France[1]

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0. Introduction.

0.1. Developments in the normative framework and state of transposition of EU instruments.

The legal regime for confiscation is laid down in article 131-21 of the Criminal Code.[8] A single[9] text whose profound[10] modernization has been achieved through international instruments, particularly European ones. *Act No. 2004-204 of 9 March 2004 adapting the justice system to changes in crime*[11] is the first to have shown the way. Other texts followed: *Act No. 2007-297 of 5 March 2007 on the prevention of delinquency*[12] and, above all, *Act No. 2010-768 of 9 July 2010 on facilitating seizure and confiscation in criminal matters*,[13] which, by creating the new category of special seizures, gives the confiscation measure a new place and scope within French criminal policy and procedure.[14] This text recasts the rules applicable to seizures, creates an Agency for the Management and Recovery of Seized and Confiscated Assets (hereinafter AGRASC)[15], and strengthens criminal cooperation mechanisms for the seizure and confiscation of assets.[16] Then comes *Act No. 2012-409 of 27 March 2012 on the execution of sentences*,[17] which (in particular) separates value confiscation from the absence of prior seizure or the impossibility of representing the confiscated asset and thus gives it a general scope, and *Act No. 2013-1117 of 6 December 2013 on the fight against tax fraud and serious economic and financial crime*,[18] which (in particular) specifies in turn the conditions for value confiscation and the missions of the AGRASC. Most recently, *Act No. 2016-731 of 3 June 2016 on strengthening the fight against organized crime, terrorism and their financing and improving the efficiency and guarantees of criminal procedure*[19] further supplemented and amended the overall system.

These reforms have broadened the scope of the confiscation penalty and, above all, have considerably facilitated its imposition, especially since, as mentioned above, the amendments made to the legal regime on confiscation have been supplemented by a thorough reform of the rules governing criminal seizures.[20]

The developments very briefly presented at the moment[21] have been largely (if not exclusively) driven by the European Union. This is why the chronology, pace and purpose of successive reforms reflect the sinuous path of European freezing and confiscation law, its successive limits

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[8] Hereinafter CC.

[9] Subject, of course, to the texts on procedure, cooperation and management of confiscated assets to be presented in Parts 2, 3 and 4.

[10] To measure it, it is sufficient to compare the versions of the text since the entry into force of the new Criminal Code in 1994 with the version in force today (unchanged since 2013): see for the 1994 version: https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=B202B7EFECC1F1FF48E6C049645C7871.tplgfr33s_1?idArticle=LEGIARTI000006417274&cidTexte=LEGITEXT000006070719&categorieLien=id&dateTexte=20030612 ; for the current version, *infra*, part. 1.

[11] *Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité.*

[12] *Loi n° 2007-297 du 5 mars 2007 relative à la prévention de la délinquance.*

[13] *Loi n° 2010-768, 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale.*

[14] *Infra*, Part 2.

[15] *Infra*, Part 4.

[16] *Infra*, Part 3.

[17] *Loi n° 2012-409 du 27 mars 2012 de programmation relative à l'exécution des peines.*

[18] *Loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière.*

[19] *Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement et améliorant l'efficacité et les garanties de la procédure pénale.*

[20] *Infra*, part 2.

[21] Described in more detail below.

and inconsistencies. Thus, the effects of the choice, initially, to favour mutual recognition to the detriment of harmonisation,[22] linked to the context of the first half of the 2000s, which was very favourable to mutual recognition because of the success of the EAW and rather hostile to harmonisation, were manifest in French law, to such an extent that the French Senate was able to highlight before the adoption of the great 2010 law, the discrepancy - without justification - between the cooperation system applicable in France (more permissive) and the "internal" system (much more limited). But it also explains why the transposition of European texts operates sometimes *ex post* (following and in view of the European instrument) but sometimes *ex ante* (in advance).
Therefore, without going into unnecessary detail (some texts transposing both *ex post* and *ex ante*), it is possible to present in this way the state and process of transposition of the European instruments constituting the Union's policy on confiscation (and freezing).
For example, the *Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence* was transposed by *Law 2005-750 of 4 July 2005 on various provisions for adapting to Community law in the field of justice*[23] by means of Articles 695-9-1 to 695-9-30 of the CCP.[24]
Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property was transposed by *Act No. 2007-297 of 5 March 2007 on the prevention of crime* through a substantial revision of article 131-21 CC.
Council Framework Decision No 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders was transposed by *Law 2010-768 on facilitating seizure and confiscation in criminal matters* through Articles 713 to 713-141 CCP.[25]
The *Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime* has been implemented through the creation of the Criminal Assets Identification Platform, PIAC, which is responsible for the identification of sources of illicit enrichment and the very nature of such wealth, and the AGRASC, which is entrusted with the operational management of seized property (by the judicial authority).
Finally, *Directive 2014/42* was partially transposed by *Act No. 2016-731 of 3 June 2016 on strengthening the fight against organized crime, terrorism and their financing and improving the efficiency and guarantees of criminal proceedings* (Art. 84) and *Decree No. 2016-1455 of 28 October 2016 on strengthening guarantees of criminal procedure and the enforcement of sentences in the field of terrorism*.

0.2. General features of the French "model".

To outline the general features of the "model" adopted by the French legislator, it is necessary to distinguish the nature of the confiscation measure, on the one hand, and its types or forms, on the other.[26]
With regard to the nature (in the sense of disciplinary affiliation), it is the choice of a unitary model that prevails, since confiscation measures are all (whatever their type/form) of a criminal

[22] In this sense, J. Lelieur, "Le dispositif juridique de l'Union européenne pour la captation des avoirs criminels", *AJ Pénal*, 2015, 232.
[23] *Loi 2005-750 du 4 juillet 2005 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la justice.*
[24] *Infra*, part 3.
[25] *Infra*, part 2.
[26] For a very clear and exhaustive presentation of the French legal regime on confiscation and seizures (excluding international and cooperation aspects), see Lionel Ascensi's recent and highly valuable book: *Droit et pratique des saisies et confiscations pénales*, Dalloz, 2019.

nature (*stricto sensu*) and are therefore governed by the Criminal Code and the Code of Criminal Procedure.
However, one major exception should be mentioned that concerns customs confiscation.[27] The confiscation measure has its own, not strictly criminal, nature in this context. This is a sanction as in criminal law (which, as in criminal law, may be preceded by other measures[28] to secure its future enforcement). But it is said to be of a fiscal or mixed nature, insofar as this sanction has both a repressive (punitive) and compensatory character.

On the other hand, the typology of confiscation measures is particularly diversified. It does not exactly match the tripartite classification of the Directive and the draft Regulation (criminal confiscation, extended confiscation and confiscation without prior conviction) and is based on considerations relating to the nomenclature of criminal sanctions as well as the scope (or purpose) of confiscation.

Thus, with regard to the nomenclature of criminal sanctions, confiscation is primarily a penalty. However, it may present itself as a security measure (*mesure de sûreté*) in a number of cases.[29] Thereafter, it may be imposed as an additional, alternative or principal penalty. In principle, it is an additional penalty. It may be enforced as a primary penalty either as a substitute to imprisonment[30] or as a substitute to another additional penalty.[31]

Finally, two classifications, used in doctrine, make it possible to approach the central question of the link between the offence and the object of confiscation.
Indeed, French law traditionally distinguishes between general confiscation, successively "maintained, abolished or restored",[32] and special confiscations.
The first, "an eclipse institution [which] disappears during periods of calm and is reborn in times of turmoil",[33] consists of the State's control over the condemned person's property (all his/her assets).[34]
The second ones concern a specific asset.[35]

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[27] As provided for in the Customs Code for the sanction of criminal customs offences.
[28] E.g. the consignment and seizure measures provided for by the Customs Code and implemented in accordance with it by customs officers.
[29] Of which only mention will be made. This report, whose main aim is to compare French law with current and future EU law, focuses on confiscation as a penalty. *See* Art. 131-21, par. 7 CC.
[30] In the following cases: "confiscation of one or more vehicles belonging to the convicted person; confiscation of one or more weapons belonging to the convicted person or which are freely available to him; confiscation of the thing which was used in or was intended for the commission of the offence, or of the thing which is the product of it, except for a press misdemeanour" (article 131-6 4°, 7°, 10° CC).
[31] "Where a misdemeanor is punishable by one or more of the additional penalties enumerated under article 131-10 [such as prohibition, confiscation, incapacity or withdrawal of a right, an obligation to seek treatment or a duty to act, the impounding or confiscation of a thing, the confiscation of an animal, the compulsory closure of an establishment, the posting a public notice of the decision or the dissemination the decision in the press, or its communication to the public by any means of electronic communication], the court may decide to impose as a main sentence one or more of the additional penalties" (article 131-11 CC).
[32] A. Beziz-Ayache, "Confiscation", *Rép. Dalloz* (2017), n° 5.
[33] J. Pradel, *Droit pénal général*, Cujas, 2014, cited by A. Beziz-Ayache, "Confiscation", *Répertoire Dalloz*, 2017, n° 5.
[34] Art. 131-21, par. 6 CC : "*Lorsque la loi qui réprime le crime ou le délit le prévoit, la confiscation peut aussi porter sur tout ou partie des biens appartenant au condamné ou, sous réserve des droits du propriétaire de bonne foi, dont il a la libre disposition, quelle qu'en soit la nature, meubles ou immeubles, divis ou indivis*" ("Where the law punishing the felony or misdemeanour so provides, confiscation may also cover all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, of which he has free disposal, whatever its nature, movable or immovable, divided or undivided").
[35] Art 131-21 (par. 2, 3, 4, 5, 8) CC, *infra*.

But, in particular because of the recent developments mentioned above, which have transformed the conception and uses of confiscation, a second typology tends to emerge, distinguishing seizure *in personam* from seizure *in rem*.[36] Thus, according to this classification, a distinction should be made between real confiscations, i.e. confiscations directly related to the commission of an offence, on the one hand, and personal confiscations which, without such a link, are only related to the convicted person, on the other hand.
This distinction would explain why the latter not only require the characterization of the official or hidden right of ownership of the convicted person but are also governed by the principle of personality (and proportionality) of penalties, while the former would be autonomous measures, "distinct from the notion of personal punishment"[37] without falling into the category of security measures.

These general and contextual considerations being recalled, it is appropriate to present the French law on confiscation, in its substantial dimension first (1), then the French law of confiscation and freezing in its procedural dimension (2) before examining the French system for the mutual recognition of freezing and confiscation orders (3), and finally the management of seized and confiscated property (4).

1. Aspects on substantive criminal law on confiscation.

1.1. Criminal confiscation.

Definition: Confiscation is a penalty provided for in the Criminal Code, which applies to property whose ownership will be permanently transferred[38] to the State. Its purpose is to punish the commission of a criminal offence committed by a natural or legal person.[39] It can only be pronounced by a court decision against a person convicted of the alleged offences.

It is because it is subject to the assessment of a judge whose status guarantees his or her independence and impartiality that the sentence has been declared in accordance with the Constitution.[40]

Article 131-21, in particular paragraphs 3 and 4, therefore envisages confiscation within the meaning of the Directive and the Regulation by distinguishing between several types of confiscation according to the penalty incurred and the link between the property and the offence (*infra*).

This general framework is superimposed on specific frameworks that it can, depending on the case, supplement or "compensate".

> Indeed, special legal regimes and this general framework on confiscations coexist under French law, which may lead to some kind of fragmentation. But the general regime does often supplant a specific confiscation (in order to punish effectively).

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[36] See for instance, G. Cotelle, "Consécration implicite de la procédure de confiscation sans condamnation préalable", *AJ Pénal*, 2016, 463.
[37] *Ibid*.
[38] If necessary, with a view to its destruction, which constitutes a means of enforcing the penalty of confiscation.
[39] *See* Art. 131-39, 8° CC.
[40] Cons. const., 26th Nov. 2010, No. 2010-66 QPC: Official Journal, 27th Nov. 2010, p. 21117.

More than that, the judge is allowed to mention several legal bases of confiscation in his rulings.[41]

Special legal regimes[42] are for instance provided as regards theft (confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, with the exception of articles subject to restitution, Art. 311-14, 4° CC); felonies and misdemeanors against the nation, the State and public peace (Art. 414-5 3°, 431-7 3°, 431-11 3°, 431-21 CC; procuring (Art. 225-22 3°, 224-24 1° CC); corruption (Art 433-23 CC); counterfeiting or forging of coins or banknotes (Art. 442-13 CC); forgery of securities issued by public authorities (Art. 443-6 CC).

Conditions relating to persons. The penalty is applicable to natural and legal persons.
As for the former, adults – including protected adults – are liable, as are minors aged 13 to 18. Confiscation is also part of the educational sanctions that may be imposed on minors between the ages of 10 and 13.[43]
As for legal persons, they also incur this penalty, the pronouncement of which follows the same regime (that of articles 131-21) as that applicable to natural persons, subject to the hypothesis of general confiscation (*infra*, extended confiscation): this penalty is only possible in matters of crimes against humanity (Art. 213-3 CC), certain offences of procuring (Art. 225-25 CC) or terrorist acts (Art. 422-6 CC).

Conditions relating to the penalty incurred. Most penal texts provide for the possible imposition of the penalty of confiscation, which may thus be imposed on a particular property according to the punitive interest it entails. Beyond this casuistic nature of the texts, there is a general framework which is that of Article 131-21 of the Criminal Code.
This provision applies to all offences, except press offences.[44] It is sufficient to incur a prison sentence of more than one year, which makes it possible to fill the many gaps in the special texts.
Below the one-year imprisonment threshold, confiscation is only incurred if there is a law providing for it, whether it is a misdemeanour or a petty offence and whether the offence is provided for in the Criminal Code or another code or penal legal or regulatory body.

Conditions relating to the link between the property and the offence. Article 131-21 of the Criminal Code provides that property may be confiscated because it is related to the offence it punishes. It deprives the offender of what allowed him/her to act or the profits he/she was able to make from his/her action.

But there are also some cases in which the link in question is presumed.

Finally, there are some of the most serious qualifications for which it is not necessary to establish a real or presumed link between the property and the offence. The mere fact of being found guilty is sufficient to authorize the imposition of this sanction, the penalty being applicable to any property of the convicted person, regardless of its lawfulness, unlawfulness or presumed lawfulness. The latter two cases will be considered as part of the extended confiscation (*infra, 1.2*).

The link with the offence is conceived more or less closely, based on the following typology, ranging from the closest to the most distended links.

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[41] Cass. Crim., 22nd Feb. 2017, n° 16-83.257.
[42] Art. 131-21 par. 4 CC, on general confiscation mentions the confiscation if provided by a special law or regulation.
[43] In this case, "any object detained or belonging to the minor that was used to commit the offence or that was the proceeds thereof" may be confiscated, *see* Ordinance No. 45-174 of 2 February 1945 on juvenile delinquents, art. 15-1, 1.
[44] See below.

The first category covered by article 131-21, paragraph 2, of the Criminal Code is property used to commit the offence (this category does not require special clarification) and property intended to commit the offence (category that allows confiscation to be applied to an attempt); it corresponds to the category of instruments of the offence.
Then, in paragraph 3 of the same article, the legislator refers to property that is on the one hand the subject-matter of the offence and on the other hand, the proceeds of the offence. These two categories require further clarification.
As for the subject matter of the offence, the legislator does not provide for any definition. The doctrine considers that it covers the result obtained or sought by the offender.[45]
As far as the proceeds are concerned, it makes it possible to cover all the assets acquired or created by the commission of the facts.[46] The judge may order the total confiscation of the property without having to explain its proportionality. Anything that is the proceeds of the offence is subject to confiscation. These proceeds can be direct or indirect. In the first case, all the assets obtained, whatever their nature, are concerned. Proof that the funds have been obtained from an illegal activity is sufficient to justify their confiscation without the need to make an accurate statement of the sums involved if the person concerned does not provide proof of the share corresponding to other sources of income. However, a demonstration is required.[47]
The connection between the offence and what the offender has gained from it must be established.[48] In the second case (indirect proceeds) "all forms of enrichment likely to be linked to the commission of the facts"[49] are concerned, which makes this category the most sensitive.

The conditions for the execution of the confiscation (confiscation in kind and value confiscation). The law provides for two types of confiscation. The confiscation may concern the property itself or its value.
It should be borne in mind that confiscation in kind or in value is not a condition of sentencing. It is only an execution modality. Thus understood, the judge may decide to apply the penalty to the property that is directly subject to confiscation.
But the judge may just as easily impose the penalty of value confiscation, in other words in proportion to the value of these assets. The decision shall indicate that the penalty of confiscation is imposed for a specified amount.
One of the first consequences is that it is not possible to combine these two penalties. Judges cannot decide to confiscate property in kind and its value. They are required to make a choice between one or the other sanction.[50]
Confiscation in kind is a matter of principle. The penalty is intended to relate to something that happens to be related to the offence committed or to the person who committed it, as a perpetrator, co-perpetrator or an accomplice.
Value confiscation is provided for in article 131-21, paragraph 9. In this case, the penalty shall be an amount the quantum of which is determined by the conviction decision.
However, this amount is not taken at random. It must correspond to the value of the property that could have been confiscated in kind. Value confiscation is therefore based on an alternative mechanism.
But even more elaborately, the law allows this value to be attributed to a property belonging to the convicted person that could not have been confiscated as such, but because this property

[45] E. Camous, "Confiscation", *Jurisclasseur Pénal Code* (Art. 131-21 et 131-21-1, Fasc. 20), 2017, n° 28.
[46] A. Mihman, "La confiscation des profits illicites", *Gazette du Palais*, 11-13 May 2014, n° 133.
[47] See recently the reminder of this requirement: Cass. Crim., 14th Nov. 2017, n° 15-81.346; 23 Jan. 2018, n° 16-87.712.
[48] Par. 3 in fine: "Si le produit de l'infraction a été mêlé à des fonds d'origine licite pour l'acquisition d'un ou plusieurs biens, la confiscation peut ne porter sur ces biens qu'à concurrence de la valeur estimée de ce produit".
[49] E. Camous, n° 32.
[50] Cass. *Crim*., 21st March 1996, *Bulletin criminel* 1996, n° 127; M. Véron, *Droit penal*, 1996, comm. 214.

has an identical value to the proceeds of the offence,[51] for example, it may be confiscated even though it was acquired before the commission of the facts.
This option attests to the great flexibility of the confiscation penalty and must be put into perspective with the new provisions of article 706-141-1 of the Code of Criminal Procedure which allow, before conviction, the value of property to be seized.
The conditions under which value confiscation may be imposed were substantially amended by Act No. 2012-409 of 27 March 2012. The old provision required the fulfilment of two alternative conditions: the property had not previously been seized or could not be represented. These requirements no longer condition the imposition of value confiscation.
The trial court now has a real choice. It is possible for the court to order confiscation in kind, in other words to apply it to confiscable property, whether or not it has previously been seized, or in value, in other words, to a sum or other thing of which the convicted person is the owner or of which he has free disposal.
The only condition is that it is not possible to combine the two penalties on the same asset.
On the other hand, the same decision may very well include confiscations in kind and in value as long as they concern separate assets.[52]
The flexibility offered to the judge makes it possible to compensate for the disappearance of the confiscable object or to seize an object unrelated to the offence but which can be confiscated because it has the same (monetary) value as the amount of money that can be confiscated.
Value confiscation is the result of compensation. This is the amount established between the value of the property whose confiscation is not or cannot be ordered and the amount indicated in the conviction decision. Consequently, the trial court may not order a value confiscation of an amount greater than that which was susceptible to in kind confiscation. Nor can it confiscate as compensation another property whose value is also higher than what was confiscable.

The conditions for the execution of the confiscation [bis] (total or partial confiscation). When it is pronounced, confiscation shall in principle cover the entire property.
The confiscation order may only affect the legal nature of the property and not its material integrity. Therefore, the penalty may be imposed on the undivided share of a property, provided that the situation of undivided ownership already exists.[53]
This is not the case for intangible property such as amounts recorded in an account. In such a case, a court may order partial confiscation of the funds.
The same applies to value confiscation because the sanction then concerns a fungible thing such as a sum of money. It can therefore be partially confiscated without altering its legal integrity.

The conditions for the execution of the confiscation [ter] (grounds). The penalty of confiscation must be reasoned, whether it is imposed for a felony, a misdemeanour or a petty offence.[54]
In a recent decision, the Court of Cassation recalled that "with respect to misdemeanours, the judge who imposes a sentence must give reasons for his decision in the light of the circumstances of the offence, the personality and personal situation of the offender".[55]

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[51] E. Camous, "La confiscation en valeur. Une peine en devenir", *Droit pénal*, 2017, n°7-8, dossier 5.
[52] Cass. crim., 22nd March 2017, n° 16-83.576.
[53] The totality of undivided share of a property may be seized and confiscated, despite the good faith of other co-owners (Cass. Crim., 3rd Nov. 2016, n° 15-85.751). On the question of breach of the right to the property of the third parties / co-owners, see E. Camous, "Saisie et confiscation de biens faisant l'objet d'une propriété collective", *Droit pénal*, 2019, n° 4.
[54] See, for example, Cass. crim., 21st March 2018, n° 16-87.296, E. Bonis, *Droit pénal*, 2017. Comm. 96, 50-51 ; Cass. crim., 27th June 2018, 16-87.009.
[55] See general individualization requirements: art. 132-1 par. 3 CC.

It adds, summarizing recent case law, that "except where the confiscation, whether in kind or in value, concerns property which, in its entirety, constitutes the proceeds of the offence, the judge, in ordering such a measure, must assess the proportionate nature of the infringement of the person's right of ownership when such a guarantee is invoked or proceed to this *ex officio* when it concerns the confiscation of all or part of the property".
Thus, when the confiscation concerns property which in its entirety constitutes the proceeds of an offence, the penalty does not have to be assessed on the basis of proportionality.[56]
The court therefore introduced a differentiated application of the principle of proportionality according to the lawfulness of the property that proceeds from the offence justifying the confiscation or seizure. In this sense, if the property subject to the measure is totally unlawful (by nature or because of its origin), "the principle of proportionality cannot apply".[57] If the confiscated property is only partly of fraudulent origin, then the confiscatory measure must be examined in the light of the principle of proportionality.[58]

Mandatory and optional confiscation. Most often optional, the confiscation measure may in certain circumstances be mandatory. In this case, the judge is required to order it. Between these two extremes there are situations in which, although necessarily provided for in the texts, the law authorises the judge to disregard it, provided that he or she gives a reason for doing so. This is a non-confiscation.

As a penalty, confiscation is a simple option that falls within the sovereign power of judges with regard to the circumstances of the offence and the personality of the offender (Art. 132-24 CC). This was reiterated by the Criminal Division of the Court of Cassation in a judgment of 27 May 2015. The Court of Appeal was not required to order the confiscation of the defendant's vehicle, even if it was automatically incurred for crimes and offences punishable by a prison sentence of more than one year. Indeed, the confiscation of property used to commit the offence is, unless otherwise provided for in article 131-21 of the Criminal Code, only a mere faculty.[59]

In some cases, the court is required to order confiscation without having to question the identity of the owner or holder, whether or not the latter is convicted. This is the case for objects classified as dangerous or harmful by law or regulation or when their detention is unlawful (Art. 131-21, para. 7 CC). In this case, confiscation is not only the sanction imposed on a person found guilty of the facts of which he or she is accused. It is also a security measure which concerns the property itself, the nature of which prohibits any restitution. This explains why, like any security measure, it is not subject to the principle of the necessity of penalties.[60] However, it must be "proportional"; but the proportionality is not to be assessed with regard to the seriousness of a convicted person's past misconduct but in respect with "the prevention of breaches of public policy necessary to safeguard rights and principles of constitutional value";[61] besides, it is then assessed *a priori*, with regard to the legal provision and not the judge's decision.

Categories of offences for which the different types of confiscation can be improved. Subject to press offences,[62] the penalty of confiscation is incurred for all crimes and offences

[56] Cass. crim., 3rd May 2018, n° 17-82.098.
[57] Cass. crim., 7th Dec., 2016, n° 16-80.879.
[58] Cass. crim., 4th May, 2017, n° 16-87.330.
[59] Cass. crim., 27th May 2015, n° 14-84.086.
[60] *See* Cons. const., 2nd March 2004, No. 2004-492 DC, recital 74; C. Lazerges, *Revue de science criminelle et de droit pénal comparé*,2004, 725.
[61] Cons. const., 21st Feb. 2008, No. 2008-562 DC, recital No. 13.
[62] Art. 131-21, para. 1 CC.

punishable by at least one year's imprisonment. For other offences, confiscation may be incurred if the criminal provision so provides. This is how, in particular, many petty offences are punishable by such a penalty. Thus, the list of offences covered cannot be reproduced here (especially since the offences are within and outside the Criminal Code).
With regard to the issue of confiscation of the assets of third parties, article 131-21 makes the existence of a title deed and free disposal one of the conditions without which the penalty of confiscation cannot be imposed, subject to dangerous or harmful objects or objects whose detention is unlawful.
With regard to the concept of free disposal, which extends the scope of confiscation, it has become equal to the condition of ownership as the reforms have progressed. However, the notion is neither defined by the law nor by the criminal judge. The case law seems to retain an autonomous definition, "disconnected from the founding principles of civil law and company law",[63] which brings the notion closer to the prevailing interpretation in the field of money laundering.[64]

The moment from which the person is the owner or has free disposal of the thing constitutes a sensitive point. This depends on the type of confiscation implemented, given the nature of the links between the offence and the property concerned.
The property that was used to commit the offence, that was intended to commit it or that was the object of the offence is naturally those that have a direct but also contemporary link with the facts. These are those that the convicted person possessed or had free access to at the time of the perpetration of the offence, regardless of the date on which these objects entered into his patrimony. However, once they have been removed from this patrimony, they may no longer be confiscated, subject to the demonstrated bad faith of the new owner.
The direct or indirect proceeds of the offence have a natural connection with the facts alleged. It is therefore necessary to establish a contemporary relationship between the offence and what it has allowed the author, the co-author or accomplice to benefit. It is therefore possible to look to the future by focusing on the property that was the result of the offence or that was acquired as a result of the offence. On the other hand, it is not possible to confiscate property whose purchase, possession or free disposal predates it. They cannot, by nature, be the direct or indirect result of an offence that necessarily occurred later.

The confiscation of property freely available to the convicted person is only possible subject to the rights of the owner in good faith. This rule was incorporated into article 131-21, paragraph 3, of the Criminal Code by Act No. 2007-297 of 5 March 2007.[65]
Good faith is thus inseparably linked to free disposal. It all comes from the fact that the one who freely disposes of the thing is not necessarily its owner. In such a case, this can lead to depriving a person of his or her property even though he or she has not been convicted. Such a consequence can be admitted when the owner is in bad faith. Thus, it is a matter of reaching those who, without committing the predicate offence, knowingly left property belonging to them at the offender's free disposal. On the other hand, those who ignore everything cannot have to suffer such a sanction.

[63] Ch. Cutajar, "Saisie pénale et « libre disposition » : nouvelle illustration de l'autonomie du droit pénal des affaires", *La Semaine juridique, Edition Générale*, 2013, 804.
[64] A. Létocard, "La revitalisation du traitement judiciaire du blanchiment. – À propos de l'article 324-1-1 du Code pénal", *La Semaine juridique, Edition Générale*, 2015, 899.
[65] Transposition of *Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property*.

Good faith is presumed. It is therefore for the prosecution to show that the owner of the thing left at the free disposal of the convicted person is acting in bad faith. The proof of this demonstration is free.
The assessment of the owner's good faith is left to the sovereign discretion of the courts. Bad faith may refer to the owner's knowledge of the use that was made of the property, in other words, that it was used to commit the offence. But it can go beyond that and result from circumstances that suggest that he could not have ignored it.

As for the victim, it is barely and inappropriately covered by article 131-21, which states that confiscation includes "all property that is the object or direct or indirect proceeds of the offence, with the exception of property that is likely to be returned to the victim".
However, the victim is necessarily a *bona fide* third party who, as such, benefits from the protection afforded by this status.
Thus, the principle is that property belonging to a victim cannot be confiscated. His/her ownership is legitimate and cannot be contested. To order the confiscation would deprive him/her of what belongs to him/her without this being justified by the commission of a criminal offence and therefore linked to a sanction. This rule applies even when the property in question is the thing that was used to commit the offence.

Confiscable objects. Article 131-21 of the Criminal Code sets out the scope of the objects that may be confiscated. In addition to objects qualified as harmful and dangerous, "all movable or immovable property, whatever its nature, divided or undivided (...), of which the convicted person is the owner or, subject to the rights of the owner in good faith, of which he has free disposal" are thus covered.
With regard to movable property, the law does not lay down any obligation as to how it should be designated. This is left to the free discretion of the court.
With regard to immovable property, confiscation can only fully produce its effects on the day on which the transfer of ownership is registered with the mortgage registry. It is therefore important that the decision respects the formalism imposed by the matter; this difficulty will most often be overcome by the fact that the property will have been the subject of a protective seizure. As the act of seizure has been previously registered, it is sufficient that the decision refers to it for enforcement to be carried out.
The possible confiscation of movable and immovable property makes it possible to include intangible property, in particular bank accounts, securities, shares or financial instruments as well as intangible property that constitute business assets.
Intangible rights, such as receivables and those arising from life insurance contracts, are also subject to confiscation.
Finally, the penalty of confiscation may relate to the state of undivided ownership of movable or immovable property (Art. 131-21, para. 2 CC) as well as intangible rights (Art. 131-21, para. 8 CC); it may not then extend to the share of co-owners who have not been convicted.

1.2. Extended confiscation.

Types of extended confiscation. Extended confiscation has two forms in French criminal law. It covers, on the one hand, the failure to justify the lawful origin of the property, provided for in paragraph 5 of article 131-21 of the Criminal Code, and on the other hand, the so-called general confiscation (confiscation of patrimony), provided for in paragraph 6 of the same article. The drafting of these two texts is the result of the aforementioned law of 5 March 2007.

In the first case, the link between the property and the offence is legally presumed.[66]
The text states that: “In the case of a felony or misdemeanour punishable by at least five years' imprisonment and having yielded a direct or indirect profit, confiscation shall also include movable or immovable property, whatever its nature, divided or undivided, belonging to the convicted person or, subject to the rights of the owner in good faith, of which he has free disposal, where neither the convicted person nor the owner, given the possibility to explain himself on the property whose confiscation is being considered, have failed to justify its source”.

Thus, as indicated at the end of the paragraph, confiscation does not therefore depend on the evidence that attests to the fact that it is the direct or indirect proceeds of the offence. It refers to the impossibility for the convicted person to prove their origin, in other words that they were legally acquired with funds of lawful origin.[67] The main consequence is that the burden of proof does not rest on the prosecution but on the person prosecuted.

In the second case, the link between the property and the offence is legally ignored: it is irrelevant. Thus, paragraph 6 provides that: “where the law punishing the felony or misdemeanour so provides, confiscation may also cover all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, of which he has free disposal, whatever the nature, movable or immovable, divided or undivided”.
This penalty is provided for the most serious offences restrictively listed by law (*infra*).

Conditions. With regard to the presumption of fraudulent origin of property, it presupposes the commission of a felony or misdemeanour punishable by 5 years' imprisonment.
The felony or misdemeanour punishable by 5 years' imprisonment must have yielded a direct or indirect profit. This condition is not locked in any other condition. Thus, the profit in question is assessed as such without the law requiring it to be reconciled with the property liable to confiscation. In other words, there is no need to establish that they were acquired with illicit assets.
Insofar as confiscation may be ordered if the accused does not justify its origin without the prosecution being obliged to bring it into line with the offence committed, the measure may relate to property the value of which goes well beyond the profits that the person has made from the offence.
Article 131-21 paragraph 5 requires that the person has been given an opportunity to explain himself. It is not only a procedural requirement but also a substantive one, which obliges the investigation services, first and foremost the investigating judge, to hear the person on his or her assets.

As for the general confiscation, the most singular feature of this category of (extended) confiscation is the fact that it is incurred as such, without it being necessary to establish a direct, indirect or even presumed link with the offence. It may concern any object, whatever its nature or value, even if it is established that it was not used to commit the facts, that it is not the product of it and that its origin is perfectly justified. It is sufficient that the person concerned be convicted of one of the offences listed restrictively by law.

[66] A. Mihman, “La confiscation des profits illicites”, *Gazette du Palais*, n° 133, 2014, 1.
[67] Note that the inability to justify his incomes, in some conditions, is a criminal offence (art. 321-6 CC).

Mandatory or optional confiscation. The penalty of general confiscation is optional, it may therefore be decided not to impose such confiscation, which is within the sovereign discretion of the judges of the merits.[68]
The same applies to confiscation based on the lack of any justification of origin of the property.

Categories of offences for which confiscation can be imposed. Confiscation based on the presumption of fraudulent origin of property concerns all felonies and misdemeanours for which the penalty is more than five years' imprisonment. General confiscation (confiscation of patrimony) is provided for the most serious offences restrictively listed by law. This is the case with regard to crimes against humanity (Arts. 213-1, 4° and 213-3, 2° CC), terrorism (Art. 422-6 CC), trafficking in human beings, procuring and related offences (Art. 225-25 CC), corruption of minors, simple and organized gang corruption, dissemination of simple and organized gang child pornography images (Art. 227-33 CC), offences relating to counterfeiting (Art. 442-16 CC), laundering of funds derived from a crime or offence (Art. 324-7, 12° CC), criminal conspiracy to prepare an offence punishable by 10 years' imprisonment (Art. 450-5 CC), failure to justify resources (Art. 321-10-1 CC).
The Act of 9 July 2010 redefined the framework of article 222-49 of the Criminal Code, which already provided for the possible confiscation of the assets of those who commit certain offences under drug legislation. The offences of transporting, holding, offering, transferring, acquiring or using illegal drugs have been added, so that almost all the offences provided for in this area are now covered (Art. 222-49, para. 2, referring to the provisions of article 222-37).

Confiscable objects. As mentioned above, the provisions of article 131-21, paragraph 5, of the Criminal Code have a very specific scope with regard to the conditions imposed. Indeed, the text qualifies as confiscable everything for which the person cannot prove its origin, movable or immovable property of any kind, divided or undivided.
This confiscation is based on a double trigger mechanism. First of all, the person must be convicted of an offence punishable by 5 years' imprisonment that has yielded a direct or indirect profit. It is only under this condition that goods whose origin cannot be proven are then confiscable. This presumption mechanism suggests that non-justified assets are the result of the direct or indirect benefit provided by the offence. As a result, confiscation can only relate to what the convicted person has acquired or had free disposal of form the date on which the offence was committed. It does not seem possible to deprive him of previously acquired property, even if he is unable to justify it.

As regard confiscation of patrimony, it covers all property owned by the person or freely available to him or her, whatever it may be and whatever the date of acquisition. This is an essential point in that it may happen that the property for which confiscation is ordered has entered the property of the convicted person before the commission of the alleged offences. The fact that it was legally acquired before the date of prevention cannot have any impact on the sentencing, which remains justified.[69] Similarly, it may be decided not to order such confiscation; a decision which is within the sovereign discretion of the judges of the merits.

[68] Par. 5 of the Art. 131-21 CC provides "confiscation affects as well…". It may seem so far that this confiscation is mandatory, as long as other paragraphs provide "may affect" or "may be imposed" when it is facultative. Yet, when the confiscation is mandatory indeed, the law states expressly "confiscation is compulsory" (para. 6 of the same text). Pursuant to the general requirement, it must be reasoned in the court's decision (see above; *Adde* Cass. crim., 8th March 2017, n° 15-87422).
[69] Cass. crim., 8th July. 2015, n° 14-86.938.

1.3. Non-conviction based confiscation.

In case of illness or absconding of the suspected person. There is no specific type of confiscation in such hypotheses in French legal provisions. Nevertheless, illness and absconding of the suspected person are not the barriers to prosecution *per se*, for the French legal system admits trials *in absentia*.[70]
More than that, Article 493-1 CCP introduced by the *Loi n° 2016-731 renforçant la lutte contre le crime organize, le terrorisme et leur financement, et ameliorant l'efficacité et les garanties de la procedure pénale*,[71] aims to refrain the convicted person for seeking for the restitution of his former property to be restituted: "In the absence of an application to set aside, the confiscated assets become the State property after the expiration of penalty limitation period."

In case cases of death of a person, immunity, prescription, cases where the perpetrator of an offence cannot be identified and other cases when a criminal court has decided that asset is the proceeds of crime. When the additional penalty of confiscation cannot be, or has not been, imposed, the property cannot be confiscated. Yet, a new legal tool, called "refusal to return the instrumentalities or the proceeds of crime" introduced by the abovementioned Law n° 2016-731, permits the recovery of illegally acquired properties.[72] It establishes a procedure for the transfer of ownership of assets related to the offence to the State, regardless of the admission of guilt and the imposition of the sentence. This procedure is part of the criminal investigation applicable to the person being prosecuted: that is Art. 41-4, 99, 373 and 481 of the Code of Criminal Procedure. From the technical point of view, it is not a confiscation, but a *refusal to return seized property, be it the instrumentalities or the proceeds of crime*, leading to its transfer to the State. However, the measure has the same effects as the ones produced by a confiscation. At the same time, it is not based on conviction. Therefore, it is a *de facto* confiscation *in rem*.[73] But it is not generalized.

When the confiscation is not legally possible (the public action is barred due to death of a person, for example) or has not been imposed by the court, it is possible to refuse to return the seized property if it is a "direct or indirect proceed from crime". That means that the refusal to return the assets is only possible in case of seizure. In other cases, neither *de facto* nor *de jure* confiscation can be imposed.[74]

1.4. Third-Party Confiscation.[75]

Article 131-21, par. 2, 5, 6 and 9 CC allows third-party confiscation. Theses paragraphs mention assets "which either belong to the sentenced person or, subject to rights of the *bona fide* owner, are at his free disposal".

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[70] *See* pt. 15 of the Directive 42/2014/EU: "in such cases of illness and absconding, the existence of proceedings in absentia in Member States would be sufficient to comply with this obligation".
[71] Transposition of *Directive 2014/42.*
[72] Previously, the judicial practice did already recognize a similar mechanism in rather a creative way: Cass. crim., 25th Nov. 2015, n°14-84985; Cass. crim., 2nd Dec. 1991, n°88-80.786 and n°90-84.994.
[73] *See* G. Cotelle, "Consécration implicite de la procédure de confiscation sans condamnation préalable", *AJ Pénal*, 2016, 463.
[74] Authors therefore recommend the introduction of the non-conviction based confiscation under French law: C. Latimier, *Le recouvrement des avoirs illicites de la corruption internationale. Évolutions récentes en droit français et recommandations à la lumière de la Convention des Nations Unies contre la corruption*, PhD thesis, Université Côte d'Azur, 2017, § 820 sq.
[75] Subject to the following remarks and in the absence of specific details, the conditions set out above are applicable.

For offences punished by a prison sentence superior to 1 year (excluding press offences), confiscation may concern "all movable and immovable assets of any nature, divided or undivided, which were used or were intended for the commission of the offence" (Art. 131-21 par. 2 CC).[77]
The same goes in case of a felony or misdemeanor punished by at least a five-years' imprisonment which has provided a direct or indirect profit "when either the sentenced person nor the owner, after have been given the opportunity to explain themselves, is not able to justify the origin" (Art. 131-21, par. 5).
More than that, Art. 131-21, paragraph 6 allows for third-party confiscation in case of felony or misdemeanor if the law so provides.
Like any criminal confiscation, third-party confiscation may be executed in value (Art. 131-21, par. 9). In any case, the rights of the bona fide owner are preserved.[78]
Finally, Art. 131-21, par. 3, foresees confiscation of all goods that are the objects or the direct and indirect proceeds of the offence. This provision sets aside the case of property liable to be returned to the victim. But it does not mention the *bona fide* owner. Accordingly, the Court of Cassation does not limit the scope of this type of confiscation to the assets of the sentenced person. In other words, a third-party confiscation is possible for objects and proceeds of the offence. The ownership of these assets is irrelevant.[79]
In addition, according to Art 131-21, par. 7, confiscation is mandatory for objects classified as dangerous or harmful by law or regulation, or whose detention is unlawful, whether or not such property is the property of the convicted person.[80]

Conditions for the imposition of confiscation.[81] The assets which can be confiscated may be the property of the convicted person as well as the third-party property. In this latter case, the asset shall be at "free disposal" of the sentenced person, in other words the convicted person is the true owner of the asset. As the legal definition of the concept of "free disposal" is not provided, the matter is subject to judicial interpretation.[82]
Because it constitutes an infringement of the right to property,[83] the third-party confiscation is possible only if the third party is *mala fide*. There is a presumption of good faith and the prosecution has to prove that the owner left the free disposal of the asset in full awareness of the relation to the criminal offences. Yet, the jurisprudence is often deducing the *mala fide* from the fact that the owner could not be unaware of the fraudulent use or of the association with a criminal offence.[84]

Mandatory or optional imposition. The imposition of third-party confiscation is potional. But it is mandatory for drug crimes: "In the cases set out under articles 222-34 to 222-40, it is mandatory for the court to order the confiscation of installations, equipment and of any asset used directly or indirectly for the commission of the offence, as well as all the products coming

[77] "La confiscation porte sur tous les biens meubles ou immeubles, quelle qu'en soit la nature, divis ou indivis, ayant servi à commettre l'infraction ou qui étaient destinés à la commettre, et dont le condamné est propriétaire ou, sous réserve des droits du propriétaire de bonne foi, dont il a la libre disposition."
[78] "La confiscation peut être ordonnée en valeur. La confiscation en valeur peut être exécutée sur tous biens, quelle qu'en soit la nature, appartenant au condamné ou, sous réserve des droits du propriétaire de bonne foi, dont il a la libre disposition".
[79] Cass. crim., 4th Sept. 2012, n°11-87143.
[80] See for instance, Art. 222-24 (human trafficking) or art. 222-49 CC (drug trafficking).
[81] As far as Art. 131-21 is applicable, the conditions for the imposition of confiscation are the same as those described above.
[82] See the discussion on problematic aspects of actual judicial definition which may exclude the trust and the propositions to extend the definition to the "beneficial owner": C. Latimier, *cit.,* §§ 738-759.
[83] E. Camous, "Le droit de propriété et la peine de confiscation", *Droit pénal*, 2019, n° 3, Study 5, 25-26.
[84] Cass. crim., 9th Dec. 2014, n°13-85150.

from the said installations, equipment or assets, *whoever may own them and wherever they may be*, provided their owner could not have been ignorant of their fraudulent origin." (art. 222-49 CC).
Confiscation is mandatory for the articles defined as dangerous or noxious by statute or by regulations (Article 131-21, par. 7 CC).

2. Aspects of procedural criminal law.

2.1. Freezing.

2.1.1. Preliminary remarks.

Terminology. In French criminal law and criminal procedure, the term "freezing" (*gel*) is reserved for international cooperation, and more particularly for cooperation between the Member States of the European Union. The term has thus been taken from international and European instruments.
The Code of Criminal Procedure uses this term only in *Title X on international judicial assistance*, concerning the "issue and execution of freezing orders" in the context of the provisions on "mutual assistance between France and the other Member States of the European Union" (*infra* Part 3).
Apart from criminal law and criminal procedure *stricto sensu*, the legislator uses the term freezing to refer to administrative preventive measures which should not be confused with measures forming part of criminal procedure and having a criminal purpose. These preventive measures all fall under the Monetary and Financial Code; they concern so-called terrorist assets (Art. L562-2 MFC and following) and freezing measures imposed by the UN Security Council or the EU Council (Art. L562-3 and following).
Thus, the terminology can be misleading, and it is important to distinguish between the repressive, strictly criminal side of freezing, which is of primary interest here, and the administrative side of a preventive nature, which will only be mentioned without giving rise to in-depth analyses.
To regulate freezing measures within the meaning of the Directive and the draft Regulation, subject to the above-mentioned special case of measures relating to mutual recognition, the French legislator uses the term and legal category of "seizures" (*saisies*): either through the general power of seizure or by means of special seizures.

These terminological remarks are not only of conceptual importance. They also have a practical significance, as illustrated by certain cases brought before the Criminal Division of the Court of Cassation. This was the case with regard to the provisions on freezing orders issued by an EU member State which are to be distinguished from those of articles 706-141 et seq. of the Code of Criminal Procedure relating to special seizures (aimed at securing future confiscation). Indeed, the decision to execute the freezing order issued by the judicial authority of a Member State of the European Union is not a seizure order within the meaning of the Code of Criminal Procedure. The investigating judge does not decide on the advisability of seizing property with a view to its confiscation, but on the advisability of enforcing a foreign decision: the investigating judge does not rule on the merits; he decides on enforcement. The specificity of the legal nature of the decision to execute the freezing orders therefore entails the specificity of the legal regime of that decision.

However, as pointed out by an author,[85] some provisions are confusing. The third paragraph of Article 695-9-1 of the Code of Criminal Procedure thus provides that "the freezing of property (…) shall be subject to the same rules and shall have the same legal effects as a seizure"; Article 695-9-15 of the Code of Criminal Procedure provides that "orders freezing property ordered for the purpose of subsequent confiscation shall be executed, at the Treasury's expense, in accordance with the procedures laid down in this Code".
The Criminal Chamber has had the opportunity to recall the specificity of the legal regime for the execution of freezing orders. In the present case, the investigating judge of Perigueux, by ordering the "seizure" of the credit balance of the bank account, and the bank, by appealing to the registry of the investigating judge, had wrongly placed themselves on the ground of criminal seizures, whereas the investigating judge's task was not to seize, but to execute the freezing order taken by the Dutch judicial authorities. Consequently, the conditions of the appeal were no longer those of article 706-148 of the Code of Criminal Procedure, which provides that the seizure order "shall be notified to the Public Prosecutor's Office, the owner of the seized property and, if known, to third parties having rights in that property, who may refer it to the investigating chamber by declaration to the court registry within ten days of the notification of the order", but those of Article 695-9-22, which provides that a non-suspensive appeal is available to the person holding the property which is the subject of the freezing order or to any other person claiming to have a right in that property, such appeal being lodged "by means of a request submitted to the registry of the investigating chamber of the territorially competent court of appeal within ten days of the date on which the decision in question is put into effect".

Normative context. Until 2010, the enforcement of confiscation remained limited in France, seizures being restricted to the preservation of evidence. Previous to the *Loi* n°2010-768 of 9th July 2010,[86] the provisions of the Code of Criminal Procedure did not consider seizure as a precautionary measure aimed to facilitate the confiscation of criminal assets but only as a procedural tool dedicated to the preservation of evidence and the neutralisation of dangerous or unlawful goods.
The current legal framework amends this restrictive conception to approximate the French criminal justice provisions to EU standards and requirements. Nonetheless, some commentators keep on arguing that these mechanisms will only find their full efficiency after magistrates' investigation culture will have integrated this evolution and they have renounced their reluctance to "democratize the identification and seizure of criminal assets"[87]. They consider that "trial courts are not sufficiently aware yet of the impact of confiscation, which they still regard as an accessory measure rather than as a first strike weapon" and that "the complete success of the new arsenal will only be acquired when the judiciary will have fully integrated the penalty of confiscation as the central element of the fight against organized crime and renewed its approach of penal punishment in this field".[88]

Directive 2014/42/EU of the European Parliament and of the Council of 3rd April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union has been transposed into French Law by two pieces of legislation, bearing in mind, however, that,

[85] L. Ascensi, "Conditions de l'appel contre l'exécution de la décision de gel de bien prise par les autorités étrangères – Cour de cassation, crim. 13 février 2013", *AJ pénal*, 2013, 357.
[86] E. Camous, "Les saisies en procédure pénale : un régime juridique modernisé, commentaire des dispositions pénales de droit interne de la loi n°2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale", *Droit Pénal,* étude 1, 2011; Ch. Cutajar, "Commentaire des dispositions de droit interne de la loi du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale", *Dalloz*, 35, 14th October 2010, 2305.
[87] J.-F. Thony and E. Camous, "Gel, saisie et confiscation des avoirs criminels : les nouveaux outils de la loi française", *RIDP*, 84, 2013/1, 284.
[88] *Idem.*

as indicated in the introduction, most of the transposition had in fact preceded the Directive and was the result of the transposition of previous European instruments.

> The first one is the *Loi n° 2016-731 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale*, of 3rd June 2016.[89] As regards (administrative) freezing, article 118 of this Law gives the government the power to intervene by way of *ordonnance*.[90] In particular, the 5th paragraph of Article 118 invites the Government to take, by way of *ordonnance*, the necessary legislative measures to reinforce the coherence and effectiveness of the national system of asset freezing with the purpose of fighting against the financing of terrorism or the implementation of asset freezing measures decided by the United Nations Security Council or the Council of the European Union.[91]
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> The second is the Ordonnance n°2016-1575 of 24th November 2016 reforming the system of asset freezing which was therefore passed.[92] It does not transpose – strictly speaking – Directive 2014/42; it strengthens the legal framework of the freezing of assets within the context of the fight against terrorism. It provides that all assets related to terrorist acts may be seized including assets used to carry out the offences as well as any assets resulting from the carrying out these offences
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> The *ordonnance* also establishes an administrative procedure, under the supervision of the administrative judge, to combat the financing of terrorist activities. The *décret* n°2018-264 provides for implementation measures[93] and is complemented by the *décret* n°2016-1455, of 28th October 2016 aimed to ensuring the efficacy of criminal procedure and on the enforcement of sentences for terrorism related sentences.[94]

2.1.2. Procedures for the freezing of assets.

The legal framework. The French legal system draws a distinction between the administrative or preventive procedure, which explicitly refers to "freezing", and the judicial procedure, which - except in matters of EU cooperation - is based on the seizure mechanism (and its wording).[95] In this study, it is the judicial aspect that will be of primary concern. However, in order to provide an overview of the national instruments covered by the concept of freezing, some more summary elements concerning the administrative aspect will also be mentioned.

Criminal seizures. Within the framework of criminal proceedings, measures involving an effect equivalent to freezing orders can be taken by judicial police officers, under supervision of the territorially competent prosecutor, or investigating judges in the implementation of their investigation powers of search and seizure. In addition to this general (ordinary law) framework, there is a set of special rules for special seizures.

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[89] *Loi* n°2016-731 of 3rd June 2016, Strengthening the Fight against Organized Crime, Terrorism and their Financing, and Improving the Efficiency and Safeguards of Criminal Procedure; available at : https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032627231&categorieLien=id

[90] As far as confiscation is concerned, art. 84 of the same Act provides for the same.

[91] Art. 118, *Loi* of 3rd June 2016 empowers the Government to: "5 ° Amend the rules contained in Chapters I and II of Title VI of Book V and Chapter IV of Title I of Book VII of Monetary and Financial Code, with a view, in particular, to extending the scope of assets that may be frozen and the definition of persons subject to the freezing and prohibition of the provision of funds, of extending the scope of trade information necessary for the preparation and implementation of the freezing measures and to specify the terms and conditions for the release of frozen assets".

[92] P. Dufourq, "Lutte contre le terrorisme : précisions sur le dispositif de gel des avoirs", *Dalloz Actualité*, 8th December 2016.

[93] https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=D2D0CE3BAD500824E62FD748A7745C8F.tplgfr37s_3?cidTexte=JORFTEXT000036794511&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000036794149.

[94] https://www.legifrance.gouv.fr/eli/decret/2016/10/28/JUSD1628593D/jo/texte.

[95] As mentioned above, measures explicitly called "freezing" are dealt with in the Code of Criminal Procedure, as a tool of cooperation within the EU: See *infra*, 3.

Indeed, until the entry into force of the law of 9 July 2010, most of the rules applicable to criminal seizures were contained in the texts that allowed the judicial authority to seize objects useful for the manifestation of the truth. The seizures were then used for a probative purpose.
As mentioned above, the law of 9 July 2010 has profoundly modified French law with the introduction of "special seizures", which have in common that they do not pursue any "evidentiary" objective. Their sole purpose is to guarantee the execution of confiscations that may be ordered by the criminal court: they therefore pursue a "patrimonial" objective.[96]
Special and common law seizures are distinguished by their regime and scope. The use of a special seizure is warranted in three cases: first, when a "patrimonial seizure" (saisie de patrimoine) is contemplated (Art. 131-21, para. 5 and 6 CC); second, because of the nature of the property concerned (seizure of immovable property or intangible property or rights); and third, because of the effects of the seizure (seizure without possession). Apart from these hypotheses, it is the common law seizure regime that applies. That is to say, when the seizure, whatever the nature of the property, pursues a probative purpose, or when the seizure is carried out for the purpose of confiscating tangible movable property whose confiscation is provided for by a text other than paragraphs 5 and 6 of art 131-21 CC and whose owner is to be deprived of its possession. In practice, all property useful for establishing the truth, as well as tangible movable property which is the object, product or instrument of the offence and is confiscable as such, will be subject to seizure under ordinary law (C. Pen., arts. 131-21, paras. 2 and 3).[97]
The difference in the regime between ordinary and special seizures is criticised by the doctrine[98] when the ordinary law seizure is carried out for the purpose of confiscation (thus pursuing a patrimonial and non-evidentiary function). In this case, the guarantees of ordinary law appear weaker than in the case of special seizures, although grounds for such a difference appear to be missing.

Hence, the purpose of the special seizures procedure (stated in articles **706-141 to 706-158** and in article **D. 15-5-1-1 CCP**) is to guarantee that the additional penalty of confiscation of the property (as defined in Article 131-21 CC) will be enforced. It applies to seizures relating to all or part of the property of a person, real property, property or a right/claim over intangible property as well as seizures that do not result in the owner being dispossessed of the property.[99]

In most cases, however, the confiscation is preceded by an act of seizure carried out either by a judicial police officer in the course of a police investigation or an investigating judge acting within a judicial inquiry. The *Cour de cassation* stated that the seizure can continue throughout the jurisdictional procedure and apply to all goods, assets and properties that are the direct or indirect proceeds of the suspected offense and which confiscation may, as such, be decided by the trial court under article 131-21 CC.[100]
Therefore, a judicial police officer, acting according to the *in flagrante delicto* procedure, may proceed with the seizure of all papers, documents, computer data and other goods in possession of the individuals who "seem to have been involved" in the offense or "seems to detain elements, information or goods related to the offense"; the officer may furthermore carry out

[96] However, the distinction between "evidentiary seizures" (*saisies probatoires*) and patrimonial seizures (*saisies patrimoinales*) does not exactly overlap with the dichotomy between special seizures and other seizures. Indeed, if the special seizures pursue an exclusively patrimonial objective, the other seizures do not only have an evidentiary function; they may also aim at a patrimonial purpose. In fact, a reading of art. 706-141 CCP suggests that special seizures should be conceived as a special category within the broader category of criminal seizures, in which ordinary law seizures should be distinguished. See L. Ascensi, *cit*. 174.
[97] *Ibid*, 175.
[98] *Ibid*, 176
[99] Art. 706-41 CCP.
[100] Cass. crim., 18th September 2012, n°12-80662, Bull. crim. n°193.

searches and seizures in any premises in which goods that may be confiscated according to the provisions of article 131-21 CC are likely to be found. When the search is carried out only to seek for and seize goods which confiscation is provided for by par. 5 and 6 of article 131-21 CC, the prior authorization of the territorially competent public prosecutor is requested.[101] In case of a preliminary police investigation, searches, house visits and seizures of exhibits may not be made without the written express consent of the person in whose residence the operation takes place. Nonetheless, if the needs of an inquiry into a felony or a misdemeanour punished by a prison sentence of five years or more justify this, or if the search for goods which confiscation is provided for by article 131-21 CC justifies it, the JLD may, at the request of the prosecutor, decide, in a written and reasoned decision, that searches, house visits or seizures will be carried out without the consent of the person in whose residence they take place (art. 76 CCP).

An investigating judge may search any premises in which he believes "useful findings" may be found (art. 92 CCP). Searches are made in all the places where items or electronic data may be found which could be useful for the discovery of the truth or assets which confiscation is allowed under article 131-21 CC (art. 94 CCP).

Besides, customs officers may carry out searches (*visites domiciliaires*) and seizures when investigating customs offenses. They must inform the public prosecutor, who may prevent them to do so, of searches of professional dwellings they intend to carry out (Art. 63ter *Code des douanes*)[102]. Except when they act *in flagrante delicto*, house searches must be authorized by the territorially competent JLD and carried out under his/her supervision; in any case, customs officers must be accompanied by a judicial police officer (Art. 64 *code des douanes*). On the other hand, when in the course of their duty, customs officers record an infringement of customs regulations, they are allowed to seize all goods likely to be eventually confiscated (Art. 323 (2) *code des douanes*).

Finally, apart from procedural tools, French public authorities have also provided for specialized police units aimed to improve the efficiency of confiscation proceedings. Thus, an inter-ministerial *circulaire* of 22nd May 2002 establishes the « *groupes d'intervention régionaux* »[103] (GIR), which gather police and gendarmerie officers, tax police officers, customs officers and civil servants from public administrations, to carry out patrimonial investigations on organized crime groups. In 2005, the legislator has established the *Plateforme d'identification des avoirs criminels* (Proceeds of crime identification platform - PIAC), which is a specialized unit, owing national jurisdiction, within the Central office for the fight against serious financial crime (*Office central de la répression de la grande délinquance financière*[104] - OCRGDF). It is mainly entrusted with collecting evidence on financial assets of organized crime groups. Its added-value also lies in its international jurisdiction, the unit being the designated police contact point in transnational inquiries. Furthermore, Act of Parliament n°2004-204 of 9th March 2004 has set up the Inter-regional specialized courts (*Juridictions interrégionales spécialisées*[105] - JIRS), which are in charge of the fight against complex organized crime activities and allowed to enforce specific derogatory procedural tools (art. 706-80 *et seq.* CCP).

[101] In flagrante delicto police investigation in felony cases: art. 56 CCP; in misdemeanour cases, when an imprisonment is incurred: art. 67 CCP.
[102] Customs code.
[103] Regional Intervention Group.
[104] Central Office for Combating Organised Financial Crime, OCDEFO.
[105] Specialized Interregional Courts.

Administrative/preventive freezing measures are dealt with in the *Code monétaire et financier* (Monetary and Financial Code, hereafter MFC).[106]

> In a recent decision, the Constitutional Council (*Conseil constitutionnel*, hereafter Cons. const.) found these provisions in conformity with the Constitution.[107] It states that "administrative police measure implemented against individuals or legal entities under the quarrelled provisions are aimed only to the preservation of law and order and the prevention of offenses", that "when referring to behaviours likely to define criminal offenses as a condition to allow the enforcement of these measure, the contested provisions do not bring in consequences on further criminal proceedings" and that "through vesting the minister of Economy with the power to order these administrative police measures, the contested provisions do not infringe on the exercise of judicial function".[108] Furthermore, these provisions do not involve a "presumption of guilt".[109] Eventually, taking into account: 1. that "freezing measures are aimed to prevent acts of terrorism or acts sanctioned and prohibited by a resolution of the UN Security council", and therefore "pursue the objective of preventing breaches of law and order, which is necessary for the safeguard of rights and principles of constitutional value", 2. that "assets and resources likely to be frozen" are precisely defined by the legislator, 3. that, when ordering a freezing measure, the minister must take into account the necessity for the person targeted to "provide for the costs of the family life and the conservation of his/her patrimony"; 4. that the length of the measure is limited to six months; that the measure should be withdrawn as soon as the required conditions are not satisfied anymore and can only be renewed provided the minister is satisfied that the conditions justifying this renewal are gathered and that the implementation of such a measure is subjected to a contradictory debate, 5. that the State is liable for damages suffered as a consequence of the implementation of unjustified freezing measures, "the legislator has provided for necessary measures and set up criteria adequated to the pursued purpose"; as a consequence, the infringement with property right is regarded as in conformity with the Constitution.[110]
> With regard to the freezing of funds and economic resources belonging to, owned, held by or controlled by natural or legal persons, or any other entity that commits, attempts to commit, facilitates or finances acts of terrorism, or incites or participates in them, the relevant provisions are stated in articles L. 562-2 *et seq*. and Articles R. 562-1 *et seq*. MFC.[111]
> Concerning freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union, Article L. 562-3 MFC applies.

2.1.3. Competent authority for the request of a freezing order.

The **prosecutor**, the **investigating judge** or, subjected to **their authorization, a judicial police officer,** may request the assistance of any qualified person to perform the acts necessary for the seizure of the property and their preservation.[112]

The judge owing local jurisdiction acts on **request of the prosecutor**. The law does not prescribe the form in which the authorization of the prosecutor must be given. A simple reference in the minutes will be sufficient, provided it evidences that the judge in charge of

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[106] Book V. Services providers; Title VI. Obligations relating to the fight against money laundering, terrorist activities financing, prohibited lotteries, games and bets and tax evasion and fraud; Chapter II. Provisions relating to the freezing of assets and the prohibition of making funds available, which gathers articles L562-1 to L562-13, as amended by *ordonnance* n°2016-1575.
[107] Cons. const., 2nd March 2016, n°2015-524 QPC, M. Abdel Manane M. K. [Gel administratif des avoirs], Official Journal, 4th March 2016, Text. n° 121.
[108] § 9.
[109] §13.
[110] § 15 to 20.
[111] These provisions have been modified by *ordonnance* n°2016-1575, 24th November 2018. https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=689CB3CEB6EA2EF0C42AF3CCBE25BAC5.tplgfr23s_2?cidTexte=JORFTEXT000033471674&idArticle=LEGIARTI000033472599&dateTexte=20161126.
The purpose of the order is to extend the scope of assets that may be frozen and the definition of persons subject to the freezing and prohibition of the release of funds for the benefit of persons covered by a measure, freezing of assets, as well as to extend the scope of information exchange necessary for the preparation and implementation of freezing measures and finally to clarify the terms and conditions for the release of frozen assets.
[112] Art. 706-42 CCP.

supervising the investigations has given his consent. The same approach applies to the content of the authorization.

In case of an *in flagrante delicto* or preliminary investigation, the **authorization of the prosecutor is required in two situations**. The first relates to crimes or offences punishable by five years' imprisonment having provided a direct or indirect profit. If the individual cannot account for the source/origin of the property, it can be confiscated.[113] The second relates to the hypotheses in which the law provides for the confiscation of general property and assets.[114] The court may order the confiscation of the property without the need to establish a correlation between the unlawful activities of the person and its enrichment. In other cases, the judicial police officer may seize all property liable to confiscation without having to obtain prior authorization, subject to the special regulations applicable to certain property.

When a judicial inquiry is started, the investigating judge must, in principle, be seized of a prior request of the prosecutor, but the *Cour de cassation* held that, in order to guarantee the confiscation of the property belonging to the individual under indictment is carried out, the investigating judge may, without prior request of the prosecutor, order the seizure of this property.[115]

> As regards **administrative freezing orders**, the request of a freezing order emanate from on the one hand national public authorities and on the other hand from EU authorities and other international public bodies for the implementation of UNSC resolutions under Chapter VII of the Charter or EU acts under article 15 and 29 TEU and 75 TFEU.
> As far as French public authorities are concerned, they are mainly intelligence services such as TRACFIN (French Financial Intelligence Unit) or counterterrorism services like the *Direction générale de la sécurité intérieure*,[116] when they have collected sufficient elements to allow them to believe that an individual or a legal entity uses his/her/its assets to commit or attempt to commit acts of terrorism, or facilitate or take part in any way to (the preparation of) such acts (art. L562-1 MFC).
> With regard to EU or International authorities, freezing orders requests will thus target individuals or legal entities suspected of having committed, being committing or being likely to commit acts sanctioned or prohibited by either the resolution or the EU act, or of aiding or abetting in anyway such acts (art. L562-2 MFC).
> With regard to freezing of terrorist assets, the power to order a freezing measure is vested in the Minister of the Economy and the Minister of Interior. No request from any other authority is necessary prior to the implementation of the freezing measure.[117] The decisions of the Ministers are published in the Official Journal and are binding as of this publication.
> With regard to freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union, they are also under the responsibility of the Minister of the Economy, which acts without prior request.[118]

2.1.4. Competent authorities to impose a freezing order.

Seizures amounting to freezing orders can be enforced by judicial police officers, under supervision of the territorially competent prosecutor, in the course of police investigations and by an investigating judge, throughout a judicial inquiry.

[113] Art. 131-21, par. 5, CC.
[114] Art. 131-21, par. 6, CC.
[115] Cass. crim., 6th May 2015, nº15-80.086.
[116] Internal Security General Directorate of the Judicial Police Central Directorate.
[117] Art. L562-2 MFC.
[118] Art. L562-3 MFC.

With respect to special seizures, when a judicial investigation is started, the **investigating judge** owes jurisdiction to order the seizure of property resulting from a crime.[119] In case of an *in flagrante delicto* or preliminary investigation, the seizure is ordered by the **prosecutor**, with the authorization of the **judge of freedoms and custody** (*juge des libertés et de la détention*, hereafter JLD). The 2010 *circulaire* provides that, in the context of the *in flagrante delicto* or preliminary investigation, the prosecutor shall request the JLD by motion to authorize the seizure. On ground of this authorization, the prosecutor implementing the criminal seizure authorized by the judge must then issue a criminal seizure decision, which constitutes the legal order enabling the seizure of the property, the JLD's jurisdiction being limited to the power to allow the seizure or not.

The Code of Criminal Procedure provides for separate seizure procedures depending on the type of property to be seized, whether it is real estate ("*saisie immobilière*")[120], intangible property ("*saisie de biens incorporels*")[121] or the seizure is made without loss of possession ("*saisies sans dépossession*")[122] or extends to the patrimony ("*saisies de patrimoine*")[123].

The authority owing jurisdiction varies according to the kind of confiscation requested.

As regards **seizures of the patrimony**,[124] article 706-148 CCP provides for the competence of the JLD, on request of the prosecutor. In an investigation on an offense which is punished by a minimum of five years imprisonment, he/she may, by a reasoned decision, order the seizure of assets which confiscation is provided for by article 131-21 CC or when the origin of these goods cannot be established. An appeal against such an order can be launched before the investigating chamber of the Court of appeal, within ten days, by the owner of the asset or any third party who owns rights on the asset.

As regards **seizures of immovable assets or of intangible rights or assets**,[125] throughout police investigations, the JLD, on request of the public prosecutor, may order the seizure of the asset which confiscation is provided for by article 131-21 CC. Once a judicial inquiry is started, the investigating judge is vested with the same power (art. 706-150 and 706-153 CCP). Judicial review of such an order may be claim in similar conditions as those previously stated.
In its decision of 24th October 2018, the *Cour de Cassation* provided important clarifications as to the apprehension of the accused's immovable assets, at the time of the preparatory phase. In this case, one of the defendants prosecuted for VAT fraud, whose damage to the State is estimated at around ten million euros, challenged the seizure in value of a residential building of which he is undivided owner. According to the Court: "where several perpetrators or accomplices have participated in a set of facts, either to the whole or to a part of them, each of them incurs the confiscation of the proceeds of the only offense(s) with which he/she is charged, with or without the circumstance of an organized band, provided that the total value of confiscated property does not exceed that of the total proceeds of this offense".[126]

The same rules apply to seizures without dispossession (art. 706-158 CCP). Nonetheless, as far as intangible assets are concerned, a judicial police officer may be authorized by the public

[119] Art. 706-42 CCP.
[120] Art. 706-150 to 706-152 CCP; *Loi* n° 2013-1117 of 6th December 2013.
[121] Art. 706-153 to 706-157 CCP; *Loi* n° 2013-1117 of 6th December 2013.
[122] Art. 706-158 CCP; *Loi* n° 2013-1117 of 6th December 2013.
[123] Art. 706-148 to 706-149 CCP.
[124] *Loi* n°2012-409 of 27th March 2012.
[125] *Loi* n°2010-768 of 9th July 2010.
[126] Cass. crim., 24th October 2018, n°18-80.834; *Dalloz*, 2018, 2093.

prosecutor or the investigating judge to seize sums of money kept on a bank account. The seizure must be confirmed by the JLD or by the investigating judge within ten days (art. 706-154 CCP).

In a decision of 16th October 2016,[127] the Constitutional Council (*Conseil constitutionnel*) has found the provisions governing the special criminal seizures consistent with the Constitution. The Council stated that sufficient guarantees are provided, once the measures are ordered by a magistrate and can only refer to assets likely to be confiscated in case of a criminal conviction, once any person claiming rights on the asset may request the public prosecutor, the general prosecutor or the investigating judge to release the seizure, once appeals can be lodged before the investigating chamber of the Court of appeal against the orders allowing the seizure.

With regard to **immovable property**,[128] during the *in flagrante delicto* investigation or preliminary inquiry, the JLD**, on prosecutor request**, may authorize, by reasoned order, the seizure of buildings whose confiscation is provided for in article 131-21 CC. This is to be done at the expense of Treasury.[129] The investigating judge may also, during the course of the judicial investigation, order the seizure under the same conditions.[130]

> The *Cour de cassation* decided, in a decision of 24th October 2018, that the instrument of the offense, within the meaning of Article 131-21 par. 2 CCP, constitutes the property that allowed the commission of the offense, whether or not its use was determinative of his commission. The investigating chamber correctly justified its decision to seize the accused's home, since a video showing him practicing sexual acts on the person of the civil party, was recorded at his home, a discreet place out of public view, where he brought the victim and his mother, and where there are furniture and accessories used in recorded acts. More precisely, he used his apartment for the accomplishment of the offenses by inviting foreign victims to stay at his place. Therefore, the provision of this building constituted one of the means to attract economically vulnerable young women.[131]

Article 706-152 CCP, enacted by the *Loi* of 3rd June 2016, which adapt French legislation to the provisions of Directive 2014/42, allows the early disposal of a building when the conservation costs are disproportionate to its value. The proceeds of the sale are then recorded and will, at the owner's request, be returned to him/her in the event of an acquittal, provided that the property was not the direct or indirect instrument or product of an offence.

As far as **intangible property** is concerned, in case of an *in flagrante delicto* or preliminary inquiry, the JLD, **on request of the prosecutor**, can authorize by a reasoned order the seizure, at the expense of the Treasury, of intangible property or rights confiscated under article 131-21 CC. The investigating judge may, in the course of his/her investigations, order the seizure under the same conditions.[132]

As regards bank accounts, the Code of Criminal Procedure now provides a legal basis for their seizure, which previously resulted from practice and has been enshrined in case law in the form of an account blocking requisition. By way of derogation from article 706-153, a judicial police officer may be **authorized**, by any means, **by the prosecutor or the investigating judge** to

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[127] Cons. const., 14th October 2016, n°2016-583/584/585/586 QPC, Société Finestim SAS et autre [Saisie spéciale des biens ou droits mobiliers incorporels], *Official Journal*, 16th October 2016, Text. n° 48.
[128] Seizure of real property (*saisie immobilière*): Art. 706-150 to 706-152 CCP; *Loi* n°2010-768 du 9 juillet 2010.
[129] These are properties derived from activities of a criminal nature (proceeds); art. 131-21, par. 3 CC, but also used to commit the crime (instrumentalities); art. 131-21, par. 2, CC.
[130] Art. 706-150 CCP.
[131] Cass. crim., 24th October 2018, n°18-82.370.
[132] Art. 706-53 CCP.

enforce, at the expense of the Treasury, the seizure of a sum of money paid into an account opened with an institution that is legally authorized to keep deposit accounts.[133] On request of the prosecutor, the seizure must subsequently by upheld by the JLD within 10 days, starting from the date that it took place.

Practically, the police officer operating the seizure orders the credit institution to transfer the sums seized to the AGRASC.[134] If, within a period of ten days, the JLD or the investigating judge, by reasoned order, confirms the seizure, the sums will remain in the agency's account. However, if the magistrate decides to release, in whole or in part, the funds concerned, they will be returned by the agency upon receipt of the order.

Seizures without loss of possession[135] may be ordered when the seizure of a tangible personal property is considered inappropriate or physically impracticable. The JLD**, on request of the prosecutor**, may authorize, by a reasoned order, the seizure, of the property without taking possession, at the expense of the Treasury. The investigating judge may, in the course of the preliminary investigations, order the seizure under the same conditions.[136] The magistrate who orders the seizure shall designate the guardian who will have the obligation to ensure the maintenance and the conservation of the property at the expense of its owner or its holder. Apart from the acts necessary for the maintenance and preservation of the property, the guardian may use the property only to the extent that the judge's decision expressly provides for it.

Seizures of estate may be subject to confiscation pursuant to par. 5 and 6 of article 131-21 CC, *i.e.* seizure is permitted only under a reasoned order made by the freedom and custody judge on request of the local prosecutor, in an investigation on a felony or a misdemeanour punished by a minimum of five years imprisonment.[137] Seizures may then extent to all or part of the property of the suspected person and can only be implemented where the Law so provides for or where the origin of the property cannot be established.

The *circulaire* of 22nd December 2010 states that the seizure of Patrimony must be implemented only when no other legal ground for seizure is available: "Otherwise, the regime specifically applicable according to the nature of the property concerned should be preferred".[138] The example provided in the *circulaire* is those of a building that was acquired through the proceeds of drug trafficking, which can be seized and confiscated under article 706-150 CCP as an indirect product of the offense and on ground of a seizure of Patrimony. It states that "in such a case, the seizure on the sole ground of article 706-150 CCP should be favoured". It is only "if there is not enough evidence to establish a direct or indirect link between the commission of the offense and the acquisition of the property concerned, or if the acquisition occurred previous

[133] Art. 706-54 CCP.
[134] Seized and Forfeited Assets Management Agency.
[135] "Saisie sans dépossession": Art. 706-158 CCP; *Loi* n° 2013-1117 of 6th December 2013.
[136] Art. 706-158 CCP.
[137] Art. 706-148 CCP refers to art. 131-21, par. 5 and 6, CC; *Loi* n° 2016-731 of 3rd June 2016. In a decision of 16th May 2018, the *Cour de cassation* decided, on the basis of Article 706-148 CCP, that the investigating chamber, before an appeal against an order of the JLD, on the request of the public prosecutor, seizure in value of goods, may, due to the devolutive effect of the appeal, and after adversarial debate, modify the legal basis of the seizure of these goods from that this measure was preceded by a request of the public prosecutor, unimportant the foundation referred to by it, and must, if it is a seizure of assets, order it itself. Cass. crim., 16th May 2018, n°17-83.584, *Dalloz*, 2018, 1075.
[138] Circulaire, 22nd December 2010, présentation des dispositions de la loi n°2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale, NOR:JUSD1033251C. http://www.textes.justice.gouv.fr/art_pix/JUSD1033251C.pdf.

to the period covered by the procedure, that the seizure on the basis of article 706-148 will remain the only effective solution".

> As far as freezing of terrorist assets are concerned, the **Minister of Economy** and the **Minister of the Interior** may decide, jointly, to freeze the funds and economic resources: i) belonging to, possessed, detained or controlled by natural person or legal entities, or any other entity who commit, attempt to commit, facilitate, finance or incite or participate in acts of terrorism; ii) belonging to, owned by, held or controlled by legal entities or any other entity which is itself owned or controlled by the persons mentioned in 1 ° or acting knowingly for the account or on the instructions of those persons.[139]
> With respect to freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union, the **Minister of Economy** may order the freezing of funds and economic resources: i) belonging to, possessed, owned or controlled by natural or legal persons, or any other entity who commits, attempts to commit, facilitate or finance actions sanctioned or prohibited by resolutions adopted under Chapter VII of the United Nations Charter or the acts adopted pursuant to article 29 of the Treaty on European Union; ii) belonging to, owned, held or controlled by legal persons or any other entity which is themselves owned or controlled by the persons mentioned in 1 ° or acting knowingly for the account or on the instructions of those persons.[140]

2.1.5. Procedural Conditions.

As far as ordinary law seizures are concerned, provisions of the CCP presented above are enforceable.[141]

As far as special seizures are concerned, first, it should be noted that the seizure can only **relate to property that may be confiscated**,[142] that is property or rights whose confiscation can be ordered as additional punishment in case of a criminal conviction. Subsequently, the seizure must be ordered by a judge. Finally, the order made both by the JLD and the investigating judge, must be **reasoned**. The seizure decision itself is not subjected to any mandatory formalities. The *circulaire* of 2010 only recommends: i) that the explicit legal basis for the seizure and the order of the JLD that authorized it are mentioned ; ii) that it contains a precise identification of the property to which the seizure relates and, where appropriate, the identification of any/all co-owners holding it, in order to ensure its enforceability and to allow enforcement; iii) to bring this decision to the notice of those concerned by any means by the public prosecutor, in order to ensure its effectiveness.

In addition, research undertaken for the sole purpose of apprehending a property with a view to confiscation must be conducted as part of an act of inquiry, in particular a formal search.[143] The magistrate or the judicial police officer is therefore bound to respect the procedural conditions of the search. He/she must in particular act in the presence of the owner of the property or in the presence of two witnesses.[144] During a preliminary inquiry, the seizure can only be carried out with the express consent of the person concerned. To override the absence of consent, the authorization of the JLD is needed.

> As regards **administrative/preventive freezing orders**, formalism is rather limited.[145] Article L562-9 MFC adds that "orders made by the ministers (…) are published in the Official journal and become enforceable from the date of publication".

[139] Art. L562-2 MFC.
[140] Art. L562-3 MFC.
[141] Art. 56, 76 and 99 CCP; See above (2.1.2.).
[142] Art. 131-21 CC.
[143] Art. 56 CCP.
[144] Art. 57 CCP.
[145] See above, 2.1.4.

2.1.6. Time limits foe the issuing of a freezing order.

A time limit is only provided for regarding freezing orders requested by judicial authorities of another EU member State within the framework of mutual recognition mechanisms.[146]

As regards siezures, no specific time limits are provided for in the CCP. As a result, the usual criteria of reasonableness and due diligence should apply. Besides, to our knowledge, there is for the moment no evidence of any particular difficulty.
In particular, rules on special seizures do not impose a mandatory delay between the request of the requesting authority and the decision to seize.
However, as regards the delay between the order to seize and its implementation, the *circulaire* of 2010 recommends that the prosecutor "provides for a rapid implementation of seizure measures authorized by the JLD in order to avoid any delay between the notification of the judge's order and the decision to seize taken by the prosecutor on the basis of the order, which would be likely to jeopardize the enforcement effectiveness".

> As far as freezing of terrorist Assets and freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union are concerned, since the Minister of Economy acts without prior request, there is no deadline imposed by the MFC.

2.1.7. Duration of the freezing order.

The CCP does not provide for a maximum time limit for seizure. The measure can therefore be maintained until the decision is made to release the seizure or a finding of criminal liability is made.

> As far as freezing of terrorist Assets and freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union are concerned, in principle, the property can be frozen for a maximum of **6 months**.[147] This suggests that the freezing measure is only to be applied temporarily.[148] However, these measures are **renewable** on the sole decision of the Minister. The lack of a maximum delay was justified by the fact that "once expired, it would make frozen funds available to terrorists again". One of the objectives of the legislator was therefore to allow permanent measures.[149] Moreover, the expiry of a national freezing measure does not necessarily mean that the assets will be released. Indeed, the freezing could be resumed either by judicial measure or international measure.

2.1.8. Rights and legal remedies of the person addressed by a freezing order.

The judicial review of all seizures amounting to a freezing order may be claimed according to the ordinary remedies provided for in the CCP. Besides, several guarantees have been enacted by Law.
With regard to the seizure of intangible property in particular, the Constitutional Council (*Conseil constitutionnel*) stated that this measure is subject to all the guarantees that the rights

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[146] *Infra*, C.
[147] Art. L562-2 and L562-3 MFC.
[148] The list of persons targeted by a national asset freeze measure is available online: https://www.tresor.economie.gouv.fr/Ressources/4248_dispositif-national-de-gel-terroriste.
[149] Ch. Mauro, "Lutte contre le terrorisme - Le gel d'avoirs n'est pas une sanction… mais un peu quand même", La Semaine Juridique, Edition Générale, 16th May 2016, 589.

of defence and freedoms may require.[150] The Council also stated that the absence of a specified period of time imposed on the investigating chamber to decide on the appeal launched against the order authorizing or pronouncing the seizure cannot constitute an infringement on the right to an effective judicial remedy that could deprive the person of the constitutional protection of the right of ownership. The judge is only required to make a ruling within a reasonable amount of time.

Right to information. When the seizure of property that may be subject to subsequent confiscation has been made, the person concerned is informed either during the search or at a subsequent hearing, provided that informing the individual is not likely to compromise the course of the investigations. He/she is then notified, at least briefly, of the reasons for the seizure.[151] In the absence of information, no foreclosure delay can be set against the person regarding a possible request for return of the property seized.

Right of Appeal. An appeal against the seizure order may be launched before the investigating chamber of the Court of Appeal within ten days of its notification.[152]
The appeal against the seizure order is not suspensory, so that it cannot be used to dissipate the seized property. The owner of the seized property and the third parties to the proceedings may be heard by the investigating chamber, but third parties cannot launch the procedure by themselves. Thus, the owner of a property seized as a product of the offence which is not the person prosecuted will not be able to appeal where he is not a party himself.
Acts with the effect of transforming, substantially altering the property or reducing its value must be authorized by the JLD, on request of the prosecutor who ordered the seizure. The person concerned and the prosecutor may, within a period of ten days from the notification of this decision, launch an appeal before the investigating chamber. The appeal is suspensory (i.e. the original decision continues to run). Thus, the request granted by the investigating judge will have no effect until the decision of the investigating chamber confirms it.

Control of the judicial authority. The seizure is ordered or controlled by a judicial authority. In the same way, the judicial authority is responsible for all the requests relating to the enforcement of the seizure.[153]

Consent of the person concerned (only in respect of the preliminary inquiry). Like the other acts of the preliminary investigation, the special seizure of property confiscated under article 131-21 CC can only be carried out with the consent of the interested person. The JLD may decide, on request of the prosecutor, that the seizure will take place without the consent of the person concerned if it is necessary for the investigation into a felony or offence punishable with a sentence of imprisonment of five years or more. The decision of the magistrate must be provided in writing, and give reasons justifying the action taken.

Provisional nature of the measure (no ownership transfer). Special criminal seizures have exclusively temporary effects. They do not transfer ownership of the property to the State.

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[150] Cons. const., 14th October 2016, n°2016-583/584/585/586 QPC, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-583/584/585/586-qpc/decision-n-2016-583-584-585-586-qpc-du-14-octobre-2016.148001.html.
[151] Art. D. 15-5-1-1 CCP.
[152] Art. 706-150, par. 2, 706-53 par. 2 and 706-58, par. 2, CCP.
[153] Art. 706-144 CCP.

Until the seizure is lifted or the seized property is confiscated, the owner or, failing that, the holder of the property is responsible for its maintenance and conservation. He bears the burden of such expenses, except for expenses that may be borne by the State.[154]
In the event of default or the unavailability of the owner or the holder of the property, the public prosecutor or the investigating judge may authorize the AGRASC to assume responsibility for the management and recovery of the seized and confiscated assets which advance sale is not envisaged. This is with a view to enabling the Agency to take all the legal and materials acts necessary for the conservation, the maintenance and the valuation of the property.
Any act that has the effect of transforming or substantially modifying the property or reducing its value is subject to the prior authorization of the JLD, upon the request of the prosecutor or the investigating judge.
The 2010 *circulaire* recommends "to inform this person or the person from whose hands the property is seized, if necessary, by a reminder contained in the body of the decision".
However, some guarantees are excluded. For example, adversarial argument is not permitted before the judge who authorized or ordered the seizure, nor is the decision to be suspended pending an appeal before the investigating chamber. This is to prevent the owner or the person concerned from taking advantage and employing stalling tactics.

Right to restitution. During an investigation, the **investigating judge** is competent to decide on the restitution of the objects placed under judicial control.[155] He/she rules, by reasoned order, either on requisitions of the public prosecutor, or, after his/her opinion, *ex officio* or at the request of the accused, the civil party or any other person claiming to be entitled on the object. The decision must be taken within one month, otherwise the plaintiff may directly seize the president of the chamber of the investigation. The investigating judge may also, with the consent of the public prosecutor, decide of his own motion to return to the victim of the offense objects under judicial authority whose property is not disputed.

However, there is no restitution if it hinders the manifestation of the truth or the safeguarding of the rights of the parties, or, since the Law of 3rd June 2016, when the property seized is the instrument or the direct or indirect product of the offense or if it presents a danger to persons or property. Finally, it can be refused when the confiscation of the object is provided for by law.

> In a judgment of 28 February 2018, the Criminal Chamber recalled the immediate application of the new provisions resulting from the law of 3 June 2016; in this case, paragraph 4 of article 99 of the CPP. As a procedural law, it escapes the principle of non-retroactivity. In this case, which concerned the seizure of a luxury branded vehicle purchased with funds derived from misappropriation to the detriment of a company, the applicant claimed to be in good faith and to benefit from paragraph 3 of Article 99, according to which the investigating judge "may also, with the agreement of the public prosecutor, decide ex officio to return or have returned to the victim of the offence objects placed under judicial control whose ownership is not in dispute". The Criminal Division relies on the sovereign discretion of the trial judges, who considered, on the one hand, that the car was the direct or indirect product of the offences and, on the other hand, that the applicant, in view of the purchase conditions, could not fail to suspect certain irregularities.[156]

In case of an *in flagrante delicto* or preliminary investigation, the right to restitution is subject to the existence of a **prior request** from the owner.[157] The responsibility to seek restitution therefore lies with him. The request is to be made within the six months following the final

[154] Art. 706-143 CCP.
[155] Art. 99 CCP.
[156] Cass. crim., 28th February 2018, n°17-81.577; D. Miranda, "Bien mal acquis (et de mauvaise foi) ne profite jamais…", in *AJ Pénal*, 2018, 264.
[157] Art. 41-5, par. 4, CCP.

decision.[158] Once this period has elapsed, the State becomes the owner. The period is reduced to two months when the owner or the person to whom the restitution has been granted does not claim the object after formal notice addressed at his last known address.[159]
According to the CCP, once a decision has been given to dismiss the case, acquit the defendant, or to convict the defendant but without applying the penalty of confiscation, the prosecutor **informs**, by acknowledgement letter, the owner of the property of the modalities of restitution of the product of the sale.[160] However, this information relates only to provisional seizures made in the context of a judicial inquiry and only applies to property disposed of during the proceedings. In other cases, the individuals concerned have no right to this information even if no decision of confiscation has been pronounced.
The prosecutor or the Court of Appeal general prosecutor are the only authorities empowered to rule on the restitution of the property that has been seized in the case of a decision where no action is taken or a decision of dismissal. This is also the case in the event of an acquittal or if, despite the conviction, the sentence of confiscation has not been pronounced.
Sometimes restitution is not allowed, which means there is no absolute right to restitution. For example, an order for restitution need not be given where this is likely to create a danger to persons or property or where a particular provision provides for the destruction of property under judicial control.[161] Furthermore, the prosecutor may order the destruction of seized personal property whose preservation is no longer necessary for determining the decision in the case of objects classified by law as dangerous or harmful or the detention of which is unlawful.[162] Sometimes the confiscation is mandatory and therefore restitution is impossible. Thus, with regard to drug trafficking,[163] shall be pronounced "the confiscation of facilities, equipment and any property that has been used, directly or indirectly for the commission of the offence, as well as any product from it to any person they belong and wherever they are found since their owner could not ignore the origin or the fraudulent use". Thus, for example, a vessel used to transport 3 kilos of cocaine will not be returned[164].

> In the abovementioned decision, the Constitutional Council (*Conseil constitutionnel*) states that individuals targeted by **administrative/preventive freezing orders** "are not deprived of the possibility to bring their claim against the orders before an administrative court, including by way of an interlocutory procedure; it is for the court to assess, according to the elements contradictorily debated before it, the existence of motives justifying the temporary freezing of assets measure"[165]. According to article L521-1 of the *Code de justice administrative*,[166] a petition for suspension allows judicial review and the suspension of the enforcement of an administrative decision, within 48 hours and up to one month, according to the level of urgency. It is a provisional measure, suspending the decision until the administrative court pronounces on the annulment appeal.
> Furthermore, the minister of Economy (art. L562-3 MFC) or the minister of Interior and the minister of Economy (art. L562-2 MFC) may jointly authorize the partial removal of the order when they consider it "consistent with the safeguard of law and order" and with the decisions that motivated the order. Such an authorization may be granted by the minister(s) on their initiative, or on a demand from the individual or the legal entity who/which is targeted by the measure. Authorizations are granted if the claimer is able to demonstrate either, a necessity resulting from particular material needs relating to his/her private and family life or to the requirement of its activity, providing this activity is consistent with law and order, or motives relating to the preservation of his/her/its patrimony (art. L562-11 MFC).

[158] Art. 41-4, par. 3, CCP; *Loi* n°2016-731 of 3rd June 2016.
[159] Art. 41-4, par. 3, CCP.
[160] Art. R. 15-41-3 CCP.
[161] Art. 41-4, par. 2, CCP.
[162] Art. 41-4, par. 3, CCP.
[163] Art. 222-49 CC.
[164] M. Véron, "Le refus de restitution d'un navire confisqué", *Droit Pénal*, 2010, comm. 68.
[165] Cons. const., 2nd March 2016, n°2015-524 QPC, §.10.
[166] Administrative justice code.

Finally, when the freezing measure is removed, this information should be brought to the attention of the person concerned, as far as possible. And when a person is no longer subject to a national freezing measure, the "right to be forgotten" orders the administration to erase any information relating to this person.

2.1.9. Legal remedies against unlawful freezing orders.

The law provides for the possibility for the owner who regains possession of his property to obtain compensation. This is not a general right however, as it relates only to "the loss of value that may have resulted from the use of the property".[167] Compensation is therefore only available in relation to the loss of value in respect of the property itself, and not the losses incurred from being deprived from use of the property.

If the property has been disposed of in the course of proceedings, then the amount received on the sale is returned. The law does not provide for the value of this sum to be re-assessed according to changing market values. It is therefore not possible for the owner to request a re-evaluation of the price based on the market value assumed at the time of restitution or loss resulting from the inability to make use of the property during the course of the procedure.

As far as administrative/preventing freezing orders are concerned, article L562-13 MFC reads "The state is liable for the damageable consequences of the enforcement, carried out in good faith" of freezing orders.

2.2 Freezing of third-parties' assets.

Subject to special rules hereafter detailed, freezing procedures previously discussed can be implemented when the freezing of third-parties' assets is contemplated.

All judicial freezing measures are subjected to the ordinary judicial review procedure available in the CCP.

As regards **administrative/preventive orders**, article L562-10 MFC reads "measures implemented (…) are enforceable against this parties who/which may claim of a right on the assets or economic resources subjected to a freezing measure, even when the right grew out previous to the measures".
In return, the partial release of the measures may be requested by any third party who/which is able to claim he/she/it owes a right on the assets or economic resources targeted by the freezing order. The granting of the authorization is subjected to the same conditions (art. L562-11 MFC).

2.2.1. Procedures for the freezing of third-parties' assets.

The legal framework. No legal provision makes explicit reference to the possibility of seizing property in the hands of a third party. From this point of view, Criminal law does not provide any counterpart to article L112-1, al. 1, of the *Code des procédures civiles d'exécution*,[168] which reads "seizures may relate to all property belonging to the debtor even if held by third parties".[169] However, such a possibility is not entirely excluded in criminal procedure, since certain provisions refer to it.[170]

[167] Art. 41-5, par. 3, CCP.
[168] Code of Civil Enforcement Procedures.
[169] *Ordonnance* n°2011-1895 19th December 2011.
[170] E. Camous, "Fasc. 20 : Des saisies pénales spéciales", in *Jurisclasseur*, 40.

Thus, **article 131-21 CC** sets out the cases in which the seizure may be carried out when the property is in the hands of a third party. The property in question belongs to the offender, but it is owned by someone else. Under this provision, the property may be apprehended whilst in the possession of this third-party holder without his being able to oppose it. The enforcement procedure is the same as that provided for interested parties.[171]

Sometimes, the seizure is subjected to the existence of a property right of the convicted person.[172] In other cases, the confiscation of property of which the convicted person has "free disposal" is allowed. Finally, the seizure can be pronounced on property, regardless of any legal relationship with the prosecuted person, no matter who holds it. However, the rights of third parties in good faith are always preserved.

Cases in which a title-deed is required. As a consequence of the principle that penalties are personal, the seizure and confiscation of property under the provisions of al. **5 and 6 of Article 131-21 CC** can only be carried out on property belonging to the convicted person.[173] These provisions respectively relate to the seizure of property of which the convicted person **could not justify the origin** and the **general seizure of all or part of his assets and general property**. The extent of this seizure explains that the legislator has subjected it to the existence of a property right of the convict on the property. The principle of proportionality requires that the property rights of third parties uninvolved in the criminal activity cannot be infringed. On the other hand, depending on the gravity of the offence committed, it may be justifiable to seize all assets or property where it cannot be demonstrated that these have been lawfully acquired. Article 131-21 CC does not establish a general principle that only property belonging to the convicted person may be seized. This requirement should not, therefore, be extended to assumptions that the law does not provide, in accordance with the principle of strict interpretation of the criminal law.

Cases in which the person must only have free disposal. Article **131-21, al. 2 CC** allows the confiscation, and thus the seizure, of the **property used to commit the offence** or which was intended to commit it when the convicted person has free disposal, "subject to rights of the owner in good faith". The freedom to dispose of the property is one of the most important elements of the right of ownership. It follows that the true owner is the one who has the right to free disposal of the property. To prove the right to freely dispose, it is necessary to demonstrate that the one who claims the property is only the apparent owner. Merely demonstrating that the individual who has been sentenced is using or enjoying the property will not be sufficient to authorize the seizure. It will be necessary to demonstrate that the third party claiming the property does not enjoy the essential prerogative of the right of ownership, namely the right to dispose of it. The requirement of good faith means that the person holding the property must have been unaware that the property which he/she acquired is related to the commission of an offence. Restitution to the owner in good faith requires that he diligently pursue its claim.

Circumstances where the right of ownership is irrelevant. In some cases, it does not matter whether the property is owned by the individual who has been convicted. This applies when confiscation is mandatory. Under **Article 131-21, al. 3, CC,** it is therefore possible to seize, the property that **is the object or the direct or indirect product of the offence**, except, of course, if it can be returned to the victim. Such property can be confiscated, no matter who holds it. In

[171] Art. 706-141 to 706-158 and Art. D. 15-5-1-1 CCP.
[172] Ch. Cutajar, "Le nouveau droit des saisies pénales", in *AJ Pénal* 2012, 124 and ff.
[173] Art. 8 and 9 of Declaration of the Rights of Man and of the Citizen; Cons. const, 16th June 1999, n°99-411 DC.

order to protect the interests of *bona fide* third parties, it is intended that, if the proceeds of the offence have been mixed with lawful funds to acquire one or more other properties, the seizure will only concern the estimated value of the proceeds of the offense. This is, moreover, the opinion of the Ministry of Justice in the 2010 *circulaire*, which states that, apart when it is so provided for by law, "seizure and confiscation do not require that the property seized or confiscated be the property of the accused or convicted person, if it constitutes the object, the instrument or the direct or indirect product of the offence". The public prosecutor, pursuant to Article 41-5 CCP, and the investigating judge, pursuant to Article 99-2 CCP, may return property belonging to victims prior to the judgment.

Specific provisions of the Criminal Code. In addition, some special provisions provide for the seizure of property, no matter who currently enjoys possession of the property. Thus, article 225-24, 1° CC allows the "Confiscation of the movable assets directly or indirectly used for the commission of the offence as well as of any products of the offence held by a person other than the person victim of human trafficking or practicing prostitution". Under this provision, the Criminal Chamber of the Court of Cassation approved the seizure of funds deposited on the accounts of a legal person and belonging to a third party condemned for habitual tolerance of prostitution.[174]

Specific provisions in the Code of Criminal Procedure.[175] Intangible property can be seized even when held by a third party according to the CCP. Thus, a sum of money paid into an account opened with an institution authorized by law to hold deposit accounts may be seized even when held by a third-party holder[176]. Similarly, the seizure may relate to a debt obligation for a sum of money. In this case, the third-party debtor must immediately record the amount due to the *Caisse des dépôts et consignations* or to the AGRASC.[177]

Article 706-145 CCP forbids any disposal of assets seized within criminal proceedings and reads that "from the time it becomes enforceable and until its release or the confiscation of the seized asset, the criminal seizure suspends or forbids any civil enforcement proceedings on the asset subjected to the criminal seizure". Nonetheless, when the upholding of the seizure is not necessary anymore, a creditor owing an enforcement order may be authorized to start or carry on civil enforcement proceedings on the asset (art. 706-146 CCP).

The criminal seizure of an immovable asset is enforceable against third parties following the publication of the order and until the release of the seizure (art. 706-151 CCP); so is the seizure of a business (art. 706-157 CCP). The seizure of intangible assets must be notified to the issuing person or corporate entity (art. 706-156 CCP). The public prosecutor is in charge of the enrolments and notifications.

The seizure of a debt obligation resulting from a life insurance contract results in the "freezing" of the contract. It suspends any right of redemption, renunciation, pledge of the contract and prohibits any subsequent acceptance of the benefit of the contract pending the final judgment, prohibiting the insurer from granting an advance to the insured. The decision to seize is notified

[174] Cass. crim., 8th April 2009, n°08-86.386 – M. Véron, "La saisie des produits de la prostitution", *Droit Pénal*, 2009, comm 106.
[175] *Loi* n°2010-768 of 9th July 2010.
[176] Art. 706-154 CCP. In its decision of 24th October 2018, the *Cour de Cassation* ruled under Article 706-154 CCP that: "the party who appeals against an order for the special seizure of money credited to a bank account is entitled, in the course of the appeal, to have the documents of the proceedings relating to the seizure which he/she is contesting made available" (n°17-86.199).
[177] Art. 706-155 CCP.

to the subscriber as well as to the insurer or to the organization with which the contract has been subscribed. The contract is frozen during the investigation and, if the confiscation is not ordered, the contract is restored to the insured. The seizure does not allow for the sums insured to be immediately apprehended, unless it can be established that the amount of premiums and contributions invested in the life insurance is the direct or indirect product of the offence. If this is the case, the seizure may then relate to the sums themselves and be carried out directly in the hands of the managing body of the insurance policy. The seizure of shares, securities, financial instruments and other intangible assets or rights is notified to the interested person and, where applicable, to the financial intermediary.

> The freezing of "terrorists' assets" is carried out against the natural or legal persons who own, hold or control them. Assets held by a third-party holder can therefore still be frozen[178].
> As regards freezing measures decided under the provisions of the United Nations Security Council or the Council of the European Union, there too, property held by a third party may be frozen under Article L. 562-3 MFC.

2.2.1. Rights and legal remedies.

The Law distinguishes between a victim and a third party acting *bona fide*.
The victim has a right to the restitution of the property seized as a consequence of the property right he/she owns on the asset.[179] The only reservation is that the continuance of the seizure is no longer required for the investigation needs.
The third party acting in good faith is treated differently in criminal proceedings. He/she has not directly suffered injury as a result of the offence and he/she has not been involved in the offence itself but has rights over the property seized. The potential loss suffered by the third party does not arise from the offence itself, but from the procedure of the seizure.

The third party must have acted in **good faith**. This good faith is presumed when the third party is not aware of the criminal use that is made of the property over which he/she claims to have rights. Therefore, he/she cannot assert his rights if it is established that he/she knew or could not have been unaware that the property was somehow associated with the commission of an offence.

The third party in good faith may require the property which he/she claims to own according to the rules applicable to ordinary law. He/she then has a **right to restitution** which is exercised according to the rules established in this area.

The third party in good faith naturally has a **right to compensation** whenever the property concerned is disposed of in anyway. The same applies if it has been transmitted to the AGRASC, in order for the Agency to carry out all the acts necessary for its conservation, maintenance or valuation.[180]

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[178] Art. L562-2 and ff. MFC, as amended by *ordonnance* n°2016-1575 of 24th November 2016 https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=689CB3CEB6EA2EF0C42AF3CCBE25BAC5.tplgfr23s_2?cidTexte=JORFTEXT000033471674&idArticle=LEGIARTI000033472599&dateTexte=20161126.
The purpose of the order is to extend the scope of assets that may be frozen and the definition of persons subject to the freezing and prohibition of the release of funds for the benefit of persons covered by a measure, freezing of assets, as well as to extend the scope of information exchange necessary for the preparation and implementation of freezing measures and finally to clarify the terms and conditions for the release of frozen assets.
[179] E. Camous, "Fasc. 20 : Des saisies pénales spéciales", *Jurisclasseur*, 186 and ff.
[180] Art. 706-143, par. 2, CCP; *Loi* n°2010-768 of 9th July 2010.

Decisions that violate the rights of *bona fide* third parties fall within the scope of the seizure court proceedings regulated by the provisions specifically established for this purpose. It is therefore the magistrate who ordered or authorized the seizure who has **jurisdiction**[181]**.**

Procedure. The law does not provide for any special provision by which a third party in good faith can assert his/her rights. No time limit has been established in this regard. He/she can therefore act as long as the seizure is continuing.

2.3. Confiscation.

2.3.1. Preliminary remarks.

By two recent decisions, the Constitutional Council (*Conseil constitutionnel*) has reviewed the conformity of confiscation provisions to the French Constitution. In a decision of November 26th 2010,[182] it states that the penalty of confiscation does not, in itself, contravene the principle of necessity of penalties, even in case of a petty offense, provided the principle of proportionality is complied with.[183] It further states that article 131-21 CC, which provides for the automatic confiscation of the goods used to commit the offense or which are the direct or indirect proceeds of the offense in case of a felony or a misdemeanor punished by a minimum of one year imprisonment (par.1), of the goods the convicted person proved unable to justify of their origin in cases of a crime or a misdemeanor having procured proceeds and punished of a minimum of five years imprisonment (par. 5), or of the goods legally regarded as dangerous or harmful when their detention is unlawful (par. 7) is consistent with the Constitution and that, as regards the seriousness of the offenses, the confiscations are not "obviously disproportionate".[184] Finally, the Council reckons that article 131-21 preserve the property right of third parties acting in good faith.[185]
Besides, in a decision of May 18th 2018,[186] the Council states that the overall confiscation of all assets belonging to individuals who have been found guilty of terrorist offenses (art. 422-6 of the Penal code) is not « obviously disproportionate », taking into account the seriousness of offenses of acts of terrorism, and therefore, is consistent with the principle of necessity and proportionality of punishments.[187]

2.3.2. Procedures for the confiscation of assets.

The legal framework. Confiscation proceedings are mainly regulated by article 131-21 CC which has been presented I detail above.[188]

The enforcement of article 131-21 CC is also provided for by articles 706-141 *et seq.*, *Title XXIX. On special seizures* of the CCP. Article 706-141 reads "the present title is enforceable, in order to guarantee the implementation of the complementary penalty of confiscation as

[181] Art. 706-144, par. 1, CCP.
[182] Cons. const., 26th November 2010, n°2010-66 QPC, M. Thibaut G. [Confiscation de véhicules], *Official Journal*, 27th November 2010, Text. n° 39.
[183] §.5.
[184] §.6.
[185] §.7.
[186] Cons. const., 18th May 2018, n° 2018-706 QPC, M. Jean-Marc R. [Délit d'apologie d'actes de terrorisme], *Official Journal* n°122, 30th May 2018, Text. n° 110.
[187] §§.15 to 18.
[188] *See*, 1.

defined by the provisions of article 131-21 CC, to seizures carried out in accordance with the present code when they are carried out on all or on a part of a person's goods, on an immovable good, on a movable intangible right or a debt obligation and on to seizure that do not involve a dispossession of the good", whereas article 706-141-1 allows confiscation "in value". Chapter I provides for the "common provisions". According to article 706-143, until the release of the seizure or of the confiscation, the owner or the holder of the assets are responsible for their maintenance and conservation. In case of non-compliance, the public prosecutor or the investigating judge may transfer the asset to the AGRASC.

2.3.3. Competent authorities to request or impose a confiscation order.

As far as national authorities[189] are concerned, confiscation can only be requested by judicial authorities.[190]
The confiscation of all assets subjected to seizure orders may be imposed by the trial court when it comes to a criminal conviction.
Furthermore, according to article 373-1 CCP, the *Cour d'assises* (Court of Assize, competent for felonies), when it orders the confiscation of an asset, may order both the immediate seizure of this asset in order to guarantee the enforcement of the confiscation and the transfer of the asset to the AGRASC for the purpose of its disposal. Appeals lodged against such an order are not suspensory. Article 484-1 CCP empowers the correctional tribunal (competent for misdemeanours) with the same prerogative.

2.3.4. Standard of proof for the imposition of a confiscation order.

As regard the standard of proof, there is no specific provisions in the French CCP. It may therefore be inferred that the standard of proof is the ordinary one. Article 427 CCP reads: "Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction. The judge may only base his decision on evidence which was submitted in the course of the hearing and contradictorily discussed before him". Prosecutors mainly have to prove the adequacy of confiscation, i.e. subject to third parties and victim rights, confiscation is necessary and proportionate to effectively punish the offender.

2.3.5. Time limits for the issuing of a confiscation order.

Disparate provisions deal with time limit issues. The general principle has been stated by the French *Conseil constitutionnel* in the abovementionned decision of October 14th 2016: "the court must rule in a reasonable time".

No evidence was found of existing complaints of unreasonable duration of this kind of proceedings in France.

2.3.6. Rights and legal remedies of the person addressed by a confiscation order.

[189] As regards foreign authorities*, see infra*, C.
[190] Cass. crim., 18th September 2012, n°12-80.662; in *JCP Entreprise et Affaires*, 46, 15th November 2012, 1682.

Rights and guarantees mainly lay in the right to lodge an appeal before the Court of appeal of any confiscation order made by a first-tier trial court. Confiscation orders are criminal sentences, subjected to the ordinary rules governing appeal proceedings.

Besides, according to article 41-4 of the CCP, "Where no court has been seized, or where the court involved has exhausted its jurisdiction without deciding on the return of property, the district prosecutor or prosecutor general are competent to decide, on their own motion or upon application, as to the restitution of property of which the ownership is not seriously disputed". Article 99 CCP reads "During the investigation, the investigating judge is competent to decide on the restitution of items placed under judicial authority. He/she decides by making a reasoned order either upon the district prosecutor's submissions or on his own motion, after hearing the prosecutor's opinion, or upon the application of the person under judicial examination, the civil party or any other person claiming a right over the item. He/she may also on its own motion decide, with the agreement of the district prosecutor, to return or to have returned the articles placed under judicial authority whose ownership is not disputed to the victim of the offence. (…) The investigating judge's order is served either on the applicant in the event of a dismissal of the application, or on the public prosecutor and on any other party concerned in the event of a restitution decision. It may be referred to the investigating chamber by an ordinary application filed with the court registry within the time limit and according to the conditions set out by the fourth paragraph of article 186. This time limit is suspensive". Furthermore, the president of the investigation chamber may order, on submissions of the general prosecutor of the Court of appeal or on request of one of the parties, by making a reasoned order on the total or partial release of seizures. Decisions of acquittal or which do not confirm the confiscation automatically give rise to the release of the seizures (art. 373-1 CCP). Likewise, the president of the correctional chamber of the Court of appeal may order, by issuing a reasoned order either upon the district prosecutor's submissions or upon the application of one of the parties, of the total or partial release of the seizures. Dismissals or decisions that do not confirm the confiscation automatically give rise to the release of the seizures (art. 484-1 CCP).

2.4. Third-Party Confiscation.

Third-party confiscation is not ruled on by any specific provisions. Provisions discussed above (III) may be enforced. The burden of proving his/her property and/or *bona fide* lies on the third-party when he/she claims against the enforcement of a confiscation which is contemplated by the trial court.

In a recent decision,[191] the criminal chamber of the Court of cassation states - under the visa of article 1 of the additional protocol n°1 ECHR, article 6, §2, of EU directive 2014/42 and articles 131-21 CC and 481 and 482 CCP[192] - that 1) a judgement denying the restitution to a third-party is appealable without *res judicata* of the confiscation order made by the trial court being opposable to him/her and 2) if the restitution application should be examined in accordance with article 481 CCP when the seized or frozen assets have not been confiscated yet, such an application must be decided on according to the provisions of article 131-21 CC once the assets have been confiscated. Having regards to the "clear and unconditional" provisions of article 6§2 of the EU directive, which guarantee the rights of the *bona fide* owner, the Court states that, although it is established that the confiscated assets have been purchased with the proceeds

[191] Cass. crim., 7th November 2018, n°17-87424.
[192] *See* also Cass. crim., 27th June 2018, n°17-87424.

of a criminal offense, nonetheless the *bona fide* third-party's rights should not be infringed, which involves the restitution of the confiscated assets.

3. Mutual recognition aspects.

3.1. Freezing.

3.1.1. National legal framework for the mutual recognition of freezing orders.

Article 6 of Act No 2005-750 of 4 July 2005 inserted a **Section 5 in Chapter II of Title X[193] of Book IV[194] of the Code of Criminal Procedure**. This section contains the provisions transposing the Framework Decision of the Council of the European Union of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.[195]

In accordance with the EIO Directive, the provisions of **Articles 695-9-1 and following have been partly rewritten** by Article 3 of the **Order of 1 December 2016** in order to cover only requests for freezing with a view to confiscation, and no longer apply, as was previously the case under the Framework Decision of 22 July 2003, to requests for freezing of evidence. As a result, when an item is requested for freezing because it is likely to be used as evidence - even if it is property which may otherwise or subsequently be subject to confiscation - the EIO will be preferred (which will in particular make it possible to use only one form, that of the EIO, without having to send the evidence freezing order accompanied by the request for transfer and the freezing certificate). Requests for freezing provided for in articles 695-9-1 and following shall henceforth be made only in cases where the sole objective sought is confiscation.

Reiterating the letter of Article 2(c) of Decision 2003/577, Article 695-9-1 **defines** a freezing order as: "a decision taken by a judicial authority of a Member State of the European Union, called the issuing State, to prevent the destruction, transformation, removal, transfer or disposal of property liable to confiscation located in the territory of another Member State, called the executing State".
The same article provides that "The freezing order is subject to the same rules and has the **same legal effects as a seizure**" (Art. 695-9-1, *in fine* CCP).

The freezing order does not cover all the cases known to national law concerning precautionary measures applicable to the organized crime regime (Art. 706-103 CCP), since the latter text allows for the taking of protective measures irrespective of any link with the alleged facts, and is limited solely to a connection between the person under investigation and his property.[196]
Furthermore, it should be noted that, while under French law confiscation may, for certain specified offences,[197] be general (confiscation of patrimony) and concern property not directly related to the said offences, the freezing order referred to in Article 695-9-1 may concern only

[193] "International judicial cooperation".
[194] "Some specific proceedings".
[195] M. Massé, "L'évolution du droit en matière de gel et de confiscation", *Revue de Science Criminelle et de Dorit Pénal Comparé*, 2006, 403 ; A. Beziz-Ayache, "La nouvelle procédure de gel de biens ou d'éléments de preuve", *AJpénal*, 2005, 410.
[196] O. Beauvallet, "Entraide judiciaire international : Dispositions propres à l'entraide entre la France et les autres Etats membres de l'Union européenne", *JurisClasseur Procédure Pénale, (Art. 695 à 695-9-53) Fasc. 20*, n° 117.
[197] *See supra*, Part A. Art. 222-49, 225-25 and 324-7 12° CP.

property which is the proceeds of an offence or corresponds in whole or in part to the value of such proceeds[198] or constitutes the instrument or object of the offence (Art. 695-9-2 CCP).[199]

3.1.2. Competent authorities for the execution of freezing orders from another EU Member State.[200]

Entrusted initially (2005) to the JLD, the competence to rule on requests for freezing of property with a view to their subsequent confiscation is now entrusted to the investigating judge (Art. 695-9-10 CCP) territorially competent (Art. 695-9-11 CCP)[201] and, where appropriate, through the public prosecutor or the Prosecutor General.

The public prosecutor is competent to carry out the measures ordered by the investigating judge. Before handing down a decision, the investigating judge, directly seized of a request for freezing, shall communicate it to the public prosecutor for his opinion (CCP, art. 695-9-12). The public prosecutor who directly receives a request for freezing shall forward it for execution, with his opinion, to the investigating judge (CCP, art. 695-9-12, para. 2).

3.1.3. Grounds for non-recognition and non-execution.

The grounds for refusal to execute a freezing order are either optional or mandatory.

Article 695-9-16 of the Code of Criminal Procedure provides that execution of the decision may (**optional grounds**) be refused if it is not accompanied by a certificate or if the certificate is incomplete or does not correspond to the freezing order. However, in this case, a period may be granted to the judicial authority of the issuing State to provide the necessary elements.

The **mandatory grounds for refusal** are provided for in article 695-9-17 CCP. There are five of them: 1° when the execution of the freezing order would be likely to threaten **public order**

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[198] The concept of value has the same meaning as that referred to in particular in the fourth paragraph of Art. 131-21 CP, which provides that "Where the thing confiscated has not been seized or cannot be produced, confiscation in value is imposed. For the recovery of the sum representing the value of the thing confiscated, the provisions governing judicial enforcement of public debts apply".

[199] "A freezing order may be issued in respect of any property, movable or immovable, tangible or intangible, as well as any judicial act or document establishing a title or a right over such property, which the judicial authority of the issuing State considers to be the product of an offence or corresponds, in whole or in part, to the value of this product, or constitutes the instrument or the object of an offence.
The provisions of this Section shall not apply to requests to prevent the destruction, transformation, removal, transfer or disposal of an object, document or data which may be used as evidence, even if it is the proceeds of an offence or constitutes the instrument or object of an offence, which requests shall be the subject of a European investigation order in accordance with the provisions of Section 1 of this Chapter".

[200] Where France is the issuing State, the public prosecutors, investigating judges, *JLD* and trial courts competent to order a seizure according to the provisions of the CPP owe jurisdiction to order the freezing of assets located in another member State and to issue the certificate (Art. 695-9-7 CCP).

[201] For the sake of simplification, there is a double extension of territorial competence. Thus, on the one hand, a competent judge on the basis of the location of only one of the property or evidence would be competent for the entire request addressed to him. And secondly, in the absence of a precise location, the territorial jurisdiction of the Paris investigating judge is extended to the entire national territory.
If the judicial authority to which the request for freezing has been transmitted does not have the competence to act on it, it shall transmit it without delay to the competent judicial authority and inform the judicial authority of the issuing State (Art. 695-9-11, ali.3 CCP).

or the fundamental interests of the nation;[202] 2° If an **immunity** bars the execution or if the asset cannot be seized according to French law (such as, for example, correspondence between the lawyer and the person under investigation or documents classified as "secret defence"); 3° (***ne bis in idem***) If it appears from the certificate that the freezing decision is based on offences for which the person who is the object of the said decision has already been conclusively judged by the French judicial authorities or by the judicial authorities of a State other than the issuing State, provided that, in the case of a conviction, the penalty has been carried out, is being carried out or can no longer be carried out under the law of the State of conviction; 4° (***discriminatory grounds***) If it is established that the freezing decision was taken with the purpose of prosecuting or convicting a person because of his gender, race, religion, ethnic origin, nationality, language, political opinions or sexual preferences or gender identity, or that the execution of the said decision could affect the situation of this person for one of these reasons; 5° (***double jeopardy***) If the freezing decision was taken with an aim of confiscating property and the facts supporting it do not constitute an offence allowing, according to French law, the seizure of that property.

Nevertheless, the ground for refusal set out in 5° is not applicable when the freezing decision concerns an offence which, according to the law of the issuing State, is comprised within one the of the categories of offences mentioned in article 694-32 (concerning the EIO) and is punished by an unsuspended custodial sentence of at least three years.

The execution of the freezing order may no longer be refused in respect of tax, duty, customs or changes on the ground that the relevant French legislation differs from that of the issuing State (*see* Art.695-9-18 CCP).

To date, no court decision has ruled on these grounds for refusal.

3.1.4. Grounds for postponement.

Enforcement may be **deferred**, pursuant to Art. 695-9-20 CCP, When it is likely to prejudice an ongoing criminal investigation (1°); when any of the property in question has already been the subject of a freezing or seizure measure in the context of criminal proceedings (2°); when the freezing order is taken with a view to the subsequent confiscation of property and the property is **already the subject of a freezing or seizure order in the context of non-criminal proceedings in France (**3°); where any of the property in question is a document or medium **protected for national defence purposes**, as long as the decision to declassify it has not been notified by the competent administrative authority to the investigating judge in charge of executing the freezing order (4°).

The investigating judge who decides to postpone the execution of the freezing order shall inform the judicial authority of the issuing State without delay by any means leaving a written record, specifying the reason for the postponement and, if possible, its foreseeable duration.

3.1.5. Time limits for the execution of freezing orders from another EU Member State.

[202] Note that this ground for refusal is based on a reference to another article of the CCP. Indeed, art. 695-9-17 CCP contains a reference to art. 695-9-14 of the same Code ("*Without prejudice to the application of article 694-4*, the execution of a freezing decision is refused in any of the following cases: […]").

Unlike international rogatory letters issued for the purpose of seizure, which do not impose any time limit for execution, the procedure for freezing property provides for very short time limits both for deciding on the request and for ordering the protective measure requested.

Thus, the decision authorizing or refusing the freezing of the property must be taken "as soon as possible and, if possible, within 24 hours of receipt of the said decision";[203] the execution of the freezing decision itself must take place "immediately".
Moreover, the investigating judge shall without delay inform the authority of the issuing State of the execution of the freezing order by any means leaving a written record.
Furthermore, the refusal to execute an order must be reasoned and notified "without delay to the issuing State judicial authority by any means leaving a written record". It is proceeded likewise when, for any reason, it proved impossible to enforce the order (art. 695-9-19 CPP).

To date, no court decision has ruled on these time limits.[204]

3.1.6. rights and legal remedies of the person addressed by a freezing order from another EU Member State.

Under article 695-9-22 CCP, **any person holding the property which is the subject of the freezing order or any other person claiming to have a right in the said property** may, lodge an appeal by sending an application to the registry of the investigating Chamber of the court of appeal competent for the area in question within ten days from the execution date of the decision. The provisions of Article 173 CCP shall then apply.[205]

The appeal is not suspensive and does not allow the substantive grounds for the freezing order to be challenged.

The investigating Chamber may, by a decision which is not subject to appeal, authorize the issuing State to intervene at the hearing through a person authorized by that State for that purpose or, where appropriate, directly through the means of telecommunications provided for in Article 706-71 CCP. Where the issuing State is authorized to intervene, it shall not become a party to the proceedings.

The person concerned by the freezing order may also obtain information from the registry of the investigating judge on the remedies available in the issuing State against the freezing order and mentioned in the certificate (695-9-24 CCP).

Informing the issuing State of the outcome of the appeal proceedings - The Prosecutor General shall inform the judicial authority of the issuing State of any appeal lodged and of the grounds raised, so that that authority may make its observations, where appropriate by means of the telecommunications facilities provided for in Article 706-71 CCP. It notifies it of the results of this action (695-9-25 CCP).

Finally, according to Art. 695-9-30 CCP, the total or partial release of the freezing order may be requested by **any interested person**. Where the investigating judge, ex officio or at the request of any interested person, intends to release the freezing order, he shall notify the judicial authority of the issuing State and enable it to submit its observations.

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[203] Art. 695-9-13 CCP.
[204] *See* however *infra*, case law on remedies against freezing orders.
[205] *See infra*: Nature of the proceeding.

Remedies against a freezing order (case law) - At the request of the Spanish judicial authorities, an investigating judge ordered the freezing of a painting by Picasso, discovered during a visit by customs officers, on a ship belonging to a company. The latter, together with another who claims to own the work, and a third party, submitted an application for annulment of the decisions of the investigating judge ordering the freezing and release of the freezing of the property. In order to reject the application, the judgment first states that the Chamber is required to examine the situation of the applicants who claim to have a right in the painting. It then states that the two companies cannot claim to hold a right in the painting concerned and the third party does not justify the exercise of any right in the work in question. The investigating chamber concludes from this that there is therefore no need to examine the grounds of nullity put forward. This decision has been annulled by the *Cour de cassation* which found that the property in dispute was on the vessel belonging to one of the applicant companies and finds that the master of the vessel, who was employed by that company, was the holder.[206]

Constitutionality of article 695-9-22 of the Code of Criminal Procedure – According to the *Cour de cassation*, there is no reason to refer to the Constitutional Council a priority preliminary ruling on the issue of constitutionality relating to article 695-9-22 of the Code of Criminal Procedure. On the one hand, it results from the combined application of articles 695-9-1, last paragraph, and [695-9-14][207] of the Code of Criminal Procedure, according to which the freezing of property is subject to the same rules as the seizure and must be executed in accordance with the rules of that Code, that the date of implementation of that decision, which determines the starting point of the 10-day period fixed by article 695-9-22 of the Code of Criminal Procedure, corresponds to the date on which the seizure decision is sent by registered letter by the investigating judge to the person concerned. On the other hand, this period shall be extended where an insurmountable obstacle has made it impossible for the latter to exercise its right of appeal in good time. Lastly, the lack of precision in the notification of the procedures for the exercise of remedies does not deprive the parties of the possibility of exercising an effective remedy before the investigating chamber and allows the exercise, also effective, of the rights of the defence, the rules laid down by article 695-9-22 of the Code of Criminal Procedure, which refers to article 173 of the Code of Criminal Procedure as to the form of the remedy, being accessible to the person concerned and/or his/her lawyer.[208]

Compliance (of the appeal against the freezing order) with the Framework Decision - Pursuant to article 695-9-22 of the Code of Criminal Procedure, which refers to the provisions of article 173 of the same Code, the appeal against the freezing order must be lodged within 10 days of the date on which the investigating judge notified the persons concerned, in the form of a declaration made to the registry of the competent court. According to the Cour de cassation, these provisions, which guarantee the effectiveness of the appeal, are an "exact transposition" of Framework Decision 2003/577/JHA of 22 July 2003, which, although it requires, in application of the principle of equivalence, that the Member States, which enjoy a margin of appreciation, organise the appeal against the freezing order in accordance with the legislation in force, "does not, however, require it to contain precise information on the time limits and procedures of the said appeal".[209]

[206] Cass. crim., 19 mai 2016, n°15-86.375.
[207] Repealed by the Ordinance 2016-1636.
[208] Cass. crim., 11 juillet 2017, n°16-87.169.
[209] Cass. crim., 5 avril 2018, n°16-87.169.

Nature of the proceeding - The proceeding in question takes the form of a request for annulment of documents since "the provisions of article 173 are then applicable" (CCP, art. 695-9-22). It is the only one applicable to the exclusion of national rules relating to special seizures.

> Following a freezing order by the public prosecutor of a foreign court, a French investigating judge, pursuant to the provisions relating to mutual assistance between France and the other Member States of the European Union, had ordered the seizure of the credit balance of an account opened in the name of persons in a bank. The latter's counsel, who considered himself a preferred creditor, appealed this decision. According to the Cour de cassation, the investigating chamber correctly declared this appeal inadmissible since it follows from the provisions of article 695-9-22 of the Code of Criminal Procedure, **which alone is applicable in this case**, that any person who claims to have a right over frozen property may, by sending an application to the registry of the investigating Chamber of the court of appeal with territorial jurisdiction, within ten days from the date of implementation of the decision in question, lodge an appeal against it, in the manner provided for by article 173 of the Code of Criminal Procedure.[210]

3.2. Freezing of third-parties' assets.

As stated above (3.1.6.), a person who holds the property which is the subject of the freezing order or any other person claiming to have a right in that property may, by application to the registry of the investigating chamber of the territorially competent court of appeal within ten days from the date of enforcement of the decision in question, bring an appeal against it. The provisions of Article 173 CCP are then applicable. The appeal is not suspensive and does not allow the substantive grounds for the freezing order to be challenged.
In addition, the investigating chamber may, by a decision which is not subject to any appeal, authorize the issuing State to intervene at the hearing through a person appointed by that State for that purpose or, where appropriate, directly through the means of telecommunications provided for in Article 706-71 CCP. Where the issuing State is authorized to intervene, it shall not become a party to the proceedings.

3.3. Confiscation.

The **Act No. 2010-768 of 9 July 2010** on facilitating seizure and confiscation in criminal matters transposed Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

It has also recast the provisions applicable outside the European Union by codifying Laws No 90-1010 of 14 November 1990 and No 96-392 of 13 May 1996 and extending their scope to all international conventions containing mechanisms for the recognition of confiscation orders.

Finally, it established a legal framework for the cross-border enforcement of confiscations on the basis of the international principle of reciprocity where there is no international convention applicable.[211]

3.3.1. National legal framework for the mutual recognition of confiscation orders.

[210] Cass. crim., 13 février 2013, n°12-82.999; A. Maron and M. Haas, "Recours emmêlés", *Droit pénal* 2013, comm. 64; *See* also Cass. crim., 13 février 2013, n°12-83.000.
[211] Art. 713-36 to 713-41 CCP.

Act No. 2010-768 of 9 July 2010 on facilitating seizure and confiscation in criminal matters inserted a Chapter III in Title I of Book V of the Code of Criminal Procedure entitled: "Transmission and execution of confiscation orders pursuant to the EU Council Framework Decision of 6 October 2006". It includes **Art. 713 to 713-35** of the CCP.
The express reference to the European Union's reference text should be underlined because this legal technique is far from systematic.

3.3.2. Competent authorities for the execution of confiscation orders from another EU Member State.

The CCP gives French judicial authorities jurisdiction in criminal matters to enforce confiscations ordered by foreign judicial authorities. It has appointed the public prosecutor to receive requests for execution from the competent foreign authorities and the *tribunal correctionnel* (criminal court which is competent for misdemeanors) to rule on such requests.

If the French judicial authority to which the confiscation order and the certificate have been addressed considers that it does not have territorial competence to act on them, it shall transmit them without delay to the competent judicial authority and inform the competent authority of the issuing State.

The public prosecutor territorially competent is that of the location of any of the confiscated property or, in the absence of a clearly determined geographical jurisdiction, the public prosecutor of Paris (Article 713-13 second paragraph, CCP).

The public prosecutor, with his opinion, refers the application for recognition and enforcement of the confiscation order to the criminal court (713-14 CCP).

After ensuring that the request is lawful, the criminal court shall decide without delay on the execution of the confiscation order (713-15 CCP).

It is for the public prosecutor to enforce that decision under the same conditions as confiscation ordered in national proceedings and to inform the competent authority in the issuing State of that recognition and execution of the confiscation order as soon as possible, by any means leaving a written record.

It follows from Articles 713 and 713-36 of the Code of Criminal Procedure that a request for execution on French territory of a confiscation order issued by a court of an EU Member State may be examined in accordance with the procedure laid down in Articles 713-12 to 713-35 of the Code of Criminal Procedure only if the State from which the request emanates has transposed into its domestic law the Framework Decision of the Council of the European Union of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.[212]

> In the absence of an international convention to the contrary, confiscation orders issued by foreign judicial authorities are governed by articles 713-37 to 713-40 of the Code of Criminal Procedure.
> The execution of the confiscation ordered by a foreign judicial authority is authorized by the criminal court, at the request of the public prosecutor (Art. 713-38 CCP).
> Enforcement is permitted provided that the foreign decision is final and enforceable under the law of the requesting State.

[212] Cass. crim., 28 May 2015, n°14-83.612.

The refusal to authorize the execution of the confiscation order issued by the foreign court shall automatically entail the release of the seizure. It is ordered for the reasons referred to in article 713-37 CCP. Automatic release shall be ordered when the proceedings instituted abroad have ended or have not led to the confiscation of the seized property.
The execution on the territory of the Republic of a confiscation order issued by a foreign court entails the transfer to the French State of ownership of the confiscated property, unless otherwise agreed with the requesting State (Art. 713-40 CCP).

3.3.3. Grounds for non-recognition and non-execution.

The **mandatory grounds for refusing recognition and enforcement of a confiscation order** are provided for in article 713-20 of the Code of Criminal Procedure[213] and do not call for any specific comments except for two grounds.

The first one is the **specific ground for refusal of extended confiscation** which allows, in certain cases, to refuse in whole or in part the recognition and enforcement of the confiscation order. Article 713-20 11th paragraph of the Code of Criminal Procedure provides: "The execution of a confiscation order shall also be refused, where appropriate in part, if the confiscation order is based on the ground referred to in article 713-1, paragraph 3. In this case, the fifth paragraph of Article 713-24 is applied". It concerns the cross-border enforcement of extended confiscations.
An extended confiscation ordered in another State of the European Union may, in most cases, be recognised and enforced. However, in some cases, it will be impossible to recognize and enforce this extended confiscation. In this respect, three situations must be distinguished:
First, if an extended confiscation ordered by the judicial authority of another EU Member State concerns acts falling within the seven categories referred to in Framework Decision

[213] "Without prejudice to the application of Article 694-4, the execution of a confiscation order shall be refused in one of the following cases:
1° If the certificate is not produced, if it is drawn up incompletely or if it clearly does not correspond to the confiscation order;
2° If immunity prevents it or if the property, by its nature or status, cannot be confiscated under French law;
3° (*ne bis in idem*) if the confiscation order is based on offences for which the person against whom the order was issued has already been finally tried by the French judicial authorities or by those of a State other than the issuing State, provided, in the event of conviction, that the sentence has been executed, is being enforced or can no longer be enforced in accordance with the laws of the sentencing State;
4° (*discriminatory grounds*) If it is established that the confiscation order was issued for the purpose of prosecuting or convicting a person on the grounds of sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation or gender identity or that the execution of the confiscation order may prejudice that person's situation for any of these reasons;
5° (*dual criminality*) If the confiscation is based on facts which do not constitute offences allowing, under French law, such a measure to be ordered, except as regards the list of offences provided for by the EAW framework and set out in Art. 694-32 CCP (cf. Art. 713-20 CCP) and regardless of tax offences (Art. 713-21 CCP).
6° If the rights of a third party in good faith make it impossible, under French law, to enforce the confiscation order;
7° (*in absentia procedure*) If, according to the information given in the certificate, the person concerned did not appear in person at the trial at the end of which the confiscation was ordered, unless, according to these information, he is in one of the cases provided for in 1° to 3° of article 695-22-1;
8° (*time limitation period*) If the facts on which the decision is based fall within the jurisdiction of the French courts and the confiscation order is time-barred under French law.
However, the ground for refusal provided for in paragraph 5 shall not be invoked where the confiscation order concerns an offence which, under the law of the issuing State, falls within one of the categories of offences referred to in Article 694-32 and is punishable there by deprivation of liberty for a term of three years or more.
The execution of a confiscation order shall also be refused, where appropriate in part, if the confiscation order is based on the ground referred to in Article 713-1, paragraph 3 [i.e. *extended confiscation*]. In this case, the fifth paragraph of article 713-24 shall apply".

2005/212/JHA of 24 February 2005,[214] the "general confiscation" ("*confiscation Générale*", that is confiscation of patrimony) provided for by the French legislation being broader than the three optional mechanisms provided for by this Framework Decision, the confiscation shall be recognised and enforced, irrespective of the option on the basis of which the law of the issuing State confiscated the property;
Second, if an extended confiscation ordered by the judicial authority of another EU Member State concerns acts not falling within the seven categories referred to in Framework Decision 2005/212/JHA of 24 February 2005 but for which French legislation authorises general confiscation (such as genocide, eugenics, reproductive cloning, etc.), the confiscation must be recognised and enforced;
Third, if an extended confiscation ordered by the judicial authority of another EU Member State concerns acts which do not fall within the seven categories referred to in Framework Decision 2005/212/JHA of 24 February 2005 or those for which French law authorises a general confiscation, the latter may not be recognised and enforced. It will either be refused in its entirety (713-20 11th paragraph), or possibly, recognized and executed "within the limits provided by French law for similar acts" (*see* last paragraph of Article 713-24 CCP).[215]

The second ground that requires clarification relates to the **limitation period under French law** which is not, except in exceptional cases, a ground for refusal of enforcement
The fact that the sentence is time-barred under French law does not constitute a ground for refusing recognition and execution of confiscation.
However, where the facts on which the confiscation order is based fall within the jurisdiction of the French courts and the confiscation order is time-barred under French law, the confiscation order may not be recognised and enforced in French territory.

The **optional grounds for refusing recognition and enforcement of a confiscation order** are provided for in article 713-22 of the Code of Criminal Procedure.[216]
The two grounds for refusal based on territoriality have always been maintained in the framework decisions on mutual recognition instruments and transposed into the Criminal Procedure Code to limit problems of conflict of legislations.
In order to give primacy to territorial application of criminal law in these conflicts of legislation, the two grounds based on the place of commission of the facts have been maintained.

Where it is not possible to proceed to the verification of the double criminality, three situations must be distinguished:

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[214] *i.e.* counterfeiting of the euro, facilitation of illegal residence or transit, trafficking in human beings, in the case of child sexual exploitation and child pornography, drug trafficking or money laundering involving organised crime or acts constituting an act of terrorism.
[215] Thus, when an "extended" foreign sentence has been pronounced for offences against a person's physical or psychological integrity (torture and acts of barbarism, violence, threats, rape, sexual assault, moral harassment, etc.) French law allows the confiscation of "one or more vehicles belonging to the convicted person" and "one or more weapons owned or freely available to the convicted person" (see art. 222-44 5° and 6° CP). An extended confiscation ordered in another State of the European Union must be refused with the exception of the confiscation of property of the type that could be confiscated in France (the vehicle belonging to the convicted person, the weapon at his free disposal, etc.).
[216] "The execution of a confiscation order may be refused in one of the following cases:
1° If the confiscation order is based on criminal proceedings relating to offences *committed in whole or in part on the territory of the Republic*;
2° If the confiscation order is based on criminal proceedings relating to offences which have been committed outside the territory of the issuing State and French law does not permit the prosecution of such acts when they *are committed outside the territory of the Republic*".

(1) The acts were committed in whole or in part in the executing State. In this case, pursuant to Article 713-22 of the Code of Criminal Procedure, ***French legislation should prevail and the recognition and execution of the confiscation order should be refused***.
(2) The acts were committed exclusively in the issuing State. In this case, ***the law of the issuing State should be given precedence and there are no grounds for refusing the execution of the confiscation order***.
(3) The acts were committed outside the issuing State and the executing State. In this case, ***it is for the court, pursuant to article 713-20 CCP, secondly, to assess whether these facts could be prosecuted under French law.***
Indirectly, this ground implies that the facts are incriminated under French law, since in any event, no prosecution would be possible in France for acts committed abroad if they are not incriminated under French law.

The two grounds for refusal referred to in Article 713-20 have not been transformed into a mandatory ground for refusal but left to the discretion of the court, since situations may arise in which the issue at stake does not involve questions of pre-eminence of jurisdiction but concerns the prosecution of acts committed in France which could be prosecuted by the French authorities.

3.3.4. Grounds for postponement.

The criminal court may stay the proceedings when it considers it necessary to translate the decision or when the property is already the subject either of a seizure or freezing order or of a final confiscation order in another proceeding.
Where it stays the proceedings, the criminal court may order seizure measures in accordance with the procedures laid down in article 484-1 CCP.
In the event of a stay of proceedings, the public prosecutor shall inform the competent authority of the issuing State without delay by any means leaving a written record, stating the reasons and, if possible, the duration of the stay of proceedings (713-17 CCP).
As soon as the reason for the stay no longer exists, the criminal court shall decide on the execution of the confiscation order. The public prosecutor shall inform the competent authority of the issuing State by any means leaving a written record (713-18 CCP).
Once the authorization has been granted by the court, the public prosecutor – responsible for the enforcement of such decision – may postpone the enforcement where the confiscation order concerns a sum of money and the amount recovered is likely to exceed the amount specified in the confiscation order due to its execution in several States; or where the execution of the confiscation order may prejudice an ongoing criminal investigation or proceedings (Art. 713-31 CCP).
The public prosecutor who postpones the enforcement of the confiscation order shall inform the competent authority of the issuing State without delay by any mean leaving a written record, stating the reasons for the postponement and, if possible, its foreseeable duration.

3.3.5. Time limits for the execution of a confiscation order from another EU Member State.

Under article 713-15 CCP, the criminal court shall decide "***without delay***" on the execution of the confiscation order.

In case of postponement, the criminal court shall decide on the execution of the confiscation order "***as soon as*** the reason for the stay no longer exists".

3.3.6. Rights and legal remedies of the person addressed by a confiscation order from another EU Member State.

If it considers it useful, the criminal court shall hear, where appropriate by rogatory letters, the ***convicted person and any person having rights in the property*** which has been the subject of the confiscation order. These persons may be represented by a lawyer (Art. 713-16 CCP).

The **sentenced person** may appeal against the decision authorising the execution of the confiscation in France (713-29 CCP).

Any person who holds the property which is the subject of the confiscation order **or any other person claiming to have a right in that property** may, by sending an application to the registry of the territorially competent criminal appeals chamber, within ten days from the date of execution of the decision in question, lodge an appeal against the latter (Art. 713-29 CCP).

In the event of an appeal against the confiscation order, the public prosecutor shall inform the competent authority of the issuing State of the appeal lodged by any means leaving a written record.

The appeal is suspensive but does not allow the substantial grounds which led to the confiscation order to be challenged.

The court may, by a decision which is not subject to appeal, ***authorise the issuing State to intervene*** at the hearing through a person authorised by that State for that purpose or, where appropriate, directly through the means of telecommunications provided for in Article 706-71. Where the issuing State is authorised to intervene, it shall not become a party to the proceedings (Art. 713-29 CCP).

Where the person concerned is able to provide proof of confiscation, in whole or in part, in another State, the criminal court, after consultation with the competent authority of the issuing State, shall deduct in full from the amount to be confiscated in France any fraction already recovered in that other State pursuant to the confiscation order (713-24 CCP).

3.4. Third-Party Confiscation.

The only reference to third parties can be found in the aforementioned Art. 713-20 CCP, which sets out the mandatory grounds for refusal.[217]
In its paragraph 6, this article provides that: "the execution of a confiscation order shall be refused (...) if the rights of a third party in good faith make it impossible, under French law, to execute the confiscation order".

4. Management and disposal aspects.

Creation of AGRASC. As a result of the "paradigm shift" introduced by the *Loi* n° 2010-768 of 9th July 2010, which gives confiscation a greater place and a new role to seizure – no longer

[217] With respect to the enforcement of confiscation orders decided by a non-EU member State, *see* Art. 713-38 CCP.

envisaged solely for evidentiary purposes but also for patrimonial purposes in order to secure future confiscations –, the Agency for the Management and Recovery of Seized and Confiscated Assets (AGRASC) was created;[218] this new actor of the criminal procedure constitutes the "institutional expression"[219] of the profound evolution of the substantive and procedural law on confiscation undertaken since 2010.[220] The AGRASC is legally defined as a public state body of an administrative nature. It is placed under the joint supervision of the Minister of Justice and the Minister in charge of the Budget.[221]
The AGRASC was created following the difficulties encountered in practice in seizures and confiscations proceedings. Although the preservation of value of seized assets is subjected to their adequate conservation, judges and clerks did not have specific means to prevent their depreciation in value. For this reason, the AGRASC, an *ad hoc* structure specializing in the management of seized and confiscated property, was created. It provides help and logistical support to the courts in the management of seized property by relieving them of the material and legal difficulties posed by the seizure of criminal assets. The AGRASC is the French Asset Recovery Office, established in accordance to the Decision 2007/845/JHA of 6th December 2007. The purpose of the scheme is to ensure the management of the property seized by the judicial authority.

4.1. Freezing.

4.1.1. Competent authorities for the management of frozen assets.

The main competent authority for the management of frozen orders is evidently the AGRASC. The Agency[222] has specific powers to ensure the conservation and enhancement of assets handed over to it. Moreover, the Agency receives all sums that have been apprehended in cash or in bank accounts and also property for the purpose of disposal before judgment. It alone ensures the publication of foreclosures of real estate and business funds. To achieve its missions, it has its own investigative powers. The Agency also responds to requests for mutual assistance or international cooperation.

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[218] The organization and objectives of the agency are specified in two *circulaires* of the Ministry of Justice, respectively of 22nd December 2010, covering the entirety of the law of 9th July 2010 (http://www.textes.justice.gouv.fr/art_pix/JUSD1033251C.pdf) and of 3rd February 2010, specifically in relation to AGRASC (http://www.textes.justice.gouv.fr/art_pix/JUSD1103707C.pdf).
[219] L. Ascensi, *Droit et pratiques des saisies et confiscations pénales*, *Dalloz*, 2019, 7.
[220] E. Pelsez, "L'agence de gestion et de recouvrement des avoirs saisis et confisqués – AGRASC", *AJ Pénal*, 2012, 139; A. Fournier, "La nouvelle Agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC). *À propos du décret du 1er février 2011*", *La Semaine juridique, édition notariale et immobilière*, 2011, 334; E. Camous, "fasc. 20 : L'agence de gestion et de recouvrement des avoirs saisis et confisqués", *Jurisclasseur Procédure pénale*.
[221] Art. 706-159 CCP.
[222] AGRASC is managed by a board of directors, chaired by a magistrate of the judiciary appointed by *décret* (Art. 706-162 CCP). The board of directors is made up of six representatives of the State: the director of criminal affairs, the secretary general of the Ministry of Justice, the director general of public finances, the director general of the national police, the Director General of the National Gendarmerie, the Director General of Customs (Art. R.54-1, 12 CCP). Thus, there are multiple large organizations involved, which is aimed at improving information-sharing between the different actors. The board of directors also comprises four qualified individuals with expertise in the areas of contract law, corporate law, wealth management and public procurement. They are selected by the Minister of Justice, one of them suggested by the Minister in charge of the Budget. This is demonstrative of the broad field of action AGRASC. Its activities go well beyond simply applying the rules of criminal procedure. Finally, there are two staff representatives at the AGRASC. They are elected under the conditions set by the Minister of Justice (art. 54-1 CCP). The term of office of senior officials representing national institutions does not have a duration as such. However, the term of office for the president, the four qualified individuals and their staff representatives is three years, but this is renewable at the end of the term (Art. 54-1, par. 11, CCP).

Its missions, carried out under judicial mandate and throughout the territory, are defined by article 706-160 of the Code of Criminal Procedure. It involves the management of all property, whatever its nature, seized, confiscated or subject to a precautionary measure during criminal proceedings, which is entrusted to it and which requires, for its conservation or recovery, acts of administration; the centralized management, through an account opened at the *Caisse des dépôts et consignations* (CDC), of all sums seized during criminal proceedings the alienation or destruction of property for which it has been entrusted with the management and which is ordered; the alienation of property ordered or authorised under the conditions provided for in Articles 41-5 and 99-2 of the Code of Criminal Procedure. The Agency may, under the same conditions, manage seized property, dispose of or destroy seized or confiscated property and distribute the proceeds of the sale in execution of any request for mutual assistance or cooperation from a foreign judicial authority. In the exercise of its powers, the Agency may obtain the assistance and any useful information from any natural or legal person, public or private, without professional secrecy being enforceable against it, subject to the provisions of Article 66-5 of Law No 71-1130 of 31 December 1971 reforming certain judicial and legal professions.
Agrasc's scope of intervention is not limited to the management of assets seized pursuant to the provisions introduced by the 2010 law (special seizures). Its powers are exercised over all seized and confiscated property (including common law seizures). Besides, the Agency performs an advisory function for magistrates. It carries out a mission to inform victims and public creditors about property that is returned by court decision.[223]

However, the public prosecutor or the investigating judge play a significant role. In particular, they have a protective role: in the event of default or unavailability of the owner or holder of the property, and subject to the rights of *bona fide* third parties, the public prosecutor or the investigating judge may authorise the handing over to the Agency for the management and recovery of seized and confiscated assets whose advance sale is not envisaged so that this Agency may carry out, within the limits of the mandate entrusted to it, all the legal and material acts necessary for the conservation, maintenance and enhancement of the property.[224] Any act having as a consequence to transform, substantially modify or reduce the value of the property is subject to the prior authorization of the JLD, at the request of the public prosecutor who ordered or authorized its seizure, the investigating judge who ordered or authorized its seizure or the investigating judge in the event of the opening of judicial investigation after the seizure.[225]

4.1.2. Powers of the competent authorities on the frozen assets.

The AGRASC has a **general mandate for the management** of the property entrusted to it.[226] In principle, it can decide on its own motion whether or not to carry out these acts without having to refer to the Courts. However, the law provides for exceptions.[227]

There is no list of authorized acts of management. Therefore, any act of management can be carried out in order to preserve the property.

[223] L. Ascensi, *Droit et pratiques des saisies et confiscations pénales*, *Dalloz*, 2019, 8.
[224] Art. 706-143, par. 2, CCP.
[225] Art. 706-143, par. 3, CCP.
[226] Art. 706-160, par. 1, CCP.
[227] *Infra*.

The AGRASC's mission is to **value the seized assets** (it is entrusted with the administration of seized properties likely to be confiscated). This objective can be differentiated from that of the daily management of a property, because it involves preventing the asset's value from depreciating. The AGRASC is therefore entitled to carry out any act that could increase the value of the property provided it is indeed a management act. The Agency does not have to obtain the consent of the owner or holder of the seized property. Only economic interests are taken into account. The texts do not set conditions for the valuation of the property, but it must only be acts of management (*actes d'administration*). For example, it may decide to sell the property such as a painting or precious object prior to the judgment, because their value is greater than the value they presented at the time of delivery.

The Agency is competent for "the **alienation and the destruction** of the property the management of which it is responsible, without prejudice of the allocation of these properties under the conditions of the articles L2222-9 of the *Code general de la propriété des personnes publiques*[228] and 707-1 of this Code".[229]

In addition, when movable property seized is no longer useful as evidence in the court proceedings or for the purposes of investigations into an offense and its return is impossible (identification of the owner of the property has not been possible or the property has not been claimed in time), the prosecutor (during an inquiry) or the investigating judge (during a criminal investigation) may authorize the delivery of these assets to the AGRASC for disposal.[230]

Assets will also be turned over to the AGRASC for disposal if maintaining the seizure results in a decrease in the value of the property.[231]

In these cases, the Agency can therefore perform **acts of disposition**. It may **sell** or **destroy** the property entrusted to it subject to compliance with procedures established for this purpose. This possibility applies only to property entrusted to the Agency as part of its general management objective.[232] The role of AGRASC is to enforce preliminary decisions. The alienation or destruction must have been ordered. The Agency cannot decide it alone.

However, it may suspend that decision where the property is likely to be allocated free of charge to an investigation service or when it is a confiscation by value.

The Law provides that "movable property which, in the course of criminal proceedings, has been transferred to the State following a final judicial decision **may be assigned, free of charge**, under the conditions determined by interdepartmental Decree, to police services, gendarmerie units or services of the customs administration when these services or units carry out judicial police missions".[233] Confiscated property can therefore be provided to investigative units. However, the courts are excluded: they cannot take advantage of the property they ordered to seize.

[228] General Code of Property of Public Persons; hereafter: GCPPP.
[229] Art. 706-160, par. 3, CCP.
[230] Art. 41-5, par. 1 and 99-2, par. 1, CCP.
[231] Art. 41-5, par. 2 and 99-2, par. 2, CCP.
[232] There are other hypotheses in which objects are handed over to it: art. 41-5 and 99-2 CCP.
[233] Art. L2222-9 GCPPP, which refers to art. 706-160, 3 ° CCP.

Assignment to services performing judicial police missions is only possible for **movable property**. Building are excluded. In addition, a final sentence of confiscation must have been given, *i.e*. the property must have been transferred to the State.

However, the AGRASC, which has been ordered to proceed with the disposal or destruction of the property over which it has custody, may refuse to enforce this measure. In this case, the property is assigned to the service concerned under the conditions provided for by interdepartmental *décret*.[234]

The Court may order the return of property entrusted to the AGRASC. In this case, the Agency is required to enforce the decision without the owner having made the request. The decision of confiscation must be final.[235]

If the property entrusted to the AGRASC is not confiscated and the decision is not that restitution should be made, the owner must make the request within 2 months (if the person was the subject of a formal notice), or within 6 months (in the absence of formal notice). The period runs from the date on which the last court seized has exhausted its jurisdiction.[236] There is no particular form to respect: the notice must only be registered at the enforcement service or the AGRASC, which is responsible for enforcing prosecution decisions on behalf of the public prosecutor. Without this request within the time limit, the property becomes property of the State, unless third parties acting in good faith have a right to the property.[237]

In principle, **restitution is in kind**. The AGRASC must return the property to the person named in the decision that provides for restitution or to the person who requests it. In the latter case, the agency must verify that the individual is the owner.

When the property itself has been entered in value - this is the case for funds seized from a bank account - the Agency returns the amount of the sum seized. If the property seized has been sold, it is the sum deposited that is returned. Only the price will be returned (without interest). No compensation can be claimed by the owner in case the asset is sold prior to the judgement at a price he/she regards as undervalued. Since the sale was made publicly and competitively on the market, there is an irrebuttable presumption of sale at the correct price.

Finally, since the Law of 3rd June 2016, Art. 706-160 states that: "the sums transferred to the Agency for the Management and Recovery of Assets Seized and Confiscated" in Criminal Proceedings "and whose origin cannot be determined shall be transferred to the State at the end of a period of four years after their receipt, at the closure of the annual accounts. In the event of a decision to return the property after the four-year period, the State shall reimburse the Agency for the sums due".[238]

4.1.3. Costs for the Management or disposal of frozen assets.

The AGRASC is financed in two ways: firstly, through **direct funding**, secondly through **self-financing**.

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[234] Art. L2222-9 GCPPP.
[235] Art. 478 to 484 CCP.
[236] Art. 41-4, par. 3, CCP.
[237] Cass. crim., 19th February 2014: JurisData n°2014-002535; E. Camous, "Ne pas réclamer c'est accepter... que la chose soit confisquée", in *JCP G* 2014, 265.
[238] Art. 706-160, par. 2, CCP.

The Agency's resources consist of grants, advances and other contributions from the State and its public institutions, the European Union, local authorities, their public institutions and any other public or private legal entity.[239] It is also funded by "the tax revenues determined by the law".[240] Finally, it can receive donations and bequests (although this situation has yet to materialize).[241]

Finally, the AGRASC is financed from **the profits of sums seized** or acquired by the management of assets seized. These profits are paid into its account at the *Caisse des Depots et Consignations*.[242] It can only do this for a proportion which is capped under the same conditions as the confiscated sums. This is the main source of funding for the agency.

4.1.4. Legal remedies against wrongful management of frozen assets.

The CCP does not provide for any direct recourse against the AGRASC for the mismanagement of property. Only the remedies mentioned above are available.

It should be noted that the *Cour de cassation* stated that the lodging of an appeal against an order refusing the return of seized property does not preclude the investigating judge from ordering its handing over to the AGRASC for the purposes of disposal.[243]

4.1.5. National practices on the management of frozen assets in a different EU Member State and in execution of a freezing order from a different EU Member State.

The Agency may, under the conditions set out above,[244] manage the seized property, dispose of or destroy the seized (or confiscated) property and proceed to the distribution of the proceeds of the sale in execution of any **request for mutual assistance or cooperation from a foreign judicial authority**.[245]

According to the circular of 3rd February 2011 on the presentation of the Agency for the Management and Recovery of Assets Seized and Confiscated (AGRASC) and its missions, the Agency will be seized by magistrates, ideally in dematerialized form, at the address amo@agrasc.gouv.fr, reserved for international missions.[246]

The referral to the AGRASC is subject to a **request for assistance from a foreign judicial** authority in accordance with the provisions governing the matter.[247] Furthermore, the investigating judge owes sole jurisdiction. The granting of the requested freezing decision leads to deal with the frozen assets "according to the rule" of the CCP.

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[239] Art. 706-163, 1 ° CCP.
[240] Art. 706-163, 2 ° CCP.
[241] Art. 706-163, 6 ° CCP
[242] Art. 706-163, 4 ° CCP.
[243] Cass. crim., 8th November 2017, n°17-82.527; V. Morgante, "Refus de restitution de bien saisi et remise parallèle à l'AGRASC", in *Dalloz Actualité,* 28th November 2017.
[244] E. Camous, "fasc. 20 : L'agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC)", in *Jurisclasseur*, 194 and ff.
[245] Art. 706-160, par. 6 CCP.
[246] http://www.textes.justice.gouv.fr/art_pix/JUSD1103707C.pdf.
[247] Art. 695-9-1 CCP. In the absence of an international convention, art. 694-10 to 694-13 apply.

The actions of the Agency are effective because it corresponds to a European model identified as Asset Management Office (AMO) or Asset Recovery Office (ARO) within the framework of the European Union. Moreover, it develops contacts and exchanges with its foreign counterparts, notably within the CARIN network (Camden Asset Recovery Inter-Agency Network) and the "ARO Platform" with the European Commission.

To date, we found no decision of the *Cour de cassation* on this point. Nevertheless, according to the annual report of the AGRASC, in 2014 more than € 205,000 has been paid to foreign States under the division of assets in the framework of international mutual assistance.[248] During the year 2014, thirty requests for International Mutual Assistance Mission were issued by 14 different countries, including 5 Member States of the European Union (representing 11 requests). In 2015, it was € 269,302. The 2017 activity report mentions 50 seizures (among 707) in 12 incoming mutual assistance cases (cases in which a foreign country orders the seizure of a property located in France and requests that its execution be carried out by the French magistrate).[249]

4.2. Freezing of third parties' assets.

The Agency manages all the frozen property entrusted to it. Therefore, it can, under the conditions mentioned above (4.1.), manage the seized property in the hands of the third party holding the property.[250] On this point, there are neither any specific provisions in the CCP, nor any specificity.[251]

It should be noted, however, that victims or civil parties (*parties civiles*)[252] may, when they receive a final decision awarding them damages and have not obtained compensation, may obtain payment from the AGRASC for this sum on the funds of frozen assets.[253]
Such a request for payment must, under penalty of foreclosure, be sent by registered letter to the Agency within two months of the date on which the decision awarding damages became final.[254] Recourse to the AGRASC is only possible if the applicant's preliminary compensation claim is rejected by the *Commission d'indemnisation des victimes d'infraction* (Commission for the Compensation of Crime Victims).[255]

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[248] Annual Report 2014, http://www.justice.gouv.fr/publication/rapport_activite_agrasc_2014.pdf.
[249] In 2017, no share of equity has been realized; Annual Report 2017 de l'AGRASC, p. 20. https://www.economie.gouv.fr/files/files/PDF/2018/AGRASC_Rapport_2017.pdf
[250] Art. 706-143 CCP refers to the third-party holder to specify that in case of default on his part, the public prosecutor or the examining magistrate may authorize the delivery to the AGRASC of properties whose advance sale is not envisaged so that it realizes all the legal and material acts necessary for the conservation, the maintenance and the valorisation of this property.
Art. 706-143 CCP states that: "In the event of default or unavailability of the owner or holder of the property, and subject to the rights of third parties in good faith, the public prosecutor or the investigating judge may authorise the handing over to the Agency for the Management and Recovery of Seized and Confiscated Assets of the seized property whose sale in advance is not envisaged so that this agency may carry out, within the limits of the mandate entrusted to it, all the legal and material acts necessary for the conservation, maintenance and enhancement of this property".
[251] It's only specified for the seizure of the payment obligation that the debtor must immediately record the amount due to the Agency. However, for contingent or term loans, the funds are recorded when these claims become due; art. 706-155 CCP.
[252] E. Camous, "fasc. 20: L'agence de gestion et de recouvrement des avoirs saisis et confisqués (AGRASC)", in *Jurisclasseur*, 174 and ff.
[253] Art. 706-164 CCP.
[254] Art. 706-164, par. 2, CCP.
[255] Cass. 2ème civ., 20th October 2016, n°15-22.789, *JurisData* n° 2016-021558.

In addition, victims can be informed by the AGRASC about property returned by court order, to ensure the payment of their debt obligations.[256]

Impact on ongoing civil enforcement proceedings relating to the seized property (Articles 706-145 and 706-146 of the Code of Criminal Procedure).
In order to guarantee the effectiveness of the criminal seizure, the law provides that it entails the suspension of civil enforcement proceedings in progress and prohibits the institution of any new civil enforcement proceedings concerning the same property. The purpose of this provision is to allow an immediate freezing of seized property in criminal proceedings, without interference from civil proceedings initiated elsewhere by the creditors of the owner or holder of the property, and to prevent the magistrate responsible for conducting the criminal investigation from being forced to manage a technical dispute before the enforcement judge in the margins of criminal proceedings, which would be a source of legal uncertainty.

Creditors who have instituted civil enforcement proceedings prior to the criminal seizure are automatically considered to hold a security interest ranking prior to the criminal seizure, so that no privilege is conferred on the criminal seizure in the event of the assets being sold. The procedural pre-eminence of criminal seizure over civil enforcement proceedings during the criminal proceedings therefore does not alter the order of creditors nor does it confer any privilege on the State. In the event that the amount of the civil claims prior to the criminal seizure is greater than the proceeds of the sale, no sum shall accrue to the State as a result.

By way of derogation from the principle of suspension or prohibition of civil enforcement proceedings as a result of the seizure of property, a creditor may, however, be authorised, under the conditions laid down in Article 706-144 CCP, to initiate or resume civil enforcement proceedings on the property, provided that he has an enforceable title recording a liquid and enforceable claim and that it is not necessary to maintain the seizure of the property in the form required. The authorization to initiate or resume civil proceedings on property that is the subject of a criminal seizure must be requested from the magistrate who authorized or ordered the seizure under the conditions provided for in article 706-144 CCP.

4.3. Confiscation.

4.3.1. Competent authorities for the disposal of confiscated assets.

In principle, the person responsible for maintaining the conservation of the seized or confiscated property is first and foremost the owner of the property or, failing that, the holder of the property. Article 706-143, paragraph 1, of the Code of Criminal Procedure thus provides that the owner or holder "shall bear the costs thereof, with the exception of the costs which may be borne by the State".

The AGRASC is responsible for the management of all property confiscated, whatever its nature, which is entrusted to it and which requires administrative acts for its conservation or recovery.[257]

[256] Art. 706-141 CCP.
[257] Art. 706-160 CCP.

The departmental director of public security or the command of a gendarmerie group may be informed on a quarterly basis by the judicial police officers under his authority, under conditions preserving the secrecy of the investigation, of the list of property seized in criminal investigations exceeding a value fixed by decree and whose confiscation is provided for by law. He may ask the public prosecutor to refer the matter to the JLD or, if judicial information has been opened, to the investigating judge, so that the latter may authorize that those of such property which are no longer necessary to establish the truth and whose conservation would entail a financial charge for the State be handed over, subject to the rights of third parties, to the AGRASC for the purpose of their disposal. [258]

The State has a beneficiary role because the sums transferred to the Agency for the Management and Recovery of Seized and Confiscated Assets whose origin cannot be determined are transferred to it after a period of four months.[259]

4.2.2. Modalities of disposal of confiscated assets.

The further execution of confiscations in kind or in value, when they concern property designated in the confiscation order, shall consist, as the case may be, in its preservation as it stands in the movable or immovable property of the State, in its alienation for the purpose of paying the proceeds of sale to the general budget of the State, which is the consequence of the principle of the non-allocation of State revenues, or in its destruction, for example if the property is dangerous or unlawful, or if it is of such a nature that its transfer is not economically relevant to the State. [260] In practice, in the vast majority of cases confiscated property is liquidated.[261]

Where enforcement is the responsibility of the public prosecutor, confiscation is carried out with the assistance of the administration in charge of matters belonging to the Directorate General of Public Finance. The property is handed over to this administration after a report has been drawn up by the registry office. If the administration does not intend to keep the property in the State's patrimony, it shall proceed with the sale by public auction of the property. Its proceeds are in principle paid into the general State budget. If, on the other hand, the confiscated property has no market value, or if it is dangerous or illegal, it is destroyed, with a destruction report being drawn up by the registry office in charge of the seals department.

The disposal of confiscated property entrusted to Agrasc, either at the stage of seizure or after the confiscation order, is subject to a special regime as to its modalities.

Due to the specific nature of the assets entrusted to the agency, it is not required to dispose of them with the assistance of the administration in charge of the domains. The agency has concluded and implemented a series of partnerships enabling it to dispose of confiscated property under financially more favourable conditions than State sales.

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[258] *See* Article 99 of Act No. 2011-267 of 14 March 2011 on guidance and programming for the performance of internal security; Décret n° 2012-594, April 27, 2012.
[259] Art. 706-160, par 2, CCP.
[260] L. Ascensi, *Droit et pratiques des saisies et confiscations pénales*, Dalloz, 2019, 155.
[261] However, according to Art. 131-21 CC, the confiscated property will vest in the State subject to the legally constituted real rights in favour of third parties. It follows from this that, at the stage of enforcement of the sentence, the body responsible for it must pay the third party rights holders whose base is the confiscated property. This will be the case for privileged creditors holding legal liens or security interests that are enforceable against the State.

With regard to movable property, Agrasc uses, on the basis of partnerships, the services of judicial auctioneers, sworn brokers of goods, or judicial officers in order to achieve the best possible liquidation of confiscated property.[262]

The execution of confiscations sometimes follows specific procedures, either because the nature of the confiscated property imposes this specificity, or because the pure and simple implementation of the devolution of the confiscated property to the State is waived.

4.2.3. Other possible destination of confiscated assets.

It is possible to identify two other types of disposal of confiscated assets: a compensatory one and a budgetary purpose.

Compensatory use. Article 706-164, paragraph 1, of the Code of Criminal Procedure provides that "any person who, having brought a civil action, has benefited from a final decision awarding him damages and interest for the damage he has suffered as a result of a criminal offence and costs pursuant to Articles 375 or 475-1 and who has not obtained compensation or reparation pursuant to Articles 706-3 or 706-14, or recovery assistance pursuant to Article 706-15-1, may obtain from the Agency for the Management and Recovery of Seized and Confiscated Assets that such sums be paid to it out of the funds or from the net asset value of its debtor whose confiscation has been decided by a final decision and of which the Agency is the depositary pursuant to Articles 706-160 or 707-1". Such application for payment shall, under penalty of foreclosure, be sent by registered letter to the Agency within two months of the date on which the decision referred to in the first paragraph of this Article has become final. In the event of multiple claimants and insufficient assets to fully compensate them, payment shall be made at the price of the journey and, in the case of claims received on the same date, at the euro market. The foregoing provisions shall not apply to the guarantee of State claims. The State shall be subrogated, to the extent of the sums paid, to the rights of the victim against the perpetrator of the offence in accordance with the priority of civil law sureties. The files likely to give rise to such an action by the State are examined by the Agency for the Management and Recovery of Seized and Confiscated Assets and then communicated to the Minister in charge of Finance who ensures their recovery.

Budgetary purpose. One of the Agency for the Management and Recovery of Seized and Confiscated Assets' special features is the way it is financed. Indeed, in addition to the usual resources of public administrative establishments, Article 706-163 of the Code of Criminal Procedure provides for two original resources, the objective being to achieve self-financing of the establishment. These resources will be a part of the proceeds from the sale of confiscated property when the agency has intervened for their management or sale, subject to the allocation of this proceeds to the "Narcotics" competition fund; the proceeds from the investment of the sums seized or acquired by the management of the assets seized and paid into its account at the *Caisse des dépôts et consignations*. The sums seized will be transferred from the courts' accounts with *Caisse des Dépôts* to the Agency's account, the latter being the beneficiary of the interest paid by *Caisse des Dépôts* on these deposited sums.

The AGRASC may withdraw a portion of **the proceeds from its activities**. Thus, it uses some of the funds confiscated to **self-finance**. According to the Code, "A proportion capped

[262] Ch. Duchaine, "De la nécessité d'un usage raisonné des saisies et confiscations. Punir le condamné ou punir l'État", *AJ pénal*, 2015, 242.

according to I of article 46 of the law n ° 2011-1977 of 28th December 2011 of finance for 2012 confiscated sums managed by the agency" is integrated into the financial resources of the Agency.[263] Funds that have been definitively transferred to the State following a court decision are taken into account. Seizures are excluded because they remain the property of the persons from whom they were apprehended.

The AGRASC may also include in its resources **a portion of the proceeds from the sale of confiscated property.**[264] The Agency simply needs to intervene in the management or sale of these goods. However, the AGRASC cannot include in its resources the proceeds of the sale of the property where the law provides for their full restitution to the person from whom they have been seized. This is the case where property seized before a judgment is rendered. The funds are then held by the AGRASC with the obligation to return them in case of non-prosecution, acquittal or if the person is convicted but the confiscation was not ordered. In any event, the Agency cannot finance itself with proceeds from the sale of property seized in connection with drug offenses.

4. 2.4. National practices on disposal of confiscated assets abroad and in execution of a confiscation order from another EU Member State. [265]

Orders for the confiscation of property issued by French courts. In order to obtain the execution of a confiscation order abroad, the Public Prosecutor's Office shall send the competent authorities of the State where the property to be confiscated is located a copy of the order which has become final, accompanied within the European Union by a certificate and outside the European Union by an international letter rogatory. According to Article 713-10 CCP: "Where the confiscation order relates to a sum of money and the competent authority of the administering State has substituted the confiscation of property for it, consent to the transfer of that property shall be given by the Minister of Justice";

Orders for confiscation of property issued by foreign courts. Reciprocally, the competent foreign authorities shall send the public prosecutor territorially competent in lieu of the property to be confiscated a copy of a final decision of the foreign court ordering confiscation, accompanied within the European Union by a certificate translated into French (Article 713-13 CCP) and outside the European Union by an international letter rogatory.

The criminal court seised by request of the public prosecutor examines whether this decision is compatible with French law and, unless there are grounds for refusal provided for by law (or possibly by the international convention), recognises and orders the execution of the confiscation on the territory of the Republic, which transfers ownership of this property to the French State. The proceeds of such confiscation may be shared between the French State and the sentencing State.

Article 706-160, paragraph 3, merely specifies that the AGRASC "may, under the same conditions, manage seized property, dispose of or destroy seized or confiscated property and distribute the proceeds of the sale in execution of any request for mutual assistance or cooperation from a foreign judicial authority".

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[263] Art. 706-163, 3 ° CCP.
[264] Art. 706-163, 3 ° CCP.
[265] Circulaire, 22nd December 2010 *relative à la présentation des dispositions spécifiques de la loi n°2010-768 du 9 juillet 2010 visant à permettre l'exécution transfrontalière des confiscations en matière pénale* (art. 694-10 to 694-13 and 713 to 713-41 CCP) NOR : JUSD1033289 C.

Requests for confiscation from an EU State. Article 713-23 of the code of criminal procedure specifies that "Where the confiscation order relates to a sum of money expressed in foreign currency, the criminal court shall convert the amount to be confiscated into euros at the exchange rate in force on the date on which the confiscation order was issued". Article 713-24 of the Code of criminal procedure states that, while the criminal court may neither apply measures that would replace the confiscation order nor modify the nature of the confiscated property or the amount that is the subject of the confiscation order, the situation is different in four cases. First, where the person concerned is able to provide proof of confiscation, in whole or in part, in another State: the criminal court, after consultation with the competent authority of the issuing State, shall deduct in full from the amount to be confiscated in France any part already recovered in that other State pursuant to the confiscation order. Second, where the competent authority of the issuing State so agrees, the criminal court may order payment of a sum of money corresponding to the value of the property in lieu of its confiscation. Thirdly, where the confiscation order relates to a sum of money which cannot be recovered, the criminal court may order the confiscation of any other available property up to the amount of that sum of money. Fourthly, where the confiscation order relates to property which could not be confiscated in France in relation to the acts committed, the criminal court orders that it be executed within the limits laid down by French law for similar acts.

In addition, article 713-32 CCP stipulates that property other than sums of money confiscated pursuant to the confiscation order may be sold in accordance with the provisions of the Code of State Property. The sums of money recovered and the proceeds from the sale of confiscated property shall vest in the French State where the amount recovered is less than €10,000, and shall vest half in the French State and half in the issuing State in other cases. The costs of executing the confiscation order shall not be set off against the amount payable to the issuing State. However, where high or exceptional costs have had to be incurred, detailed information on these costs may be communicated to the issuing State in order to obtain their sharing. Confiscated property which is not sold shall vest in the French State unless otherwise agreed with the issuing State.

Requests for confiscation from a non-EU Member State or from an EU Member State not subject to mutual recognition. Article 713-38 CCP specifies that the authorisation for enforcement from the criminal court may not have the effect of infringing rights lawfully constituted for the benefit of third parties, pursuant to French law, in respect of property the confiscation of which has been ordered by the foreign decision. However, if this decision contains provisions relating to the rights of third parties, it is binding on French courts unless the third parties have not been able to assert their rights before the foreign court under conditions similar to those laid down by French law.

Article 713-40 of the Code of Criminal Procedure provides that the execution on the territory of the Republic of a confiscation order issued by a foreign court entails the transfer to the French State of ownership of the confiscated property, unless otherwise agreed with the requesting State. The property thus confiscated may be sold in accordance with the provisions of the State state property. The costs of executing the confiscation order shall be charged against the total amounts recovered. The sums of money recovered and the proceeds from the sale of confiscated property, after deduction of enforcement costs, shall vest in the French State where the amount is less than €10,000 and shall vest half in the French State and half in the requesting State in other cases. If the foreign order provides for confiscation in value, the order authorising its enforcement makes the French State creditor of the obligation to pay the corresponding sum of

money. The amount recovered, net of all costs, shall be shared in accordance with the rules presented above.

4.4. Third-Party Confiscation.

Impact of the commencement of collective proceedings (Article 706-147 of the Code of Criminal Procedure)

In the event of collective proceedings being initiated, the provisions of Article L. 632-1 of the Commercial Code provide for the nullity of certain acts committed during the so-called "suspect period", i.e. after the date of cessation of payments, when this was postponed by the court of procedure, and in particular concern precautionary measures. This text has on several occasions been at the origin of the annulment of civil protective measures taken in the context of criminal proceedings and was a source of legal uncertainty for the magistrates responsible for conducting investigations.

For this reason, the law expressly provides that this provision is not applicable to criminal seizures ordered under Title XXIX of the CCP, the legal certainty of which will not be called into question in the event that a subsequent judgment postpones the date of cessation of payments. However, this option does not confer any privilege on the State's claim in connection with the liquidation and recovery of assets.

This derogation applies only to criminal seizures. However, protective measures intended to guarantee the State's claim as a fine or that of the victims as damages remain subject to the aforementioned provisions of the Commercial Code.