom the confiscation order was issued did not appear in person at the trial that resulted in the confiscation order.

- ***Awareness level and Training requirements***

- All participants discussed and agreed that in Greece, the lawyers and the members of the judiciary have a very low level of awareness in regard to the framework of the Regulation and the Directive.
- A main point of knowledge gap is identified particularly in the cross-border freezing and confiscation orders.
- The fact that Greece is not fully aligned institutionally with the provisions of the Regulation, constitutes a serious factor that together with the awareness gap result in practical obstacles.
- The Bar Associations and the School of Judges should be the core of the target groups for capacity building activities.
- The capacity building activities should focus on :
    - The integration of the Regulation and the Directive into the national legislation
        - and practical consequences and case studies analysis

- The instruments of judicial cooperation between EU MSs for increased international cooperation in the criminal law sector
- Theory and practice in the mutual recognition procedure
  - transmission, recognition and execution of freezing orders and confiscation orders for the competent authorities
- The main types of freezing and confiscation present in the legal systems of the EU MSs and the related regulatory coverage
  - case studies presentations
  - practical problem solving
  - best practices sharing
- Assets use and reuse
  - national and EU MSs legislation
  - activities functional to that scope

## 6. CONCLUSIONS

- The Greek State needs to quickly update its institutional framework in order to meet up with the provisions of the Regulation 2018/1805.
- Due to the above deficiency, there is often confusion in terms of practical implementation of both the Directive 2014/42 and the Regulation 2018/1805
- The legal professionals and the members of the judiciary have low level of awareness regarding the asset tracing and identification, freezing and seizure, confiscation and international asset disposal
- The forthcoming capacity building activities on the above-mentioned topics need to be addressed to the lawyers, to the judiciary and to the students of the School of Judges in regard to the whole context of the amended provisions that are in alignment with the Directive and the Regulation.

# RINSE

# Research and INformation Sharing on freezing and confiscation orders in European Union

## D 2.4 – FOCUS GROUP MEETINGS

## ITALY

Report on the results of the focus group meetings, highlighting major practical obstacles to effective international judicial cooperation in the specific legal field.

UNIVAN

Law Department

G.R.A.L.E.

Research and consulting s.r.l.

Napoli (IT),

September 2023

In Italy, the Grale partner, in collaboration with the Department of Law at the University of Campania Luigi Vanvitelli, organized five focus group meetings. Following these meetings, experts from various backgrounds, including judges, prosecutors, lawyers, professors, officials from the National Agency for Seized and Confiscated Assets, and representatives from third-sector organizations specializing in asset management (both real estate, movable, and businesses), were asked to provide their input and analysis. The purpose of these meetings was to discuss and analyze the Italian situation regarding asset seizures and confiscations and the level of implementation of mutual recognition of freezing and confiscation orders. The experts were asked to primarily identify weaknesses in the discussed procedures. Below is a summary of the findings from the meetings held between April 2023 and June 2023.

## Freezing and confiscation orders: a comparison of expert's practices

**Original title:** I provvedimenti di sequestro e confisca: la prassi degli esperti a confronto

**When:** April 19, 2023, 3:00 pm

**Venue:** Palazzo Melzi, Aula Consiglio, Department of Law, Università degli Studi della Campania Luigi Vanvitelli, S. Maria C.V., (CE), Italy

**Speakers:**

- Andreana Esposito, associate professor of criminal law, University of Campania, Univan project Leader for Rinse
- Antonio Pagliano, associate professor of European criminal procedural law, University of Campania, Grale's Project manager for Rinse
- Catello Maresca, magistrate, Court of Appeal of Campobasso
- Giovanni Allucci, Agrorinasce
- Mauro Baldascino, Comitato don Peppe Diana
- Rosario Di Legami, lawyer, Palermo
- Paolo Giustozzi, lawyer, Macerata
- Marinella Graziano, magistrate, Court of S. Maria C.V. (CE)
- Maria Luisa Mirandola, magistrate, Court of Naples
- Luigi Roma, lawyer, Naples

- Marcella Vulcano, lawyer, Milan

**Discussion:** six topics have been discussed during the meeting.
**Preventive Seizure**: The first topic investigated within the focus group is the Italian practical approach adopted by the Santa Maria Capua Vetere Court, Section for the Application of Preventive Measures, in the execution of preventive seizure. Guidelines have been developed for this purpose and are also provided to judicial administrators. These guidelines aim to reconcile two opposing needs: on one hand, the provisional nature of the precautionary seizure, and on the other, an advance determination of the asset's destination. The execution of the seizure is preceded by an extensive phase of communication between the court and the judicial police, a phase that facilitates the operations of taking possession, which may also require a considerable amount of time. This is followed by the transfer of the assets to the judicial administrator's control. The judicial administrator is responsible for drafting a separate report referred to as the "preliminary report on the execution of the seizure". It is indeed essential to promptly provide the court with detailed information regarding the commencement and conclusion of the possession-taking process for each specific seizure order issued by the judicial office. This is done to ensure compliance with the effectiveness terms of the seizure, which begin upon the completion of the possession-taking (Article 24, Paragraph 2 of the Legislative Decree No. 159/2011). This marks the beginning of a phase aimed at managing the seized asset, a phase in which two main issues are encountered. The first issue arises from the difficulty of releasing the assets if they are already occupied, as often these are individuals facing hardship and unable to relocate elsewhere. The second problem involves the so-called "temporary allocation" – a phase that precedes certain aspects of the asset's final destination, necessary due to the time gap between the seizure and confiscation. Temporary allocation is realized in the form of a loan for use. Consequently, the execution of works intended for the asset's use can only be carried out with the consent of the borrower, who could potentially regain control of the asset if the seizure does not lead to confiscation.

**Prevention measures and the system of guarantees:** The compatibility of the preventive measures system with constitutional and convention guarantees continues to pose significant challenges. The United Sections of the Court of Cassation, in 2014 with judgment number 4880, analyzed the legal nature of the preventive measures system, affirming its non-punitive character (which is an important assumption in the light of the mutual recognition of confiscation orders of a preventive measure). However, this does not mean that this matter is exempt from the application of fundamental guarantees provided both by the Constitution and the European Convention on Human Rights. The Constitutional Court has included both preventive confiscation (Article 24 of Legislative Decree No. 159/2011) and "extended" confiscation (Article 240-bis of the Criminal Code) within the so-called "tertium genus" of balancing confiscation based on the idea that a crime cannot be considered a mode of property acquisition. These measures serve to restore the compromised asset situation resulting from unlawful activities through the removal of assets derived from or the proceeds of crimes. Indeed, with judgment number 24 of 2019, the Constitutional Court declared, on one hand, the constitutional illegitimacy of Article 4, paragraph 1, letter c) of Legislative Decree No. 159 of 2011, insofar as it establishes that the measures provided for in Chapter II also apply to the subjects indicated in Article 1, letter a). On the other hand, it declared the constitutional illegitimacy of Article 16 of Legislative Decree No. 159 of 2011, insofar as it establishes that the preventive measures of seizure and confiscation, regulated by Articles 20 and 24, also apply to the subjects indicated in Article 1, paragraph 1, letter a). The Constitutional Court thus decided to limit, through interpretation, the consequences of the Strasbourg Court's judgment in De Tommaso v. Italy case, saving from unconstitutionality the same cases insofar as they allow for the

application of preventive measures, such as special surveillance, with or without residence or travel restrictions, seizure, and confiscation, to the subjects indicated in Article 1, letter b) of Legislative Decree No. 159 of 2011 ("those who, based on factual elements, are deemed to habitually, even partly, live off the proceeds of criminal activities").

**Management of Companies**: Criticisms of Article 104-bis of the Implementing Provisions of the Code of Criminal Procedure. The observation of significant challenges faced by the state in overcoming the issues characterizing the phase of judicial administration (following the seizure) and the period of management by the National Agency (between the initial confiscation and final confiscation) - multiplied for hundreds of companies and persisting over the lengthy period mentioned above, which lies between the seizure order and the final confiscation - leads to a positive consideration of the possibility that the destiny of a company, particularly its sale, can be arranged, albeit exceptionally, before the final confiscation or even anticipated at the time of the initial confiscation, although with all the precautions implied by the novelty of the proposal. First and foremost, this anticipation requires the establishment of safeguards for the individual who holds the property affected by the confiscatory measure, to be prepared for the scenario in which the confiscation is not definitively confirmed in subsequent levels of legal proceedings. In this regard, the Commission believes that it is necessary to first assess the market value of the company at the time of the initial confiscation, taking into account the expenses incurred in managing the process of legalizing the company (related to regularizing employment relationships, paying taxes and contributions, etc.). Once the value of the company is assessed, its sale should be permitted, following the involvement of various interested parties (the National Agency, labor organizations, employers, etc.), an involvement to be institutionalized at the regional level through the establishment of Permanent Tables on seized and confiscated companies at the prefectures. The phase of alienation should (of course) be accompanied by precautions aimed at preventing the assets from returning, even indirectly (through intermediaries or straw men), to the assets of criminal organizations. The proceeds from the sale of companies confiscated in the initial stage would be channeled into a separate management of the Unified Justice Fund, which would be accessed in case the confiscatory measure is not definitively confirmed, thus necessitating the equivalent restitution of the property to the owner.

**Judicial Control, issues:** In addition to the classic system of confiscation, our legal system also includes what is known as collaborative prevention within the Anti-Mafia Code. This approach involves adopting measures aimed at recovering companies and business entities that are not irreparably compromised by criminal infiltrations. This objective is achieved through the implementation of various measures (e.g., organizational models, establishment of an OIV - Organismo di Vigilanza). However, these measures are viewed with suspicion by the administrative judge, who believes that the only element capable of cleansing the company is the replacement of its governance. An illustrative case is the one discussed by the Council of State in Plenary Assembly No. 6/2023. It involved a positive outcome from judicial control with a report by the administrator attesting to the complete absence of mafia infiltration attempts within the company. The Prefect, upon re-evaluation, decided to confirm the anti-Mafia interdiction measure. Subsequently, the company decided to submit to judicial control again, creating a vicious cycle that essentially renders judicial control a measure capable only of temporarily neutralizing the effects of the interdiction.

**The Challenging Role of the Judicial Administrator:** The role of the judicial administrator is crucial in the management of assets subject to seizure. This figure collaborates with both the prefecture and the court to preserve and, if necessary, make anticipatory arrangements for the asset's social use. However, certain challenges arise, including the multiplicity of interpretations given by prefectures to the provisions

of Article 41-ter of the Anti-Mafia Code. Among these is the rule that the Prefecture should help the judicial administrator based on the directives issued by the delegated judge, as well as to the Agency during the administration, management, and allocation phases of companies. In practice, this does not always occur. An emblematic case handled by the Florence court involved multiple companies engaged in waste storage and treatment that were subject to preventive and subsequent confiscations. The waste disposal site was left in a state of abandonment, posing a risk to the surrounding environment, before the administrator's intervention. In this case, the Prefecture's activities did not assist in the proper management of the asset since the institution believed it was exempt from jurisdiction, despite the law providing for direct competence in territorial administration matters. Therefore, there is a need for proper training of managerial personnel in the entities actively involved in the seizure and confiscation process.

**Challenges in the Social Reuse of Assets and Mutual Recognition:** The issue of the social reuse of assets is a fundamental aspect of Regulation 1805/1805 and represents one of the possible destinations for seized or confiscated assets. However, achieving the goal of social reuse is challenging due to several critical factors. Firstly, a significant number of assets are sold at auction, thereby denying any possibility of their social use. Secondly, very often the judicial administrator takes over businesses that are characterized by tax evasion and the illegitimate employment of labor. The company, therefore, operates within a business context where most companies operate in this manner, at least in some parts of Italy. This implies that when the judicial administrator takes over, they bring the company back into compliance with the law. This entails that a company operating legally is at a disadvantage compared to competing businesses that continue to evade tax and labor regulations while offering the same services at lower prices. In effect, the company succumbs to legality. Thirdly, the utility of temporary asset allocation has been discussed. It has been emphasized in various contexts that this solution is of limited practical utility because it is very difficult to find entities willing to invest resources, knowing that in most cases, that asset will be sold and not reassigned. Temporary asset allocation is another idealistic concept because no entity is willing to spend money to renovate an asset that will subsequently be sold and may not be reassigned to the municipality or the association that invested resources in its recovery. The same critical issues can be observed abroad. The highlighted challenges become more pronounced when considering the scenario in which the Italian state issues a measure that must be executed by the executing state. Given that the management of the asset occurs according to the rules of the executing state, it should be emphasized that in many states, there are no regulations for situations that would be regulated in the Italian state. One of these is the relationship between bankruptcy and preventive measures, regulated by the anti-mafia code. Another problematic aspect arises when, despite there being a residual public utility value in the asset, it is then managed by the executing state. One possible solution might involve the application of guidelines developed by the United Nations Office on Drugs and Crime (UNODC).

## Freezing and confiscation orders: substantive and procedural requirements

**Original title:** I provvedimenti di sequestro e confisca: profili processuali e sostanziali

**When:** May 25, 2023, 2:30 pm

**Venue:** Palazzo Melzi, Aula Consiglio, Department of Law, Università degli Studi della Campania Luigi Vanvitelli, S. Maria C.V., (CE), Italy

**Speakers:**

- Andreana Esposito, associate professor of criminal law, University of Campania, Univan project Leader for Rinse
- Antonio Pagliano, associate professor of European criminal procedural law, University of Campania, Grale's Project manager for Rinse.
- Giuseppe Amarelli, full professor of criminal law, University of Naples
- Donatella Curtotti, full professor of criminal procedural law, University of Foggia
- Federico Consulich, full professor of criminal law, University of Turin
- Raffaello Magi, magistrate, Supreme Court of Cassation

**Opening of the meeting:** In order to be able to reason of mutual recognition of seizure and confiscation orders in the light of European Regulation 2018/1805, we must first examine the national legal system.
For decades now, we have witnessed a process of renewal and a "flood proliferation" of confiscation and its fields of application from a legislative and jurisprudential perspective.
To the traditional model of confiscation, the numerous special hypotheses overlap to the point that it becomes difficult to attempt a unitary and systematic classification. The only common feature across all confiscation scenarios is the ablation of privately owned assets in favor of the State.
In a context which the criminal political objective is to combat crime by targeting assets, confiscation measures represent the quintessential tool. As attested by constitutional and supranational jurisprudence, a condensed set of issues emerges concerning the respect for fundamental principles and rights, including the principle of legality, the presumption of innocence, the right to a fair trial, the right to property, and the freedom of economic initiative.

**Discussion:** In the analysis of the most problematic hypotheses, it is necessary to focus on preventive measures and confiscation for equivalent.
In the field of prevention, the rules are structurally and ontologically different from criminal law for two main reasons:

- The absence of a specific prohibition (except in very general terms);
- The severity of the penalty.

These measures present with a substantial societal cost, in terms of incapacitation, at least partially, of the subject (in the case of personal measures), economic harm to the same (in the case of asset-related measures), without any corresponding direct protection of legal assets.
Nevertheless, the proliferation of preventive measures attests to its intrinsic appeal for the contemporary legislator, careful to guarantee himself a pervasive instrument of social control.
The absence of an unlawful act marks, on the one hand, the fundamental differentiating element from criminal penalties, and paradoxically, on the other hand, it constitutes a significant potential vulnerability to citizens' rights, as they are deprived of an empirical basis for their defenses.
In identifying the criteria for safeguarding and the full legitimacy of preventive measures, the jurisprudence of the Constitutional Court and the European Court of Human Rights (ECHR) are essential interlocutors. indispensable counterparts. The Court has consistently ruled out the criminal nature of preventive measures, both personal (special surveillance) and asset-related (preventive confiscation).
Paradigmatic is the judgment in the case of De Tommaso vs. Italy, in which the Court initially noted the inadequate predictability of the consequences of their conduct for the individual affected by the preventive measure of special surveillance, and, secondly, the vagueness and imprecision concerning the content of the accompanying prescriptions when imposing this measure, identifying the conventional reference parameter in non-criminal laws related to freedom of movement.

Asset-based prevention faces the same criticisms as personal prevention, carrying a disruptive impact on fundamental rights, such as economic freedom, and irreversible consequences on a reputational level.
In practice, the study conducted by the University of Trento in 2016 highlighted that approximately 70% of businesses affected by seizures and preventive confiscations are in a state of liquidation.
The legislator aimed to equate economic crime with organized crime, but it would be necessary to establish a differentiated approach, with appropriate modulation for the different criminological substrates.
Further problems are posed by confiscation for equivalent, confiscation hypothesis that risks creating distortion in the framework of preventive confiscation and in confiscation without conviction.
Confiscation for equivalent has had a very hectic legislative life in recent years: it was born in the context of the crime of usury and then expand in the field of crimes against the public administration, in tax crimes, within the d.lgs. nr. 231/2001 and in the field of prevention.
At first, the national jurisprudence had opposed the prospect of considering such confiscation a *species* of the penalty *genus*, espousing the thesis of its submission to the discipline in the matter of security measures, in particular to that contained in the art. 200 c.p.
Apart from some decisions that had initially qualified the confiscation of value as a security measure, the majority doctrine and the jurisprudence recognize the confiscation for equivalent sanctioning character.
According to the jurisprudence and the U.S. 2015 (Lucci), instead, today constitutes *ius receptum* the characterization of confiscation for equivalent ex art. 322b c.p. as a sanction measure, falling under the statute of the guarantor of the 'criminal matter', where the rule of non-retroactivity prevails in *malam partem.*
Finally, also the Consulta in a note on the administrative confiscation for the administrative offense in matter of abuse of inside information of which to art. 187 bis, d.lgs. February 24, 1998, n. 58 t.u.f., and 9 paragraph 6, l. April 18, 2005, n. 62 expressly reiterated that confiscation for equivalent has always a nature "eminently sanctioning" and must be attracted in the list of guarantees.
While direct confiscation preserves its nature as a security measure, thus serving an essentially preventive function, confiscation by equivalent, by seizing assets of a completely different nature unrelated to the committed offense, "reveals a predominantly punitive character."
In the context outlined by the jurisprudence of legality and constitutional law, a system asymmetry. The ruling of the Constitutional Court No. 24 of 2019 in the field of preventive measures provides a pertinent clarification regarding their legal nature, reaffirming their exclusion from the conventional concept of criminal law and the punitive-sanctioning function that characterizes the latter. On one hand, personal measures serve a preventive function as they require an assessment of the dangerousness of the individual to public safety under Article 6 of Legislative Decree No. 159/2011, even without initiating a criminal process against them, unlike what is required for security measures. On the other hand, real measures serve a restorative function, as they aim to nullify the effects of property acquisition that is presumed to be non-compliant with the legal system and find their "justifying basis" in the "reasonable presumption that the property was acquired with proceeds from illicit activities," similar to extended confiscation under Article 240 bis of the Criminal Code.
At this point, we must pose a question: what is the legal nature and the resulting guarantees of confiscation by equivalent? It must be attributed, as asserted by the jurisprudence of legality, regardless of the *nomen iuris,* the nature of a criminal sanction, or, as argued by the Constitutional Court, that of an administrative sanction?
Another issue of system circularity arises in the case of confiscation by equivalent without conviction, particularly in the case of prescription of the crime after the first instance judgment.

The jurisprudential debate is settled before the S.U. of 2015 (Lucci), which, for the first time, established the applicability of the mandatory direct confiscation of the price of the crime referred to Article 240, paragraph 2, No. 1 of the Criminal Code, and the price or profits of the offense under Article 322 ter of the Criminal Code, in the presence of a so-called substantive conviction. This means a judgment that declares the offense extinguished due to the statute of limitations but contains a full determination on the merits at a judicial level, subsequently unchallenged, of the defendant's criminal liability. Since this is not a criminal sanction but a restorative measure aimed at achieving restorative functions, it can be ordered even in the absence of a formal conviction. In contrast, confiscation by equivalent, as a essentially a criminal sanction, is subject to all the safeguards of criminal law and can only be ordered in cases of a formal conviction.

The legislator incorporated these jurisprudential guidelines by introducing in 2018 (and subsequently amending it in 2019 by including reference to confiscation under Article 322 ter of the Criminal Code) into Article 578 bis of the Criminal Procedure Code the possibility, in cases of statute of limitations, where confiscation has already been ordered by a first-instance conviction, to continue the Appeal or Cassation proceedings solely for the assessment of mandatory confiscation under Article 240 bis of the Criminal Code (extended confiscation), confiscation under Article 322 ter of the Criminal Code (improperly, all types, including that confiscation by equivalent, which, instead, could never be ordered in cases of statute of limitations as it has a criminal nature), and other special cases provided for by the law.

Hence the question: does the 2019 legislative intervention allowing the possibility of applying confiscation by equivalent in the absence of a conviction also apply to acts committed before its entry into force?

To the question has been given from the U.S. 2023 (Esposito) solution "negative, being of disposition of substantial nature also subject to the prohibition of retroactivity of the law in *malam partem* under art. 25 of the Constitution".

In other words, the orientation that recognizes the punitive nature of value-based confiscation has been accepted, and the principle of non-retroactivity of criminal law, as established by Article 25, paragraph 2 of the Constitution and Article 7 of the European Convention on Human Rights (ECHR), should apply. Consequently, the confiscation in question is precluded from having effects on events that occurred before the entry into force of the law that made its retention possible, even in cases where this was not previously allowed.

Despite the delicate balancing act by the jurisprudence of legality, there is a fundamental limitation that creates a structural incompatibility: the Court of Cassation should have maintained that the reference made to the cases of confiscation by equivalent under Article 322 ter of the Criminal Code and the special cases was not practicable because confiscation by equivalent essentially has a criminal nature, specifying that the reference should only be understood with regard to direct confiscation.

Another argument in support of this thesis is found in Article 578 bis of the Criminal Procedure Code, where the reference to extended confiscation without a conviction is only for confiscation under the subsection (thus, for direct confiscation only).

Extending this regulation to the in lieu thereof form creates a short-circuit in the system.

In such a context, one must inquire about the nature of confiscation in lieu thereof. Is it a measure of asset seizure with its own autonomous regulatory framework distinct from direct confiscation (as repeatedly argued by jurisprudence), or is it an alternative form of execution of typical confiscations that subsequently alters its legal nature by reflection? Should it be considered a penalty?

## Mutual Recognition of freezing and confiscation orders: critical issues

**Original title:** Il mutuo riconoscimento dei provvedimenti di sequestro e confisca: criticità nella prassi

**When:** May 26, 2023, 2:30 pm

**Venue:** Palazzo Melzi, Aula Consiglio, Department of Law, Università degli Studi della Campania Luigi Vanvitelli, S. Maria C.V., (CE), Italy

**Speakers:**

- Antonio Pagliano, associate professor of european criminal procedural law, University of Campania, Grale's Project manager for Rinse.
- Amedeo Barletta, lawyer, European Criminal Bar Association
- Guido Colaiacovo, associate professor or criminal procedural law, University of foggia
- Maria Vittoria De Simone, magistrate, National Directorate for Anti-Mafia and Anti-Terrorism
- Ciro Grandi, associate professor of criminal law, University of Ferrara

**Opening of the meeting:** At the meeting, experts working in the European context, such as lawyers, judges specializing in international cooperation in criminal matters, and professors with scientific publications on mutual recognition, were invited. The entire discussion revolved around the most challenging aspects encountered by the mutual recognition instrument when applied between authorities from different member states. This meeting marks the first shift away from a solely national regulatory approach.

**Discussion:**

**Issues in the practical application of the Regulation**: From the debate prompted by the experts called to participate in the focus group meeting, some fundamental themes have emerged regarding the application of the Regulation EU 2018/1805 in Italy and in the European Union. First and foremost, the speakers highlighted how the tool is poorly known and therefore underutilized among Italian judges and lawyers. Certainly, part of the reason why there are not many requests for mutual recognition among European judicial authorities lies in the lack of specific training on how the tool works and the correct way to fill out the certificate (Annex 1) exchanged between authorities. From a national perspective, one of the issues highlighted is the lack of coordination between the European Regulation and domestic legislation. National laws adopted to implement the two Framework decision of 2003 and 2006 are still used in Italy regarding the choice of which are the issuing and the executing authorities. Currently, in Italy, there is an ongoing discussion on a draft legislative decree aimed at implementing Regulation 2018/1805 and, therefore, overcoming the existing regulatory inconsistencies. Furthermore, what hinders the effectiveness of the tool set by the Regulation is the lack of an interoperability system between the national Courts and the National Agency for Seized and Confiscated Assets, which should be the first destination for assets to allow for a rational resource management.

**Issues among the grounds for refusal:** Another point that emerged in the debate concerned the reasons for refusing mutual recognition, specifically the relevance given, for the first time in a regulation on judicial cooperation in criminal matters, to the violation of fundamental rights. Governed by letter h) of Article 19 of the Regulation, the refusal ground puts into words the jurisprudence of the European

Court of Human Rights in the Aranyosi and Căldăraru cases regarding the European Arrest Warrant. The presence of letter h) in Article 19 raises two sets of issues. Firstly, the legislation does not specify which essential fundamental rights, when violated, allow a State to object to the request. Secondly, it is not defined according to what criteria one can assess whether a fundamental right has been infringed during the process of applying the seizure or confiscation measure.

**Issues regarding procedural rights:** The issue of procedural rights is further a subject of debate in academia. Specifically, at the European level, bar associations advocate for the observance of the principle of dual defense, meaning the presence of defense representation both in the issuing and executing States. In the light of the judicial cooperation, a dual-check system should always be allowed, which serves different purposes, a substantive review conducted by the issuing state and a formal review by the executing state. This issue mirrors the ongoing debate regarding Article 31 of the EPPO Regulation. It is true that judicial cooperation tools are intended to enhance the capacity of national states to prosecute economic crimes; however, a balance must be find with the rights and safeguards of individuals. The regulation, in order to facilitate judicial cooperation, introduces fast-track and simplified procedures that, due to their increased efficiency, risk unduly encroaching upon the defense rights of the affected individuals who are not provided with sufficient time to defend themselves. The Regulation establishes a tight timeline, requiring the decision on mutual recognition of confiscation to be adopted by the executing state within 45 days of the request, as set in Article 20 of the Regulation. This prescribed timeframe should comply with the provision of Article 33 of the Regulation regarding Remedies in the Executing State against the recognition and execution of freezing or confiscation orders. However, for this activity, complex verifications are necessary, such as those aimed at assessing violations of the ne bis in idem principle or evaluating the existence of fundamental rights violations, which are hardly compatible with such a short deadline.

**Issues regarding the mutual trust:** The respect of individual rights is fundamental to strengthen mutual trust among states, which is the basis requisite for the effective implementation of the mutual recognition principle. However, this mutual trust is called into question by the extension, as requested by the Italian delegation, of the scope of the Regulation to include Italian preventive measures. Since there is a ground for refusal related to the violation of fundamental rights in the Regulation, the inclusion of our preventive confiscation within its scope, without a prior conviction, risks raising questions about the violation of fundamental rights. The European Court of Human Rights (ECtHR) has, in fact, considered preventive confiscation as not falling within the strict sense of criminal matters. The standard of proof accompanying the preventive confiscation is based on different and less protective standard than those provided in criminal proceedings. The standard of proof for applying the Italian preventive confiscation is that of civil proceedings for the protection of property rights, excluding certain fundamental rights in criminal matters, such as the presumption of innocence or a fair trial, even though they are invoked by Articles 47 and 48 of the fundamental Charter of the European Union, as required by Considerando 18 of the Regulation. An intervention by the Court of Justice of the European Union on the definition of "criminal matters" is hoped for as soon as possible.

**Issues regarding non conviction based confiscation:** In conclusion, non-conviction-based confiscation (preventive confiscation) is susceptible to abusive applications that can result in violations of fundamental rights, and its inclusion in the framework of mutual recognition is contentious. It is also challenging to explain to the judiciaries authorities of other member states the functioning of our non-conviction-based confiscation, which, according to the Regulation, all states are called to recognize and execute, even though it is a foreign instrument to their own legal systems. The proposed directive

currently under discussion for the harmonization of confiscation procedures aims to align the legislations of member states by introducing a form of non-conviction-based confiscation. However, it differs significantly from the Italian measure, which has a much broader scope of application.

**In conclusion:** The question of how to strengthen asset forfeiture measures to enable states to combat transnational economic crimes was answered by emphasizing the need to modernize investigations and, above all, bolster financial investigations. This is because large criminal organizations increasingly invest in financial products that are more challenging to detect.

## Social economy as an antidote to criminal economy. The social and institutional reuse of confiscated asset and confiscated companies

**Original title:** Economia sociale come antidoto all'economia criminale. Il riuso sociale e istituzionale dei beni e delle aziende confiscate

**When:** June 19, 2023, 9:30 am

**Venue:** Casa Don Diana, Via Urano, 18, Casal di Principe (CE), Italy

**Speakers:**

- Salvatore Cuoci, Comitato don Peppe Diana
- Stefano D'Alfonso, professor of public law, University of Naples
- Daniela Lombardi, National Agency for Seized and Confiscated Assets
- Luigi Lochi, Fondazione con il Sud
- Tatiana Giannone, Libera contro le Mafie
- Alberto de Chiara, associate professor of administrative law, University of Campania, Univan project manager for Rinse
- Gianpaolo Capasso, National Agency for Seized and Confiscated Assets
- Giovanbattista Tona, magistrate, Court of Appeal of Caltanissetta
- Federica Colucci, magistrate, Tribunal of Naples
- Giuseppe del Medico, Unioncamere
- Alessandro Buffardi, network of confiscated assets managers
- Michele Mosca, professor of economic, University of Naples
- Luciano Modica, Banca etica
- Domenico Posca, judicial administrator
- Fabio Pantaleo, Unicredit
- Gianluca Casillo, judicial administrator
- Gisella Mammo Zagarella, judicial administrator
- Luigi Moscato, judicial administrator

**Opening of the meeting:** The working group has analyzed the phases that follow the seizure and final confiscation of assets from organized crime. Through the experience/narrative of the discussants, each from the perspective of their area of expertise, we have explored the possible implications of social reuse and the social economy of confiscated assets as an antidote to the organized crime system. Among the participants in the working group there were magistrates, ANBSC officials, scholars, judicial administrators, representatives from the third sector actively engaged in the field, and, finally, operators

from confiscated companies/businesses who have revealed their own "redemption" stories. The meeting took place at the headquarters of the Don Peppe Diana Committee in Casal di Principe (CE), an asset confiscated from the Camorra, which is considered in Italy as a symbol of legality and of the rebirth of an entire community where the criminal system was deeply rooted, as the clan considered it their own court from which definitive sentences were issued.

**Discussion:** The current governance system does not allow an effective management of the extensive confiscated asset portfolio due to significant challenges that hinder the efficiency of the system. Information about confiscated assets is partial, because data collection relies on cadastral units rather than individual real estate units. It is also fragmented due to the presence of various non-communicating national databases, which hampers a comprehensive understanding of asset-related information. Although there have been some advancements by ANBSC in automating data flows, it remains partially transparent: according to an investigation conducted by Libera, approximately 60% of municipalities do not comply with the legal requirement, as stipulated in the anti-mafia code, to publish an updated list of assets in their possession.

Economic and financial resources are limited compared to the asset portfolio: notwithstanding the allocation of approximately €250 million within the PNRR (National Recovery and Resilience Plan), funding is still lacking at both national and regional levels. The significant financial resources allocated to the FUG (Unified Justice Fund) remain inaccessible to municipalities and third-sector entities that could fund management projects.

The allocated resources are distributed through calls for proposals. There are also limitations in the preparation of these calls. For instance, the principle of co-design, as outlined in the third-sector code, is often requested as an additional requirement rather than a fundamental one. Another limitation is the lack of necessary coordination between interventions concerning property restructuring and those concerning management activities. These two aspects often lack coherence with each other, mainly because structural interventions occur before management activities. Overall, there is a greater demand for structural interventions than for management activities, driven by the absence of active social promotion and cohesion policies.

The current management model has a purely administrative approach that should be complemented with additional skills and procedures capable of achieving two results: maintaining employment levels and facilitating the demand for confiscated assets promoted by the third sector and the supply offered by municipalities. Facilitating means providing technical assistance to make processes more fluid and functional. Early allocation is possible but raises delicate issues, especially regarding third-party protection. However, this tool is not very attractive, primarily due to the costs associated with structural interventions (restructuring and maintenance) and management activities.

In general, the anti-mafia code presents a layered set of interventions that have evolved over time, lacking a systematic approach.

Strengthening the role of the Agency as the main actor in the chain is necessary.

Contrary to the past, we are now witnessing a change in the management of companies and assets, which require a more dynamic governance approach compared to real estate management. Currently, there are 3,100 confiscated companies, with most being "empty shells" that could have already been liquidated at the time of seizure. Others have recovery prospects but are currently non-operational, while about 150 (excluding Apulia, Calabria, and Sicily) are operational. In 2018, a section of ANBSC exclusively focused on companies was established. Within the process, the Agency intervenes to assist the judicial authority already in the first instance, before final confiscation. A central moment is the report as per Article 41 of the Anti-Mafia Code, prepared within 6 months (with extensions) by the judicial administrator. The

delegated judge is responsible for evaluating, based on the report and the continuation program, whether to maintain or definitively close the business. This is one of the most delicate phases of the process because it must ensure both the continuity of the activity and consider the economic and financial evaluations, not only regarding to the "current" state of the business but also to its ability to generate income in the long term. The report should consider a careful analysis of the company's financial position, characterizing it with the proposed and his family members, its operating environment, and the regularization costs it must incur to operate legally. This represents a significant challenge for operators tasked with deciding, without excluding the possibility that, due to the intrinsic characteristics of the market, the business may no longer be competitive and therefore may consider the feasibility/opportunity of closing it.
Another critical issue concerning management is the difficulty in accessing credit. In this regard, the existence of measures/instruments, long provided for by Italian legislation but still relatively unknown, has been noted. An important example is the measure allocated by MISE (Ministry of Economic Development) of €48 million for confiscated companies to support liquidity and financing (10 years without interest with a 2-year pre-amortization). Access conditions are specified, and the key requirement is the prospective capacity to repay the financing.

**Results:** The outcome of the discussion necessitates more than one reflection on the delicate issue of managing confiscated assets. Starting from a meta-legal perspective, there is a clear urgency for a change in perspective that takes into account the directions in which confiscated assets (real estate and especially companies) should be directed: social purpose and public interest. While it is true that returning the asset to its community of origin is an inspiring principle reiterated by the Constitutional Court and referred to in administrative jurisprudence, the legal instruments and procedures to achieve this result are not fully implemented on the legal front. To rethink the allocation phase as a dialectical moment between institutions and civil society, through the use of negotiation tools that promote the meeting of supply and demand, with a focus on co-design and co-programming activities that actively involve the third sector, can be a way forward. To strengthen networked collaboration, also through the interrelation of available public data, would enhance monitoring. It is also necessary to consider the FUG resources as a potential means to drain management activities entrusted to local authorities and third-sector entities. Within the network, emphasizing the central role of ANBSC and implementing financial and instrumental resources to support its work would also be beneficial.

## Freezing and confiscation orders in the European prospective

**Original title:** I provvedimenti di sequestro e confisca nella prospettiva europea

**When:** June 20, 2023, at 9:30 AM.

**Venue:** Real Sito di Carditello, via Carditello, 81050 San Tammaro (CE), Italy

**Speakers:**

- Maurizio Maddaloni, Real Sito di Carditello
- Raffaele Picaro, Head of law school, University of Campania
- Luigi Roma, lawyer, Naples
- Giuliano Balbi, full professor of criminal law, University of Campania

- Caterina Scialla, research fellow in criminal law for Rinse
- Marco Pelissero, full professor of criminal law, University of Turin
- Maria Gabrielle Casella, magistrate, President of the Court of S.Maria C.V. (CE)
- Giovanni Sodano, PhD in criminal law
- Anna Maria Maugeri, full professor of criminal law, University of Catania, project Leader of Recover
- Gianfranco Criscione, Directorate General for International Affairs and Judicial Cooperation
- Francesca Mele, Phd candidate in criminal law
- Francesco Menditto, public prosecutor, Tribunal of Tivoli
- Ciro Grandi, associate professor of criminal law, University of Ferrara
- Giacinto Cirioli, PhD candidate in criminal law
- Andreana Esposito, associate professor of criminal law, University of Campania, Univan project Leader for Rinse

**Opening of the meeting:** The meeting was introduced by institutional welcomes from Maurizio Maddaloni, Real Site of Carditello, Raffaele Picaro, Head of law school, University of Campania and Luigi Roma, lawyer and member of the Board of Directors of the Real Site of Carditello. Dr. Caterina Scialla gave an extensive and detailed overview of the project and the main topic areas discussed at the conference. Professor Andreana Esposito, professor of criminal law at the University of Campania Luigi Vanvitelli oversaw summarizing the reports.
Each discussant brought to the speakers' attention two questions having to do with practices and critical issues that have emerged in relation to the domestic regulatory status of freezing and confiscation orders, as well as with reference to the mutual recognition process under European Regulation 1805/2018

**Discussion:** Below are the main topics addressed by the speakers.
Particular attention in the first phase of the meeting was devoted to the status of the current domestic regulatory status of freezing and confiscation orders. Maria Gabrielle Casella, magistrate, Tribunal of S. Maria C.V. discussed the theme of preventive freezing and confiscation. Preventive measures, originally a mere tool for fighting social hardship, have become an institution of wide application in the action toward organized crime and from profit through the freezing and confiscation of illicitly accumulated assets, so much so that it has become a model for other international legal systems. The subject of personal and patrimonial measures, reorganized by Legislative Decree 159/2011, has undergone a progressive evolution in recent years because of the several interventions of jurisprudence and continuous regulatory changes, most recently with Law 161/2017 and with Decree Law 113/2018, conv. by Law 132/2018. The European Court has also intervened ("de Tommaso v. Italy" ruling of 2017) and, recently, the Constitutional Court with sentences Nos. 24 and 25 of 2019, which have completed the work aimed at making this institution compatible with the principles of the Constitution and the ECHR.
Marco Pelissero, professor of criminal law, University of Turin, addressed the analysis of the most relevant issues in the field of confiscation for equivalent and confiscation provided by art. 240 bis.1 c.p.). Through an ample excursus of the normative and jurisprudential evolution, the question regarding the legal nature of the two institutions was particularly addressed. With respect

to confiscation for equivalent, despite the dominant orientation in jurisprudence being in favor of the recognition of the measure's afflictive-sanctioning character, it was observed that the solution is not entirely unanimous in the doctrine, where some authors maintain that it retains the nature of a restorative measure. The option for one or the other alternative is bound to be tangibly reflected in terms of the applicable guarantees and discipline. With reference to the so-called enlarged confiscation, the ambiguity of the orientation that attributes to the institution the nature of an atypical security measure has been pointed out, as well as the critical issues that pertain to its normative statute, which has been accused of excessive generality and vagueness. However, appreciable, at the same time, has been the jurisprudential attempt to offer a constitutionally oriented interpretation of the measure by emphasizing, in particular, the need to apply the measure only when it should not be applied where the crime for which a conviction was made presents in concrete terms such characteristics as to convince the judge that that was an isolated criminal episode, and to require an assessment of disproportion in relation to the acquisition of each individual asset of which that asset is composed, rather than in reference to the asset as a unitary whole. This is from a perspective of temporal reasonableness, which presupposes that the specific purchase of assets that the confiscation is intended to neutralize is identified.

Anna Maria Maugeri, professor of criminal law, university of Catania, focused on the current issues posed by European Regulation 1805/2018 on the mutual recognition of freezing and confiscation orders. Starting from the analysis of the principle of mutual recognition of decisions of the judicial authorities of EU member states, as codified in Article 82, § 1 in the aftermath of the historic Tampere European Council in October 1999, the reasons that led the European institutions to abandon the conventional type of assistance system, based on the slow and cumbersome mechanism of rogatory letters, were highlighted. In particular, the limitations of the current formulation of the relevant legislation were discussed. Despite the undoubted merit of the legislative effort made, doubts were expressed about the ambiguity of some of the expressions used by the European legislator, which risk undermining its potential for application. Recital No. 13, in delimiting the scope of application of the Regulation, uses the phrase "proceedings related to a criminal offence," which, it is debated, whether or not it is also appropriate to include certain hypotheses of confiscation without conviction admitted in domestic law. Similarly, the problem arises for the Italian legal system as to whether preventive confiscation falls within it; the amendment made to the Proposed Regulation under the agreement of December 8, 2017, so as to include all "proceedings related to a crime," would seem to broaden the scope of the Regulation in order to also include this type of confiscation - the subject of a recent reform by Law No. 161/2017 - since it is applied in proceedings that certainly fall within "proceedings related to a crime." However, the controversial legal nature of the institution and the lack in the application procedure of some of the guarantees consubstantial to the criminal trial lead part of the doctrine to doubt the possibility of extending the operation of the Regulation to the institution.

A marked difference of views on the point is registered between Ciro Grandi, professor of criminal law, University of Ferrara, and Francesco Menditto, public prosecutor, Tribunal of Tivoli.

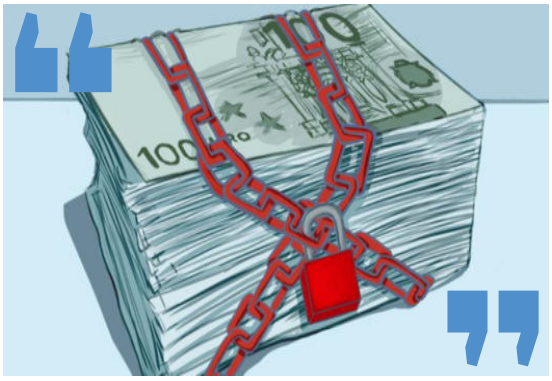
The former questioned, first, the latitude of the notion of "proceedings related to a crime" referred to in recital 13 of the Directive and whether it can be identified with that of "criminal matters" coined by the case law of the Edu Court. He doubts the possibility of extending the scope of Regulation 1805/2018 to preventive confiscation given the provisions of Recitals no. 13 and 14, insofar as they provide that Whereas : "This Regulation respects the fundamental rights and observes the principles recognized by the CDFUE and the ECHR" and "The procedural rights set forth in Directives 2010/64/EU (interpretation and translation), 2012/13/EU (information), 2013/48/EU (right to a lawyer), 2016/343 (presumption of innocence), 2016/800 (safeguards for minors) and 2016/1919 (legal aid) should apply [...] to criminal proceedings within the scope of this Regulation." According to national constitutional jurisprudence, on the other hand, the enforcement procedure does not have to "necessarily conform to the principles that the Constitution and conventional law specifically dictate for criminal proceedings," which would exclude, for the reasons stated above, its falling within the scope of the European legislation under consideration.

Francesco Menditto lands on a solution of a different tenor, arguing that the process of jurisdictionalisation and the recent normative evolutions that have affected the domestic discipline of preventive measures now make it possible to sustain the full compatibility of the matter with the constitutional and conventional dictates. The breadth of the notion of "proceedings related to a crime," contained in Recital No. 13 of the Regulation, is such that it also encompasses preventive confiscation by presupposing an assessment of social dangerousness based, first and foremost, on the existence of indications of the commission of crimes in the cognitive part of the judgment (whether qualified or generic dangerousness; as well as if the dangerousness is current on the prognostic judgment of future commission of crimes) and having as its object profits or products of the crime.

Gianfranco Criscione, Directorate General for International Affairs and Judicial Cooperation overviewed the role of the Ministry of Justice in the process of mutual recognition of freezing and confiscation orders. 85 cases are the registered cases of active mutual recognition (including 8 relating to preventive measures), in which Italy is the issuing state (Spain 15, Germany 13, Lithuania 9, Romania Belgium and Bulgaria 6 each) 61 cases, conversely, the passive ones, in which Italy is the executing state (France 12, Germany 10, Belgium 5).

## Meeting Agenda and Signatures sheet speakers and attendances

Freezing and confiscation orders: a comparison of expert's practices, 19th April 2023



Progetto RINSE – *Research and INformation Sharing on freezing and confiscation orders in European Union*

I provvedimenti di sequestro e confisca: la prassi degli esperti a confronto

**Mercoledì 19 Aprile 2023**
Dipartimento di Giurisprudenza
Palazzo Melzi, Aula Consiglio – Via Mazzocchi, Santa Maria Capua Vetere

Ore 10,00 – Assemblea dei *partner*
Ore 15,00 – Tavola rotonda

*Introducono*

**Andreana Esposito**
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**Antonio Pagliano**
Università degli Studi della Campania "Luigi Vanvitelli"

*Coordina*

**Catello Maresca**
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*Discutono*

**Giovanni Allucci**
Amministratore delegato Agrorinasce

**Francesco Balato**
Tribunale di Santa Maria Capua Vetere – Sez. Misure di Prevenzione

**Mauro Baldascino**
Comitato don Peppe Diana

**Rosario Di Legami**
Foro di Palermo

**Giuseppe Furciniti**
Colonnello Guardia di Finanza – Comando Provinciale di Caserta

**Paolo Giustozzi**
Foro di Macerata – Responsabile dell'Osservatorio misure patrimoniali e di prevenzione-UCPI

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**Maria Luisa Miranda**
Tribunale di Napoli – Ufficio Gip

**Luigi Roma**
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**Marcella Vulcano**
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**19 Aprile 2023**
**Consortium meeting – Focus group meeting**

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| MELISSA BONAVOLIA | | |
| RIZZOLI | | |
| PAGELI | | |
| [illegible] ANGELA | | |
| LUIGI ROMA | | |
| VULCANO MARCELLA | | |
| ROSARIO DI LEGAMI | | |
| PAOLO GIUSTOZZI | | |
| GIOVANNI ALLUCCI | | |
| CATELLO MARESCA | | |
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| ALBERTO DE CHIARA | | |
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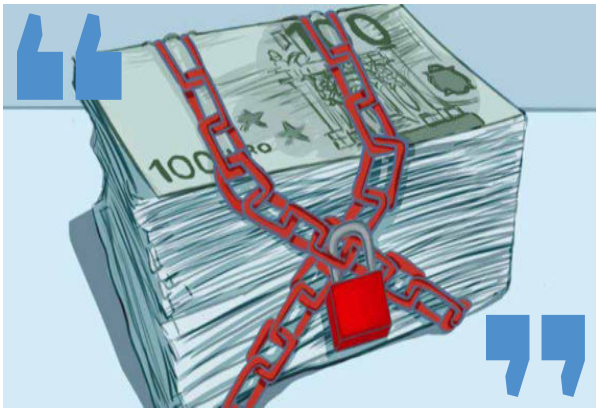
Freezing and confiscation orders: substantive and procedural requirements, 25th May 2023



Progetto RINSE – *Research and INformation Sharing on freezing and confiscation orders in European Union*

## I provvedimenti di sequestro e confisca: profili processuali e sostanziali

**Giovedì 25 maggio 2023 - ore 14.30**
Dipartimento di Giurisprudenza
Palazzo Melzi, Aula Consiglio
Via Mazzocchi, Santa Maria Capua Vetere

*Introduce*
**Andreana Esposito**
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*Coordina*
**Antonio Pagliano**
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*Discutono*
**Giuseppe Amarelli**
Università degli Studi Federico II

**Donatella Curtotti**
Università degli Studi di Foggia

**Federico Consulich**
Università degli Studi di Torino

**Giuseppe Furciniti**
Colonnello Guardia di Finanza

**Raffaello Magi**
Corte Suprema di Cassazione

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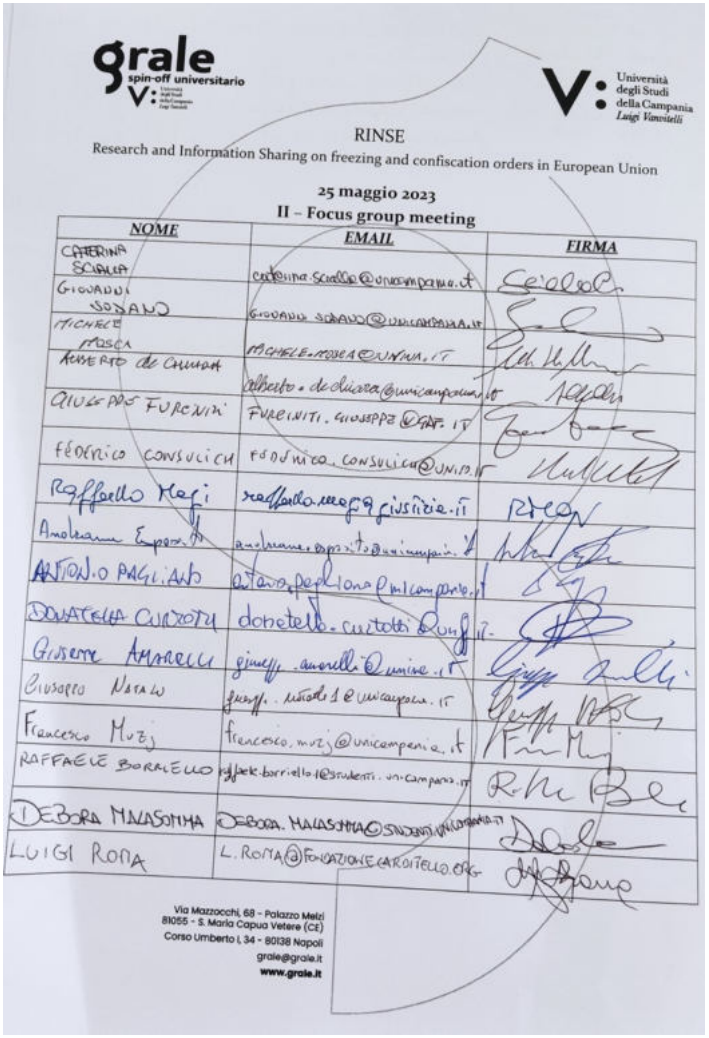

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**25 maggio 2023**
**II – Focus group meeting**

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Progetto RINSE – *Research and INformation Sharing on freezing and confiscation orders in European Union*

## Il mutuo riconoscimento dei provvedimenti di sequestro e confisca: criticità nella prassi

**Venerdì 26 maggio 2023 - ore 14.30**
Dipartimento di Giurisprudenza
Palazzo Melzi, Aula Consiglio
Via Mazzocchi, Santa Maria Capua Vetere

*Introduce*

**Antonio Pagliano**
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*Coordina*

**Catello Maresca**
Corte d'appello di Campobasso

*Discutono*

**Amedeo Barletta**
Foro di S. Maria C.V. - Osservatorio Europa UCPI

**Guido Colaiacovo**
Università degli Studi di Foggia

**Maria Vittoria De Simone**
Direzione Nazionale Antimafia e Terrorismo

**Ciro Grandi**
Università degli Studi di Ferrara

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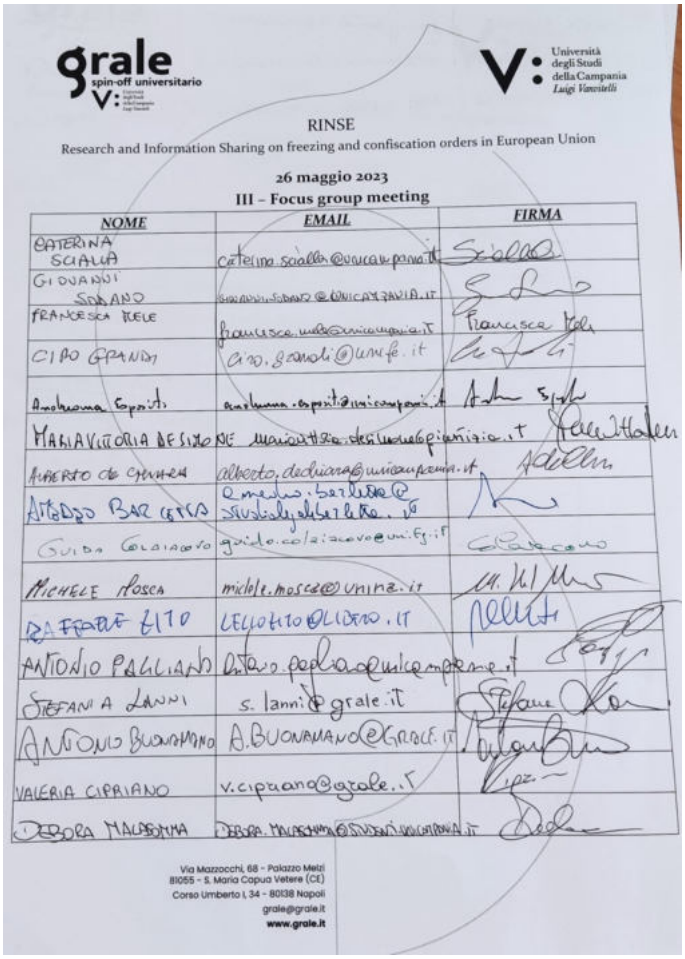

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**26 maggio 2023**
**III – Focus group meeting**

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Social economy as an antidote to criminal economy. The social and institutional reuse of confiscated asset and confiscated companies, 19th June 2023

Casa don Diana
*Via Urano 18 Casal di Principe* (CE)
**Lunedì 19 Giugno - ore 09.30**

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**International focus group**

**Economia sociale come antidoto all'economia criminale**
**Il riuso sociale e istituzionale dei beni e delle aziende confiscate**

**Ore 9:30 - Indirizzi di saluto**
**Salvatore Cuoci**
Comitato don Peppe Diana

**Ore 09:45 - Prima sessione**
**La gestione dei beni immobili confiscati**

**Stefano D'Alfonso**
Università di Napoli *Federico II*

**Daniela Lombardi**
Agenzia Nazionale Beni Sequestrati e Confiscati

**Luigi Lochi**
Fondazione Con il Sud

**Tatiana Giannone**
Libera, nomi e numeri contro le mafie

Modera
**Alberto de Chiara**
Università degli Studi della Campania *Luigi Vanvitelli*

**Ore 11:15 - Coffee break**

**Ore 11:30 - Seconda sessione**
**La gestione delle aziende confiscate**

**Gianpaolo Capasso**
Agenzia Nazionale Beni Sequestrati e Confiscati

**Giovanbattista Tona**
Corte di Appello di Caltanisetta

**Federica Colucci**
Tribunale di Napoli - Sezione GIP

**Giuseppe del Medico**
Unioncamere

**Alessandro Buffardi**
Rete gestori di beni confiscati
Da terre di camorra a Terre di don Peppe Diana

Modera
**Michele Mosca**
Università di Napoli *Federico II*

**Ore 13:00 - Lunch presso NCO**

**Ore 15:00 - Terza sessione**
**Buone pratiche e criticità nella gestione delle aziende confiscate**

**Luciano Modica**
Banca Etica - Geotrans

**Domenico Posca**
Amministratore giudiziario

**Fabio Pantalco**
Unicredit

**Gianluca Casillo**
Amministratore giudiziario

**Gisella Mammo Zagarella**
Calcestruzzi Ericina Libera

**Luigi Moscato**
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**Antonio Pagliano**
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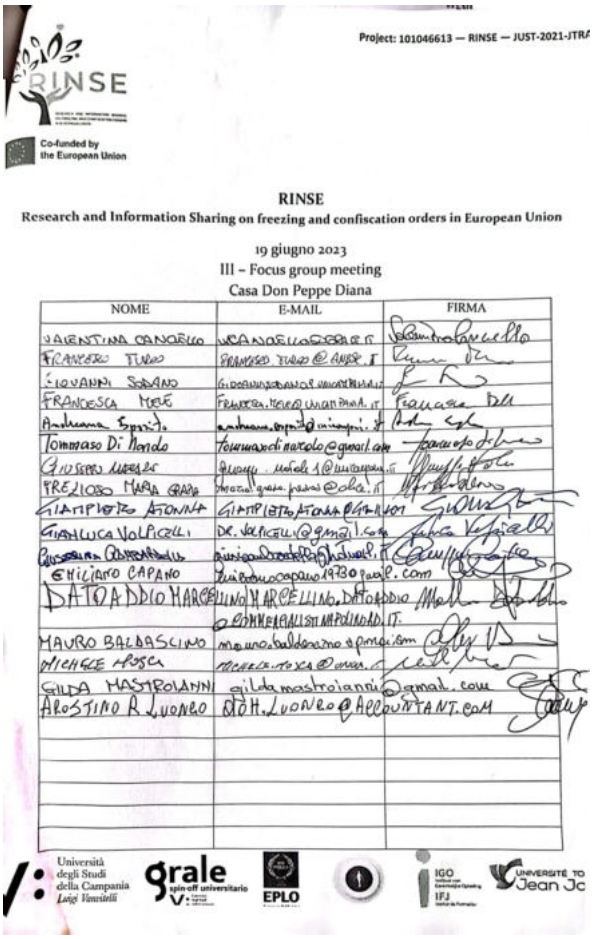

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**RINSE**
**Research and Information Sharing on freezing and confiscation orders in European Union**

19 giugno 2023
III – Focus group meeting
Casa Don Peppe Diana

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**UNIVERSITÀ DEGLI STUDI DELLA CAMPANIA LUIGI VANVITELLI**

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**PROGETTO RINSE**

**RESEARCH AND INFORMATION SHARING ON FREEZING AND CONFISCATION ORDERS IN EUROPEAN UNION**

20 giugno 2023
ore 9:00 – 16:00
Real Sito di Carditello
via Carditello, 81050 – San Tammaro (CE)

**Indirizzi di saluto**
Dott. Maurizio Maddaloni
Presidente Fondazione Real Sito di Carditello

Prof. Raffaele Picaro
Direttore del Dipartimento di Giurisprudenza – Università degli Studi della Campania *Luigi Vanvitelli*

Avv. Luigi Roma
Consigliere di amministrazione Fondazione Real Sito di Carditello

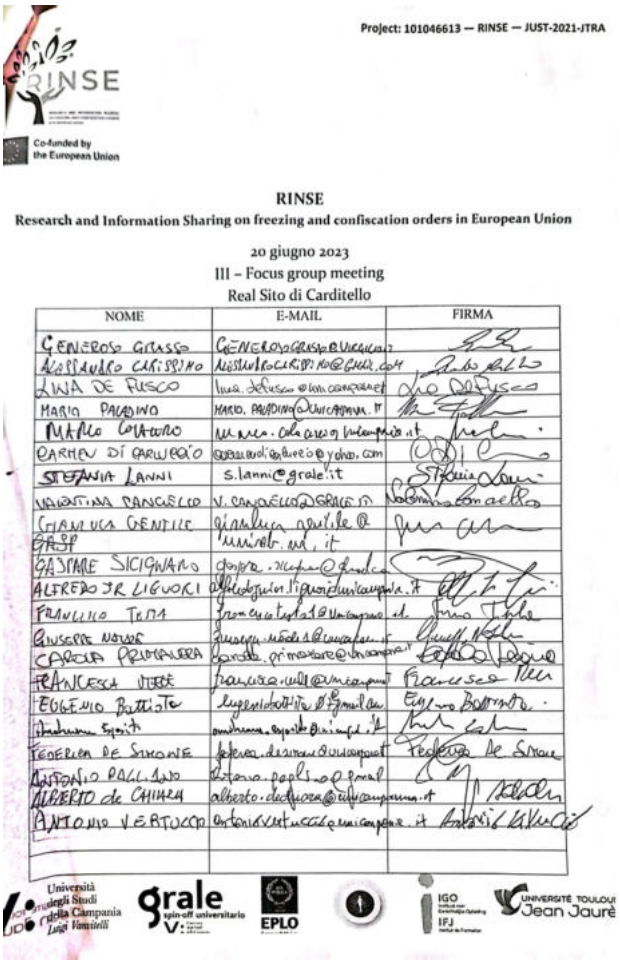
**Coordina**
Prof. Giuliano Balbi
Ordinario di Diritto penale – Università degli Studi della Campania *Luigi Vanvitelli*

**Introduce e conclude**
Prof.ssa Andreana Esposito
Project leader progetto RINSE
Associata di Diritto penale – Università degli Studi della Campania *Luigi Vanvitelli*

**Oltre il dato letterale: cosa intendiamo quando parliamo di sequestri e confische nell'ordinamento nazionale**
**Intervengono**
Prof. Marco Pelissero
Ordinario di Diritto penale – Università degli Studi di Torino

Prof.ssa Mariangela Montagna
Associata di Diritto processuale penale – Università degli Studi di Perugia

**Discussant**
Dott. Giovanni Sodano
Dottore di ricerca in Diritto penale – Università degli Studi della Campania *Luigi Vanvitelli*



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**Research and Information Sharing on freezing and confiscation orders in European Union**

20 giugno 2023
III – Focus group meeting
Real Sito di Carditello

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