

European aspects of confiscation

Criminal confiscation perspectives from Europe



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On the menu today

- General introduction to confiscation
- The asset recovery chain and the “follow-the-money” approach
- Transversal typology of EU confiscation models
- A word on the EU state-of-play
- A word on balancing efficiency and fundamental protections

General introduction

An economic snapshot of the criminal economy

- **IMF** (1998) : **2-5%** global GDP
- **UNODC** (2009) : **3,6%** global GDP (USD **2.1** trillion for year 2009)
2,7% global GDP (USD **1.6** trillion) available for laundering
- **UNODC** (2011): proportion of laundered proceeds actually **seized**: **0.2%**
 - *Globally, it appears that much less than 1% (probably around 0.2%) of the proceeds of crime laundered via the financial system are seized and frozen*
- **UE** (2013) : EUR **330** billion laundered each year in the EU
 - Undervaluation?: Up to EUR **100** billion in DE (2016) & GBP **90** billion in the UK (2016)
- **EU** (2015): main illicit markets in the EU generate EUR **110** billion/year in proceeds (**1%** GDP)
- **EUROPOL** (2016): **2.2%** of criminal proceeds (EUR **2.4** billion) **seized**
1.1% of criminal proceeds (EUR **1.2** billion) **confiscated**

Freezing/confiscation as part of the follow-the-money approach

- **Preventing** illicit financial flows: detecting, tracing and preventing illicit financial flows through the anti-money laundering and other regulations (regulatory framework)
- **Criminalising** illicit financial flows: investigating and prosecuting money laundering, terrorism financing and even the possession of unexplained wealth
- **Depriving** illicit financial flows: freezing and confiscating the instrumentalities and proceeds of crime through the asset recovery strategy

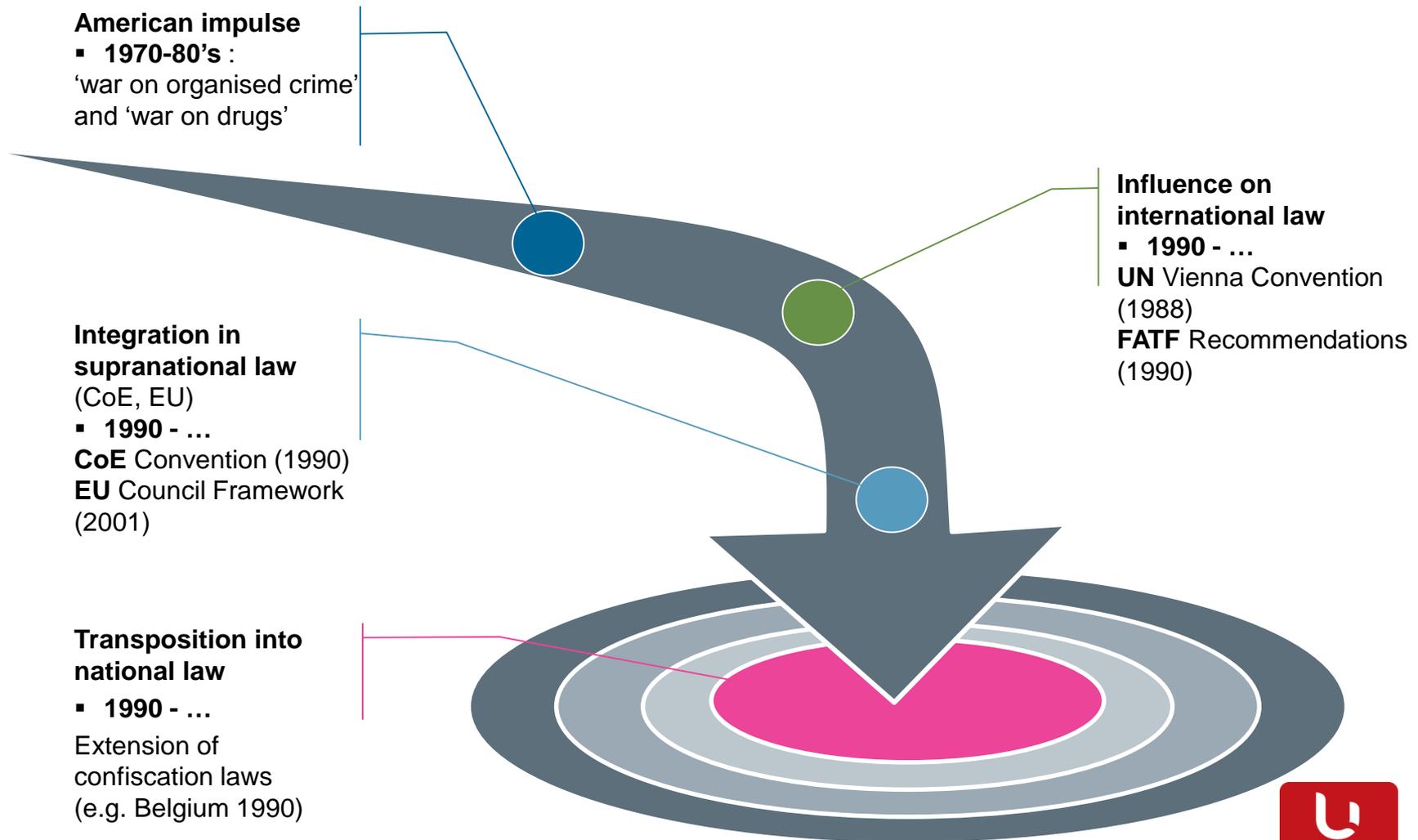
The asset recovery chain

- Asset tracing
 - Financial investigation: collecting intelligence, tracing, identifying, locating
- Asset freezing or seizing & management
 - Securing property: temporary deprivation of suspected criminal property
- Asset **confiscation** (/forfeiture)
 - Issuing a final order: permanent deprivation of criminal property
- Asset recovery & disposal
 - Effectively enforcing orders and returning/re-using property adequately

Why confiscate? So that ‘crime does not pay’

- Punitive justification (compare fines) = penalty
- Preventive / deterrent justifications = security measure
- Remedial justification (compare restitution) = unjust enrichment theory

The birth of the follow-the-money approach



The expansion of the follow-the-money approach

- **Birth:** ensuring that **'crime does not pay'**

As long as the property of organised crime remains, new leaders will step forward to take the place of those we jail (US Congress, 69')

- **Momentums:**

- Birth 1970s-1990s : **'war on drugs'** and **'war on organised crime'** → proceeds of crime
- Expansion 1990s : a new response to all forms of acquisitive crime
- Redefinition 2000s : **'war on terror'** → new paradigm → instrumentalities of crime
- New evolution 2010s : **war** (?) on white-collar crime... 'witch hunt'/'cash cow'

Transversal typology of confiscation models

Birth of modern European confiscation models

- **Birth** (1970s-90s):
 - *Issue*: alleged ineffectiveness/inefficiency of traditional responses of the criminal justice (e.g. prison)
 - *Response*: emergence and/or growth of ‘antiprofit’ criminal policies: the asset recovery strategy (esp. standard confiscation)

Departure point: standard confiscation

‘Standard’ criminal confiscation :

- **Permanent** deprivation
 - Ordered by a **court** of law (judicial)
 - As part of a **sentence** – penalty (/security measure)
 - After **conviction** of a defendant (conviction-based)
 - **Burden of proof**: high (non-presumption based)
 - Confiscation of: instrumentalities and proceeds (object, product, material benefits from crime)
- Costly, lengthy, high standards = little effective...

Evolution of European modern confiscation models

- **Evolution** (1980s-...):
 - *Issue*: alleged ineffectiveness/inefficiency of standard confiscation
 - *Response*: emergence and/or growth of
 - presumption-based, and/or
 - non-conviction-based (and/or non-judicial) deprivation powers

Expansion of confiscation models in Europe

Evolution towards a multitude of confiscation powers:

- **Judicial**, or non-judicial
 - **Conviction-based**, or non-conviction-based
 - Criminal, civil and/or administrative
 - **Presumption-based**, or non-presumption-based
 - In property, or in value
 - Directed against specific, unjustified or all property
 - Directed against serious and organised crime, or not
 - Retributive, preventive, deterrent and/or remedial
- Challenges in understanding foreign devices, ensuring full cooperation, harmonising powers (see EU instruments)...

European transversal typology of confiscation powers

Three overarching powers of confiscation

- (Judicial) conviction-based confiscation
- Judicial non-conviction-based confiscation
- Non-judicial (non-conviction-based) confiscation

(simplified)

criminal confiscation

civil confiscation

administrative confiscation*

*contra IT

European transversal typology of confiscation powers

Three overarching powers of confiscation

(simplified)

– Conviction-based confiscation

- Of specific property
- Of unjustified property (presumption-based)
- Of all property

(standard) criminal confiscation
extended confiscation
confiscation of estate

– Non-conviction-based confiscation

- Of specific property
- Of unjustified property (presumption-based)

(standard) civil confiscation
unexplained wealth orders

– Non-judicial confiscation

- Of specific property

administrative confiscation

European transversal typology of confiscation powers

The two most popular **conviction-based** confiscation models (*general features)

– **Standard confiscation**

- Post-conviction, for any crime
- Specific property
- Proceeds & Instrumentalities of underlying crime
- Burden of proof on prosecution

E.g.: confiscation (UK), confisca (IT), confiscation spéciale (BE, FR), decomiso (ES)

European transversal typology of confiscation powers

The two most popular **conviction-based** confiscation models (*general features)

– **Extended confiscation**

- Post-conviction, for serious/organised crime*
- Proceeds of *specific* or *other* crimes*
- Unexplained property (disproportionate property)
- *Shared* burden of proof (relaxation of nexus between property and crime)

E.g.: criminal lifestyle confiscation (UK), confisca allargata (IT), confiscation élargie (BE, FR), decomiso ampliado (ES)

European transversal typology of confiscation powers

Two increasingly popular **non-conviction-based** confiscation models (growing trend)

– **Civil confiscation**

- For any crime
- Specific property
- Proceeds & Instrumentalities of underlying crime*
- *Shared* (?) Burden of proof (50-50)

E.g.: civil recovery/cash forfeiture (UK), confisca di prevenzione (IT)

European transversal typology of confiscation powers

Two increasingly popular **non-conviction-based** confiscation models (growing trend)

– **Unexplained wealth orders**

- For serious/organised crime
- Unexplained property (disproportionate assets)
- Proceeds of any crime
- *Shared* (reversal?) burden of proof

E.g.: Unexplained wealth orders (UK, GA...), confisca di prevenzione (IT)

European transversal typology of confiscation powers

One emerging **non-judicial** confiscation model? (uncertain trend)

– **Administrative confiscation**

- For any crime
- Specific property
- Proceeds & Instrumentalities of any crime
- NO burden of proof absent challenge of non-judicial process
 - IF challenge by aggrieved party: back to judicial route

E.g.: administrative cash forfeiture (UK)...

European transversal typology of confiscation powers

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- **Judicial, conviction-based** = standard confiscation
 - Judicial, conviction-based & **presumption-based*** = extended confiscation
 - Judicial, **non-conviction based** = civil confiscation
 - Judicial, non-conviction-based & **presumption-based*** = unexplained wealth orders, preventive confiscation
 - [**Non-judicial** = administrative confiscation]

* Presumption: shifting of burden of proof ;
leads to confiscation of unexplained property

*A word on the EU state-of-play on freezing
and confiscation*

Freezing and confiscation within the EU:

Chronological snapshot of the EU legal framework

- Joint Action 98/699/JHA on money laundering, freezing & confiscation
- Council Framework Decision 2001/500/JHA on money laundering, freezing & confiscation
- Council Framework Decision 2003/577/JHA on execution of freezing property or evidence
- Council Framework Decision 2005/212/JHA on confiscation of instrum/proceeds of crime
- Council Framework Decision 2006/783/JHA on mutual recognition of confiscation orders
- Council Framework Decision 2007/845/JHA on cooperation between Asset Recovery Offices

- Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union
(replaces JA 98 and limited provisions of FDs 2001 and 2005)

- Regulation EU 2018/1805 on the mutual recognition of freezing orders and confiscating orders
(replaces FDs 2003 and 2006 as of 19/12/2020)

Freezing and confiscation within the EU: Current EU Legal Framework

- **Substantive law:** harmonisation of confiscation models (Directive 2014/42/UE + FDs 2001 & 2005)
 - Improves domestic powers of freezing and confiscation
- **Procedural law:** mutual recognition of freezing and confiscation decisions (FDs 2003 & 2006 until Regulation 2018/1805)
 - Improves cross-border enforcement of freezing and confiscation orders
- Regulation *complements* Directive: aim to contribute to effective asset recovery in the EU

Freezing and confiscation within the EU: Substantive legal framework

Directive 2014/42/UE

- Standard conviction-based confiscation (art. 4(1))
- **(Non-)conviction-based confiscation within criminal proceedings** (art. 4(2))
- **Extended confiscation** (art. 5)
- **Third party confiscation** (art. 6)
- Freezing (art. 7)
- Safeguards (art. 8)
- Effective freezing/confiscation (art. 9) (*post conviction investigation*)
- Management of assets (art. 10)

Implementation of Directive 2014/42/UE

Implementation of Directive 2014? 3 groups of Member States (Impact Assessment 21/12/16):

- +-12 MS: classical conviction-based approach + aligned (or are currently aligning) their regimes along the lines of Dir 2014/42/EU (including extended confiscation and criminal NCBC in cases of illness or absconding only)
- +- 8 MS: go beyond the requirements of the Dir 2014/42/EU & include other forms of criminal NCBC (in case of death of a person or where a criminal court can confiscate an asset in the absence of conviction when the court is convinced that such asset is the proceeds of crime)
- +- 7 MS: have an asset recovery regime (or where a reform is ongoing) which includes also civil or administrative NCBC

Freezing and confiscation within the EU: Procedural legal framework

Regulation 2018/1805

- **One single instrument** directly applicable for the recognition and execution of both freezing and confiscation orders in other EU countries (limited grounds for refusal)
- **Widened scope** of cross-border recognition:
 - inclusion of all orders issued within the framework of proceedings in criminal matters: i.e. orders covered by Directive 2014/42/EU + other types of order issued without a final conviction (but proceedings in administrative and civil matters excluded);
- Increased **speed and efficiency** of freezing or confiscation orders:
 - Standard certificates and procedures
 - 45 days for recognition of confiscation orders (48 hours in urgent cases) and 48 hours for the execution of freezing orders
- Ensured respect of **victims' rights** to compensation and restitution

What about tomorrow? A EU perspective

Today:

- Standard criminal confiscation already in place
- Directive 2014 requires the adoption of extended powers of confiscation within the scope of criminal matters
- Regulation 2018 requires recognition/execution of orders provided there is a link with a criminal matter
- EU still considering a model of non-conviction-based confiscation

Tomorrow:

- Towards a ‘full-fledged’ non-conviction-based confiscation of criminal property (through civil/administrative proceedings)?

*A word on the equilibrium between
confiscation and fundamental protections*

Confiscation models v. fundamental protections

- *‘In all jurisdictions there is a potential conflict between asset confiscation processes and human rights which makes all such cases challenging to adjudicate’*
(Matrix Insight Ltd., 2009)
- There is a **continuing tension** between the use of **efficient crime control mechanisms** and the protection of **fundamental rights** of confiscation subjects
- Negative correlation: **procedural efficiency** v. **procedural guarantees**
 - (-) Procedural efficiency = Procedural guarantees (+)
 - (+) Procedural efficiency = Procedural guarantees (-)

Evolution of European confiscation models: A slippery slope?

(-) *Procedural efficiency* = *Procedural guarantees* (+)

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- Judicial, conviction-based = standard confiscation
 - Judicial, conviction-based & **presumption-based** = extended confiscation
 - Judicial, **non-conviction** based = civil recovery/forfeiture
 - Judicial, **non-conviction**-based & **presumption**-based = preventive confiscation, UWOs
 - [**Non-judicial** = administrative confiscation]

(+) *Procedural efficiency* = *Procedural guarantees* (-)

→ Progressive **decline** in defense protections... for the **sake** of efficiency

Evolution of European confiscation models: A slippery slope?

The **ECtHR** as an answer to 'calibrate' **due protection & efficiency** to fight crime?

'Under the nomen juris of confiscation, the States have introduced ante delictum criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings, and civil measures in rem. Confronted with this enormous range of responses available to the State, the Court has not yet developed any consistent case-law based on principled reasoning.'

J. Pinto de Albuquerque

(*Varvara v. Italy*, no. 17475/09, 29.10.2013)

'I regret that the present judgment does not provide the answer to my call for clarity in Varvara. That will be for another day.'

J. Pinto de Albuquerque

(*G.I.E.M. S.R.L. and others v. Italy (GC)*, no. 1828/06 a.o., 28.06.2006)

Questions?



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