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Substantial aspects of Criminal Confiscation in Europe

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Subject matter

1. Criminal confiscation

- legal nature, confiscation of instrumentalities & proceeds (country-based)

2. Extended confiscation

- legal nature, applicable test (country-based)

3. Third party confiscation

- legal nature & particularities (country-based)

4. Non-conviction based confiscation

- particularities (country-based)

*in Belgium, France, Germany, Italy, the Netherlands, Romania & in the sense 2 of Directive 42/2014/EU and COM (2016) 819 final



Criminal Confiscation (I)

Belgium	✓	France	✓
Germany	✓	Italy	✓
The Netherlands	✓	Romania	✓

Definition

It consists of confiscating a property belonging, as a rule, to the convicted person and transferring said property to the State, or, when the transfer of this property is not possible, in imposing on the convict the payment of a sum of money equivalent to the value of the property which should have been confiscated.



Criminal Confiscation – legal nature (II)

Belgium

- Accessory Penalty & Security measure

France

- Penalty & Security measure

Germany

- Criminal measure (similar to unjust enrichment)

Italy

- Penalty & Security measure

Netherlands

- Criminal sanction (three variants)

Romania

- Security Measure



Criminal confiscation - **instrumentalities** (III)

Belgium

- (1) compulsory*, (2) value-based, (3) proportionality test, (4) no limit

France

- (1) optional, (2) value-based, (3) proportionality test, (4) press

Germany

- (1) optional, (2) value-based, (3) proportionality test, (4) no limit*

Italy

- (1) optional*, (2) value-based, (3) **no** proportionality test, (4) press

Netherlands

- (1) optional, (2) value-based*, (3) proportionality test, (4) no limit

Romania

- (1) mandatory, (2) value-based, (3) proportionality test, (4) press



Criminal confiscation - **proceeds** (IV)

Belgium

- (1) compulsory & optional, (2) value-based, (3) proportionality test*, (4) no limit

France

- (1) optional*, (2) value-based, (3) no proportionality test, (4) no limit

Germany

- (1) mandatory, (2) value-based, (3) proportionality test, (4) no limit*

Italy

- (1) compulsory & optional, (2) value-based*, (3) no proportionality test, (4) no limit

Netherlands

- (1) optional, (2) value-based*, (3) no proportionality test, (4) no limit

Romania

- (1) mandatory, (2) value-based, (3) no proportionality test, (4) no limit



Extended Confiscation (I)

Belgium ✓

Germany ✓

The Netherlands ✓

France ✓

Italy ✓

Romania ✓

Extended confiscation is regulated in all Member States of the EU subject of the analysis



Extended Confiscation – legal nature (II)

Belgium

- Accessory Penalty & Security measure

France

- Penalty & Security measure

Germany

- Criminal measure (similar to unjust enrichment)

Italy

- Penalty & Security measure

Netherlands

- Criminal sanction (three variants)

Romania

- Security Measure



Extended Confiscation – applicable test (III)

Belgium

- (1) list (2) unjustifiable wealth (3) similarity

France

- (1) gravity criterion (2) unjustifiable wealth (3) free disposal

Germany

- (1) all offences (2) unjustifiable wealth (3) direct or indirect link

Italy

- (1) list (2) unjustifiable wealth (3) free disposal

Netherlands

- (1) gravity criterion* (2) unjustifiable wealth (3) no direct or indirect link

Romania

- (1) list & gravity (2) unjustifiable wealth (3) similarity



Third-party confiscation (I)

Autonomous institution

Italy



Extended applicability

Belgium



France



Germany



Netherlands



Romania



Third-party confiscation - Belgium

- **No special legal provisions exist.** Concerning the type of assets:
 - **Object of the offense – no, Instrument of the offense – no, Proceeds derived from the offense – yes, Profits derived from the offense – yes, Additional patrimonial benefits – yes**

Third-party confiscation - France (III)

- **Possible on the basis of the wording of the legal texts** regulating confiscation
 - Subject to rights of the *bona fide* owner (concept of free disposal)

Third-party confiscation - Germany (IV)

Confiscation of criminal proceeds of others

- Not a different type of confiscation. **Extension of scope**
 - Premise: **the convicted person acted for a third party** (on behalf or benefited directly)



Third-party confiscation - Italy (V)

Traditional confiscation & confiscation as a security measure

- Non applicable for third-parties – **legality issues**

Approach – the **availability of property doctrine** (jurisprudence & legislative option)

Third-party confiscation - the Netherlands (VI)

- **Confiscation Order:** cannot be imposed.
- **Forfeiture & Withdrawal:** can be imposed.

Non-conviction based Confiscation (I)

Belgium	✓	France	✓
Germany	✓	Italy	✓
The Netherlands	✓	Romania	✓

Disclaimer

The possibility to confiscate is indeed provided in all Member States at least in some cases. However, in some countries, the situations as provided in the Directive are not specifically regulated for confiscation,



Non conviction based confiscation

Illness

- trial in absentia => not non conviction based confiscation
- Romania => impossible to confiscate
- Germany => *independent confiscation*

Absconding

- All countries = *trial in absentia* => not non conviction based confiscation



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Thank you!

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