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Substantial aspects of Criminal Confiscation in Europe

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Subject matter

1. Criminal confiscation

- legal nature, institutions, particularities (country-based)

2. Extended confiscation

- legal nature, institutions, particularities (country-based)

3. Third party confiscation

- legal nature, institutions, particularities (country-based)

4. Non-conviction based confiscation

- legal nature, 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 - institutions (III)

Belgium

- Special confiscation (mandatory & optional)

France

- General vs. Special vs. Preventive Confiscation (mandatory & optional)

Germany

- General confiscation (mandatory)

Italy

- Traditional confiscation vs. Preventive confiscation (mandatory & optional)

Netherlands

- Withdrawal from circulation, Forfeiture, Confiscation (optional)

Romania

- Special confiscation (mandatory)



Criminal confiscation - Belgium (IV)

Special confiscation, features:

- Requires conviction, **Accessory Penalty**
- Imposed on the perpetrator of a crime, misdemeanor or contravention
- Perpetrator: natural or legal person

Approach: **object based** / type of assets

- Object of the offense (compulsory)
- *Instruments* of the offense (*compulsory*)
- Proceeds of the offense (*compulsory* for crimes or misdemeanors)
- *Profits* of the offense (*optional*)
- *Additional patrimonial benefits* (*optional*)
- The *patrimony of a criminal organization* (*compulsory*)

Confiscation by equivalent:

- Possible for: *instrument, proceeds, profits, additional benefits of the offense*



Criminal confiscation - France (V)

Features

- Requires conviction, **Penalty**
- General framework **vs.** Special legal regimes
- Imposition in some cases – below one year imprisonment, only when the law provides
- Perpetrator: natural or legal person (including minors, 10-13, 13-18)
- **Categories:** property used / intended for the commission, the proceeds, the subject matter
- Confiscation in kind **vs.** confiscation in value (simply an execution modality)
- Total **vs.** partial confiscation (applicable proportionality test)
- Regularly **optional**, but in some cases **mandatory** (excluded in press offenses)
- Property belonging to the victim cannot be confiscated

Features

- Security measure (object of the offense classified as dangerous by law)



Criminal confiscation - Germany (VI)

Features

- Requires a criminal conviction
 - However, **it does not require personal guilt**
- Mandatory for all offenses
 - the Court can decide not to confiscate (minor value, regularly under 500 euros)
- Criminal measure - **restitutive aim**
 - Not part of the sentencing process
- Excluded in the cases of property belonging to the victim
- Confiscation in kind **vs.** confiscation in value
 - Value based – **execution modality** = sum of money
 - Enforcement through prison term not possible
 - Value based – including when the asset falls short of the original value

Criminal confiscation - Italy (VII)

Traditional confiscation

- presupposes a pertinent link between the *res* and the offense
- requires a conviction judgment
- inapplicability of the measure if the asset belongs to a third person

Preventive confiscation (Anti-Mafia)

- Identify “dangerous subjects”
- Certify “social dangerousness”
- Identify the direct or indirect availability of the property (*iuris tantum*)
- Certify “sufficient indications” as to the illegal origin or re-use of assets

OBS: “*autonomy between personal and real prevention measures*” = possible to request only the patrimonial measure with regard to subjects who are no longer socially dangerous but were so in the past, when they accumulated considerable wealth.

Criminal confiscation - the Netherlands (VIII)

Withdrawal from circulation (features)

- *Instrumenta delicti, corpora delicti* & by exception proceeds
- Object-based confiscation
- Relates to objects whose possession is in breach of law!!
- Provided in the sentencing phase, possible with a **conviction & acquittal**

Forfeiture (features)

- *Instrumenta delicti, corpora delicti* & by exception proceeds
- Object-based confiscation
- Provided in the sentencing phase, **requires conviction**. Execution possible – value based
- Possibility to pay must be taken into account

Confiscation order (features)

- Proceeds – through a different autonomous criminal procedure, **requires conviction**
- Value-based confiscation (**opportunity** to pay an amount & keep the object – restorative aim)
- Direct & subsequent profits.
- Cannot be ordered for fiscal & custom offenses



Criminal confiscation - Romania (IX)

Features:

- Security measure, **requires a unjustifiable criminal offense**
- Perpetrator: natural or legal person
- Mandatory for all offenses
- Confiscation in kind **vs.** confiscation in value
- Non-applicable to object pertaining to the victim

Approach: **object based** / type of assets

- Assets produced
- Assets used or intended to be used to commit, escape or retain profits
- Assets given to commit or to reward
- Assets acquired by perpetrating
- Assets the possession of which is prohibited by criminal law
- Additional patrimonial benefits



Extended Confiscation (I)

Belgium ✓

Germany ✓

The Netherlands ✓

France ✓

Italy ✓

Romania ✓

Legal nature

Extended confiscation is regarded in all the analysed Members States to have the same legal nature as criminal confiscation.



Extended confiscation - Belgium (II)

Requirements:

- Targets **additional patrimonial benefits**
- Predicate conviction for similar facts – same heading
- Serious and concrete indicators that these pecuniary benefits derived from facts similar to those that triggered the conviction
- Property acquired in the relevant time period

Features

- Confiscation in kind **vs.** by equivalent
- Optional
- Property must not necessarily pertain to the offender
- Possession is sufficient

Extended confiscation - France (III)

1. Failure to justify the lawful origin of the property (features)

- Targets felonies or misdemeanors punishable by at least 5 years
- Link between the property and the offence is **legally presumed**
- Assets belonging to the offender **or** for which free disposal
- Requires impossibility to prove legitimate origin
- Property must be acquired in a relevant time period

2. Confiscation of patrimony (features)

- Targets felonies or misdemeanors punishable by at least 5 years
- Gravity criterion: when the law provides (restrictively listed)
- **Link between the property and the offence is legally ignored**: it is irrelevant
- Presumption of fraudulent origin of property
- Value based – **it can go well beyond the profits made** by the commission of the offense
- Property must be acquired in a relevant time period



Extended confiscation - Germany (IV)

Extended confiscation – *Erweiterte Einziehung von Taterträgen* (features)

- Criminal measures – restitutive aim
- Targets proceeds derived from criminal activity – **requires predicate offense**
- The court is **intimately convinced** that the assets stem from (any) other crime committed
- Imposition is **mandatory**
- Extended applicability to **all crimes**



Extended confiscation - Italy (V)

Conditions

- The person must have committed one or more criminal acts **expressly provided** for by law
- The person must have the availability (*direct or indirect*) of the goods
- There must be a disproportion between the declared income or the economic activity carried out and the value of the assets

Features

- Confiscation in kind vs. value based
- Conviction for the predicate offense **or** plea bargaining
- Property can belong to
 - The offender
 - Intermediary persons (the offender has **the availability** of the property)



Extended confiscation - the Netherlands (VI)

Conditions

- Commission of a predicate offense - of a certain gravity
- Likeness that any offenses have led to financial gain
- Impossibility to prove the legitimate source of the asset

Features

- Unrequired to specify the exact offense that gave rise to financial gain!!
- Abstract calculation of proceeds
- Confiscation in kind **vs.** value-based confiscation
- Provision present since 1993



Extended confiscation - Romania (VII)

Conditions

- Commission of a conviction for a triggering offense sanctionable by at least 4 years (list)
- The offense must be likely to procure a material benefit;
- The value of the assets in the propriety of the convicted persons must clearly exceed the revenues obtained lawfully in a period of maximum 5 years
- The court must be convinced that the difference in value originated from criminal activities similar to the ones for which conviction was decided.

Features

- Confiscation in kind **vs.** value based confiscation
- Rebuttal of the constitutional presumption of licit origin of property
- Property must belong to the offender
- Proportionality test – 5 years period



Third-party confiscation (I)

Autonomous institution

Italy



Extended applicability

Belgium



France



Germany



Netherlands



Romania





Third-party confiscation - Belgium (II)

- **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**
- **Special regimes** compulsory nature of confiscation exist concerning: money laundry, drug trafficking, slumlords, pimping and keeping a brothel, etc.

Obs: third-parties may assert their rights by virtue of their "**lawful possession**"

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
- Use of the concept of “free disposal” of the convicted person
- **Free disposal:**
 - Good/Bad faith is inseparably linked to free disposal. Good faith is presumed
 - The person who freely disposes of the asset is not necessarily its owner
 - The **targeted person** is the one who knowingly left property belonging to them at the offender's free disposal. It is for the prosecution to show that the owner left the asset at the free disposal of the convicted person (bad faith)



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**

- **Conditions:**
 - the perpetrator committed the offense on behalf of the third party
 - the third party benefited directly
- **Benefits:**
 - The third party has acquired the proceeds free of charge **or** without legal grounds **or** knew or at least ought to have known that the relevant assets stemmed from the commission of a crime **or** the third party has acquired the assets by inheritance or by compulsory share

- **Mandatory for all offenses**



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)

- must be understood as a synonym of substantial belonging, even in the absence of formal ownership of the property, such that the offender acts *uti dominus* in respect of the asset.
- provides for the possibility of compulsory confiscation against a third party if he / she is found to have been able to foresee the illicit (even occasional) use of the assets, their illicit origin or a lack of vigilance.
- *Bona-fide third parties* against which confiscation cannot be pronounced are those who have not only not participated in the commission of the crime but have not even taken advantage of or benefited from it.



Third-party confiscation - the Netherlands (VI)

- **Confiscation Order:**
 - Cannot be imposed.
 - A condition is to have a conviction against the person subject to the order.

- **Forfeiture:**
 - Can be imposed.
 - The measure can be pronounced against a third party who knew or could have reasonably suspect the nature of the goods = mala fide third party

- **Withdrawal:**
 - Can be imposed.
 - It considers the dangerous character of the illegal goods.



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 - Belgium (II)

Illness or absconding

- Trial *in absentia* procedure
 - Absconding
 - Mental disorder
- The general regime of confiscation applies in this case.

Death, immunity, prescription & others

- Death – confiscation applicable only as a **security measure**
- Minority – confiscation can be pronounced
- Penal transaction / mediation - abandoning frozen assets or surrender assets
- Conviction without a main penalty – confiscation can be pronounced
- Statute of limitation - confiscation applicable only as a **security measure**



Non-conviction based confiscation - France (III)

Illness or absconding

- Trial *in absentia* procedure
 - Absconding
 - Illness

Death, immunity, prescription & others

- Refusal to return the instrumentalities or the proceeds of crime
- *De facto confiscation in rem (applies only for frozen assets)*
 - In the rest on the cases when confiscation is not legally possible, neither de jure or de facto confiscation is applicable



Non-conviction based confiscation - Germany (VI)

Illness or absconding

- **Independent confiscation** (*selbständige Einziehung*).
- Procedural extension of confiscation measures
 - No criminal conviction
 - Proven elements of the criminal offense

Death, immunity, prescription & others

- *New approach* – similar to *misura di prevenzione* (Italy) or the English model of civil confiscation
- Confiscation can be ordered in the case of prescription
 - The mechanism applies only if the other legal bases are not suited (*ad rem*)
 - All mechanisms in general become time-barred after 30 years



Non-conviction based confiscation - Netherlands (VI)

Illness or absconding

- Trial *in absentia* procedure
 - Absconding
 - Mental disorder
- The general regime & particularities apply (confiscation, forfeiture, withdrawal)
- In a strict sense - not 'non-conviction-based confiscation'

Death, immunity, prescription & others

- Non-conviction-based confiscation is not possible for:
 - forfeiture
 - confiscation order
- Non conviction-based confiscation is possible for:
 - withdrawal (however it cannot target money)



Non-conviction based confiscation - Romania (VII)

Illness or absconding

- Trial *in absentia* procedure – for the situation of absconding
- Medical condition – confiscation cannot be ordered (suspension of trial)

Death, immunity, prescription & others

- Confiscation is possible:
 - for *assets the possession of which is prohibited by criminal law*
- Confiscation is not possible:
 - insofar as it is not incompatible with the reason provided for closing the case



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Thank you!

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