

## NATIONAL REPORT – GERMANY

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### *1. Substantial Aspects on Confiscation*

In German criminal law, confiscation is not a criminal penalty (Strafe), but classified as criminal “measure” (Maßnahme, section 11 No. 8 Criminal Code, Strafgesetzbuch – StGB) that aims at depriving the offender of his illegal profits and objects generated by or used in its commission or preparation (*producta vel instrumenta sceleris*). However, due to the complexity of the German confiscation regime and its unclear relationship to victim compensation claims, criminal courts were reluctant in the past to order confiscation because the measure was considered to be an error-prone and resource-intensive instrument. To overcome these deficiencies, the legislator initiated a reform of the German confiscation regime that entered into force on 1 July 2017<sup>1</sup>. In its essence, the reform pursued five objectives, namely (1) to streamline the relationship to victim compensation and to abolishing

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<sup>1</sup> Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung of 13 April 2017, BGBl. I 2017, p. 872.

the exclusion of confiscation by the mere existence of victim compensation claims, (2) to enable criminal courts to postpone confiscation to a later stage of criminal proceedings (i.e. after final conviction), (3) to widen the scope of extended confiscation, (4) to establish a legal basis for non-conviction based confiscation of assets of unknown origin and (5) to transpose Directive 2014/42/EU into German law<sup>2</sup>. By the reform, the confiscation regime has undergone profound changes so that it must be carefully examined whether and to what extent the well-established case-law applies to the revised provisions. As the practical implementation of the “new legislation is in the initial phase, many issues still need to be resolved<sup>3</sup>.

### *1.1 Criminal confiscation (Art. 4 para. 1 Directive 2014/42/EU; see also Art. 2 No. 2 Regulation (EU) 2018/1805)*

Criminal confiscation as defined by Article 4 para 1 of the Directive is provided for by section 73 of the German Criminal Code (*Strafgesetzbuch* – StGB), so-called “confiscation of criminal proceeds” (*Einziehung von Taterträgen*), and section 74 para. 1 StGB, so-called “confiscation of objects generated by or used in the commission or preparation of a crime” (*Einziehung von Tatprodukten und Tatmitteln*). Classified as criminal “measure” (*Maßnahme*, section 11 No. 8 StGB), it constitutes a criminal law instrument and requires a criminal conviction – either by judgment or penal order (*Strafbefehl*, see section 432 StPO).

Nevertheless, the legislator considers section 73 StGB not to be of penal, but of restitutive nature, arguing that – similar to the civil law concept of “unjust enrichment” (*ungerechtfertigte Bereicherung*, section 812 ff. of the German Civil Code) – it aims at reallocating assets (“*quasi-konditionelle Ausgleichsmaßnahme*”) only<sup>4</sup>. As a consequence, it neither forms part of the sentencing process nor is it subject to the principle of non-retroactivity (see below)<sup>5</sup>. Scholars however claim that the introduction of the “gross principle” (*Bruttoprinzip*, see below) in 1992 has turned confiscation into a criminal sanction because it goes beyond restoring the *status quo ante*<sup>6</sup>: If confiscation is based on the *Bruttoprinzip*, the perpetrator’s expenses to generate the proceeds are not deducted from the amount subject to confiscation. Thus, the perpetrator might not only be deprived of his or her ill-gotten gains, but also of assets he or she owns legally. The German Constitutional Court (*Bundesverfassungsgericht*) yet hold in 2004 that the *Bruttoprinzip* was in line with the restitutive purpose of confiscation because it corresponded to the law of unjust enrichment<sup>7</sup>. According to section 817 sentence 2 BGB, the recipient may not demand restitution of any performance rendered in fulfilment of an obligation that violates a statutory prohibition. A district court (*Landgericht Kaiserslautern*) ruled that the amended provision constituted a penalty in the sense of Art. 7 of the ECHR<sup>8</sup>. However, only recently, the German Supreme Court (*Bundesgerichtshof*) explicitly confirmed the restitutive character of the new regime<sup>9</sup>.

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<sup>2</sup> Explanatory Memorandum, BT DRS 18/9525 2-3.

<sup>3</sup> For general information on the amendments to the confiscation system see F. BITTMANN, “Vom Annex zur Säule: Vermögensabschöpfung als 3. Spur des Strafrechts”, *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2016, 131 ff.; M. KÖHLER, C. BURKHARD, “Die Reform der strafrechtlichen Vermögensabschöpfung - Teil 1/2”, *Neue Zeitschrift für Strafrecht*, 2017, 497 ff.; M. KÖHLER - C. BURKHARD, “Die Reform der strafrechtlichen Vermögensabschöpfung – Teil 2/2”, *Neue Zeitschrift für Strafrecht* 2017, 665 ff; G. TRÜG, “Die Reform der strafrechtlichen Vermögensabschöpfung”, *Neue Juristische Wochenschrift*, 2017, 1913 ff.

<sup>4</sup> BT DRS 18/9525 48.

<sup>5</sup> BGH *Neue Juristische Wochenschrift* 1995, 2235 f.; 2002, 2257, 2258 (regarding the former regime).

<sup>6</sup> See W. JOECKS, “§ 73”, in *Münchener Kommentar zum Strafgesetzbuch*, München: C.H.Beck, para 4 ff.

<sup>7</sup> BVerfGE 110, 1, 21 ff..

<sup>8</sup> LG Kaiserslautern, wistra 2018, 139; see also S. BEUKELMANN, “Keine Rückwirkung der Einziehung”, *Neue Juristische Wochenschrift-Spezial*, 2018, 56.

<sup>9</sup> BGH *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 2018, 241. See also M. HEGER, § 73“, in K. KÜHL - M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para 1.

In contrast, the confiscation of objects generated by or used for the commission of a crime (section 74 para. 1 StGB) is considered a punitive sanction that requires personal guilt of the offender<sup>10</sup>. As a consequence, the confiscation forms part of the sentencing process, and, together with the main penalty (imprisonment or a fine), must not be disproportionate to the guilt of the perpetrator<sup>11</sup>. However, if the guilt of the offender cannot be established, the court may order the confiscation of objects (*producta vel instrumenta sceleris*) that pose a danger to the general public or are supposed to be used for the commission of a crime (§ 74b para. 1 lit. b StGB). Insofar, the confiscation shall not punish the offender, but prevent the commission of a crime and to protect the general public. Accordingly, it is a preventive measure (*Sicherungseinziehung*)<sup>12</sup>.

The confiscation regime distinguishes the confiscation of proceeds of crimes (section 73 StGB) and the confiscation of *producta vel instrumenta sceleris* (sections 74, 74b StGB). In any case, confiscation may be ordered for any crime, both felonies (*Verbrechen*, section 12 para 1 StGB) and misdemeanours (*Vergehen*, section 12 para 2 StGB). The confiscation of proceeds (section 73 StGB) requires the commission of crime (i.e. unlawful conduct, irrespective of whether personal guilt can be established) and an object that has been obtained through or for the committed offence (see below). However, to avoid “double-confiscation”, confiscation is excluded to the extent claims of the victim have been satisfied, section 73e para 1 StGB<sup>13</sup>. Furthermore, confiscation must not be ordered against a *bona fide* third-party who no longer disposes of the proceeds or its value, section 73e para 2 StGB (see below 1.5). If the proceeds no longer form part of the perpetrator’s assets or of those of a *male fide* third party, the court is only held to *suspend* the enforcement of a confiscation order (section 459g para 5 sentence 1 German Criminal Procedure Code, *Strafprozessordnung* –StPO). The proceedings can be resumed if new facts come to light – for instance, proceeds that are discovered only after the order has been issued (section 459g para 5 sentence 1 StPO)<sup>14</sup>.

According to the wording (“... the court shall order ...”), the confiscation of proceeds is mandatory<sup>15</sup>. Nevertheless, the court may refrain – with consent of the prosecution service – from confiscation under the conditions laid down in section 421 para. 1 StPO, i.e. if the proceeds in question are deemed to be of minor value (No. 1), if confiscation is deemed insignificant in addition to the anticipated penalty or measure of reform and prevention (No. 2), or if the proceedings insofar as they relate to confiscation are considered to be disproportionate or to make a decision on the other legal consequences of the offence unreasonably difficult (No. 3).

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<sup>10</sup> A. ESER - F. SCHUSTER, “§ 74”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 2, 17; M. HEGER, “§ 74”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, C.H. Beck, München 2018, para 1, 3.

<sup>11</sup> BGH *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 1993, 400; *Neue Zeitschrift für Strafrecht* 2019, 82; A. ESER - F. SCHUSTER, “§ 74”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, paras 28-29.

<sup>12</sup> A. ESER - F. SCHUSTER, “§ 74b”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 2.

<sup>13</sup> BT DRS 18/9525, 68; BGH *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 2019, 119.

<sup>14</sup> BT DRS 18/9525 57, 69, 94. Section 459g para 5 StPO replaces the so-called “hardship clause” laid down in former section 73c para 1 StGB, which stated that confiscation should not be *ordered* to the extent it would constitute an undue hardship for the person affected. It is not clear whether the enforcement proceedings can only be resumed by a court or also by the enforcement authority (prosecution service), see C. COEN, “§ 459g”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck, 2018, para 19 f., 31.

<sup>15</sup> M. HEGER, “§ 73”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para 9; BGH *Neue Zeitschrift für Strafrecht* 2019, 221.

The confiscation of *instrumenta vel product sceleris* may be ordered if the criminal liability of the offender (including personal guilt) has been established<sup>16</sup>. Furthermore, the offender must own or have a right to the object to be confiscated (section 74 para. 3 sent. 1 StGB). In contrast, the preventive confiscation (*Sicherungseinziehung*) does not require personal guilt nor is it limited to the property of the offender (section 74b para. 1 No. 1 and 2 StGB). The confiscation is optional (“... the court may order ...”). In exercising its discretion, the court has to comply with the principle of proportionality (section 74f StGB). The (punitive) confiscation (section 74 StGB) must not be disproportionate to the guilt of the offender (section 74f para. 1 sent. 1 StGB), and a preventive confiscation (section 74b StGB) shall be deferred if its purpose can be attained by less intrusive means such as instructions to modify or dispose of the objects in a certain manner (section 74f para. 1 sent. 2 and 3 StGB).

The confiscation may be applied to proceeds of crime (section 73 StGB) and to *producta vel instrumenta sceleris* (sections 74, 74b StGB).

As far as the confiscation of proceeds is concerned, the court shall confiscate any object of economic value that has been obtained by the perpetrator through or for the commission of a crime (section 73 para. 1 StGB). The confiscation order shall extend to benefits derived from these objects as well as to surrogates, i.e. objects acquired by way of sale of the originally obtained object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right (section 73 para. 2 and 3 StGB).

In contrast to the former confiscation regime, the new legal basis is not limited to objects directly obtained “from” the commission of a crime (the illegal gain, i.e. the difference between profit and costs)<sup>17</sup>, but covers any objects that has been (directly or indirectly) obtained “through” the illegal act (see also Art. 2 No. 1 Directive 2014/42/EU)<sup>18</sup>. This “object-based” confiscation system further develops the “gross approach” (*Bruttoprinzip*) and, referring to the civil law concept of “unjust enrichment” (section 817 BGB), establishes a two-step approach for the determination of the object to be confiscated: (1) The court has to determine (1) the object that has been directly or indirectly obtained through (or for) the illegal act (the crime), and (2) whether and to what extent expenses incurred by the offender shall be deducted from object (respectively its value) subject to confiscation (section 73d para. 1 sent 1 StGB)<sup>19</sup>. The court, however, shall not deduct any expenses for the purpose of preparing or committing the crime (section 73d para. 1 sent. 2 StGB; see also section 817 sent. 2 BGB), for instance the expenses for purchasing drugs or the payment of bribes<sup>20</sup>. In contrast, regular costs related to the provision of services (where the contract has been acquired by corruption) must be taken into account<sup>21</sup>.

Where, due to the nature of what has been obtained or for other reasons, a confiscation is impossible (e.g. saving of expenditure), the court shall order the confiscation of the obtained object’s monetary value of the obtained objects (section 73c StGB – *Einziehung des*

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<sup>16</sup> A. ESER - F. SCHUSTER, “§ 74”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 2, 4; M. HEGER, “§ 74”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para 3.

<sup>17</sup> BGH *Neue Zeitschrift für Strafrecht*, 2010, 339 (341 – insider dealing).

<sup>18</sup> BT DRS 18/9525 55.

<sup>19</sup> BT DRS 18/9525 55-56.

<sup>20</sup> BT DRS 18/9525 55, 68; A. ESER, F. SCHUSTER, “§ 73d”, in A. SCHÖNKE - H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 5.

<sup>21</sup> BT DRS 18/9525 55, 68; A. ESER, F. SCHUSTER, “§ 73d”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 5; see also OLG Celle, Beschluss v. 18.12.2018 – 3 Ws 222/18. Likewise, costs that have been made, for instance, for the preservation of the proceeds are to be deducted. For more information, see T. RÖNNAU - M. BEGEMEIER, “Grund und Grenzen der Bruttoeinziehung: Zur Gestaltung der Bruttoabschöpfung anlässlich der Reform der strafrechtlichen Vermögensabschöpfung”, *Goltdammer's Archiv*, 2017, 1 ff. See also OLG Celle, Beschluss v. 18.12.2018 – 3 Ws 222/18.

*Wertes von Taterträgen*). The value-based confiscation also applies if the confiscated object falls short of the value of what was originally obtained (section 73c sentence 2 StGB). As far as surrogates are concerned, the court may confiscate the object (section 73 para. 3 StGB) or its value (section 73c sentence 1 StGB)<sup>22</sup>. In case of value-confiscation, the court orders the confiscation of a sum of money that will be effectively enforced as a fine (*Geldstrafe*), though a default prison term is not possible<sup>23</sup>. Since the reform of 2017, the prosecution service is even competent (but not obliged) to file for insolvency if the offense has given rise to claims of more than one victim and the person concerned is unable to satisfy all of them, section 111j para 2 StPO<sup>24</sup>.

In theory, there are no quantitative limits. However, according to section 421 para 1 No. 1 StPO, the court may – with consent of the prosecution service – refrain from confiscation if the assets in question are of minor value. The applicable threshold varies between 50 €<sup>25</sup>, 150 €<sup>26</sup> and 500 €<sup>27</sup>.

The confiscation of *product vel instrumenta sceleris* (sections 74, 74b StGB) applies to any object generated by the commission of a criminal offence (e.g. falsified documents or counterfeit money) or used (or intended for use) in its commission (e.g. vehicles used for smuggling)<sup>28</sup>. If the offender has consumed or disposed of the object or otherwise obstructed its confiscation, the court may order the confiscation of the object's value (section 74c para. 1 StGB); the value may be estimated (section 74c para. 3 StGB). Like the confiscation according to section 74 StGB, the confiscation of the object's value is a punitive measure and requires personal guilt (at least negligent obstruction of the confiscation order)<sup>29</sup>.

### 1.2 Extended confiscation (Art. 5 para. 1 Directive 42/2014/EU; see also Art. 2 No. Regulation (EU) 2018/1805)

The German criminal justice system has provided for extended confiscation since 1992 (section 73d StGB – *Erweiterter Verfall*)<sup>30</sup>. The recent reform changed the terminology and numbering (section 73a StGB – *Erweiterte Einziehung von Taterträgen*), but adhered to the legal concept of a non-punitive measure, thereby sharing function and purpose of confiscation of proceeds of crime (section 73 StGB, see above 1.1)<sup>31</sup>.

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<sup>22</sup> A. ESER, F. SCHUSTER, “§ 73c”, in A. SCHÖNKE - H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 6.

<sup>23</sup> Sections § 459g Abs. 2 StPO, der §§ 459, 459a sowie 459c Abs. 1 und 2 StPO.

<sup>24</sup> For more details see M. HUBER, “§ 111j”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck, 2018, paras 17 ff. See also R. E. KÖLLNER - V. CYRUS - J. MÜCK, “Referentenentwurf des BMJV zur Reform der strafrechtlichen Vermögensabschöpfung – Insolvenzverwalter als ‘Staatsanwalt Nummer 2’?”, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 2016, 329, 333 ff.

<sup>25</sup> M. KÖHLER - C. BURKHARD, “Die Reform der strafrechtlichen Vermögensabschöpfung - Teil 2/2”, *Neue Zeitschrift für Strafrecht*, 2017, 665, 675.

<sup>26</sup> H. PUTZKE - H. SCHEINFELD, “§ 421”, in C. KNAUER, *Münchener Kommentar zur Strafprozessordnung*, München: C.H.Beck, 2019, para 19.

<sup>27</sup> Information provided by the public prosecutor's office in Bonn (*Staatsanwaltschaft beim Landgericht Bonn*).

<sup>28</sup> A. ESER, F. SCHUSTER, “§ 74”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 7, 12.

<sup>29</sup> A. ESER, F. SCHUSTER, “§ 74c”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 2, 6.

<sup>30</sup> Art. 1 No. 7 Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität (OrgKG) of 15 July 1992, BGBl. I 1992, 1302.

<sup>31</sup> BT DRS 12/989 23 (on the former provision), „variation of ordinary confiscation“ („*eigenständige Erscheinungsform des Verfalls*“); BT DRS 18/9525 48, 66 (on the new version). See also M. HEGER, “§ 73a”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para 3.

In its former version, the scope of the provision (section 73d StGB) has been limited to an exhaustive list of offences linked to organized crime<sup>32</sup>. Since Directive 2017/42/EU does not provide for such a limitation, but requires the Member States to extend the scope of their corresponding national provisions to (more or less) any harmonized offence (Art. 5 para. 2, Art. 3 Directive 2014/42/EU), the German legislator abandoned the list-based approach and extended the scope of extended confiscation to any criminal offence<sup>33</sup>.

Like criminal confiscation, extended confiscation presupposes the commission of a criminal offence, i.e. an unlawful conduct; personal guilt is not required (see above I.1.c.-e.)<sup>34</sup>. In contrast to criminal confiscation, extended confiscation allows for the confiscation of objects that have not been obtained through the crime the perpetrator has been charged with, but through or for any other crime he/she has committed (section 73a para. 1 StGB). Even though a link to the criminal offence under investigation is no longer necessary, the new provision does not allow for the confiscation of objects whose criminal origin have not been established. Prior to the recent reform, it was sufficient that the circumstances justify the assumption that the objects were acquired as a result of unlawful acts, or for the purpose of committing them (section 73d StGB former version), but according to the Federal Court of Justice and the Constitutional Court the provision had to be interpreted in conformity with constitutional guarantees (presumption of innocence, fundamental right to property); therefore extended confiscation may only be ordered if the court is intimately convinced that the object to be confiscated stems from another crime that has been “committed by its owner<sup>35</sup>. On the other hand, the requirements for the standard of proof must not be overstretched; in particular, the court is not obliged to determine the illegal conduct through which the perpetrator has obtained the object to be confiscated<sup>36</sup>. In the light of this case-law, the legislator adapted the legal basis for extended confiscation to the aforementioned constitutional guarantees (section 73a para. 1 StGB).<sup>37</sup> In its assessment, the court has to weigh the circumstances of the case, in particular the findings of the criminal investigation on the crime on which the confiscation order shall be based, the circumstances under which the object has been seized, and the economic and personal situation of the offender (section 437 StPO; see below 2.3.2)<sup>38</sup>. In particular, the court may rely on the fact that the value of the relevant object is disproportionate to the lawful income of the offender (see also Art. 5 para. 1 Directive 2014/42/EU)<sup>39</sup>.

Extended confiscation (section 73a StGB) is subsidiary to criminal confiscation (section 73 StGB) and, thus, may only be ordered if a link between the offence the perpetrator is charged with and the objects to be confiscated cannot be established<sup>40</sup>. If the offence the

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<sup>32</sup> F. SALIGER, “§ 73d”, in U. KINDHÄUSER, U. NEUMANN, H.U. PAEFFGEN, *Nomos Kommentar zum Strafgesetzbuch: Kommentar*, Baden-Baden: Nomos, 2017, para 6.

<sup>33</sup> BT DRS 18/9525 65. It has been criticized that this extension is not in line with fundamental rights and/or principles, in particular with the right to property (Art. 14 para 1 sentence 2 GG) and the proportionality principle, see T. RÖNNAU - M. BEGEMEIER, “Die neue erweiterte Einziehung gem. § 73a Abs. 1 StGB-E: mit Kanonen auch auf Spatzen?”, *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2016, 260, 262.

<sup>34</sup> A. ESER, F. SCHUSTER, “§ 73a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 6; see also BT DRS 18/9525 48, 66.

<sup>35</sup> BVerfG *Neue Juristische Wochenschrift* 2004, 2073, 2078, referring to BGH *Neue Juristische Wochenschrift* 1995, 470.

<sup>36</sup> BGH *Neue Juristische Wochenschrift* 1995, 470.

<sup>37</sup> BT DRS 18/9525 65 f

<sup>38</sup> BT DRS 18/9525 66, explicitly referring to section 437 StPO.

<sup>39</sup> A. ESER - F. SCHUSTER, “§ 73a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 11; M. HEGER, “§ 73a”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para 8.

<sup>40</sup> M. HEGER, “§ 73a”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para 11; BGH *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport* 2018, 380.

proceeds originate from is time-barred (section 78 StGB), confiscation can only be based on section 76a para 2 StGB (see below)<sup>41</sup>. Like criminal confiscation, extended confiscation is mandatory (“... the court shall order ...”)<sup>42</sup>. The exceptions under section 421 StPO apply accordingly (see above 1.1)<sup>43</sup>.

*1.3 Non-conviction based confiscation in the framework of criminal proceedings: in case of illness or absconding of the suspected person (Art. 4 para. 2 Directive 42/2014/EU; see also Art. 2 No. 2 Regulation (EU) 2018/1805)*

In section 76a paras. 1 to 3 StGB, German law allows for non-conviction based confiscation if no person can be prosecuted or convicted of the offence linked to the object to be confiscated. The provision applies in particular to cases where the offender is ill and, thus, unable to stand trial or absconding from justice<sup>44</sup> and, thereby, implements Art. 4 para. 2 Directive 2014/42/EU<sup>45</sup>. The provision mainly refers to the requirements of criminal confiscation (and extended confiscation)<sup>46</sup>, but does not constitute a different type of confiscation; it simply enables the court to order confiscation without the requirement of a criminal conviction<sup>47</sup>. Therefore, it is called “independent confiscation” (*selbständige Einziehung*).

The court may issue an independent confiscation order if the offender cannot be prosecuted or convicted, but the elements of criminal offence and the other requirements for confiscation have been established (section 76a para. 1 StGB).

As independent confiscation is not an autonomous type of confiscation, it basically refers to the standard types of criminal confiscation so that the substantive requirements for each confiscation measure apply accordingly (see above 1. and 2.). As a consequence, independent confiscation is not *per se* mandatory or facultative, but this, again, depends upon the type of confiscation: Whereas confiscation of proceeds (section 73 para. 1 StGB; see section 76a para. 1 sent. 1 StGB) is mandatory, the confiscation of *product vel instrumenta sceleris* (section 74, 74b StGB) is facultative (section 76a para. 1 sent. 2 StGB; see also above 1.1)<sup>48</sup>. Nevertheless, independent confiscation orders are issued upon request of the prosecution service (section 435 para. 1 StPO) which is at the discretion of the latter<sup>49</sup>.

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<sup>41</sup> M. HEGER, “§ 73a”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 11.

<sup>42</sup> A. ESER, F. SCHUSTER, “§ 73a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 12; M. HEGER, “§ 73a”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para 10.

<sup>43</sup> A. ESER, F. SCHUSTER, “§ 73a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 12.

<sup>44</sup> A. ESER, F. SCHUSTER, “§ 76a”, in A. SCHÖNKE - H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 6.

<sup>45</sup> BT DRS 18/9525 72.

<sup>46</sup> M. HEGER, “§ 76a”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para 1a.

<sup>47</sup> A. ESER, F. SCHUSTER, “§ 76a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 1.

<sup>48</sup> A. ESER, F. SCHUSTER, “§ 76a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 4.

<sup>49</sup> D. TEMMING, “§ 435”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H. Beck, 2018, para 7.

*1.4 Non-conviction based confiscation in criminal matters: the 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 (Art. 2 No. 2 and recital (13) Regulation (EU) 2018/1805)*

The scope of independent confiscation (see above 1.3) is not limited to cases where the offender is unable to stand trial or absconding from justice, but applies to any other cases where prosecution and conviction is impossible (section 76a paras 1 to 3 StGB). In addition, the recently introduced confiscation regime provides for a legal basis for non-conviction based confiscation orders in cases where the offender of an offence cannot be identified and, thus, not be convicted, i.e. “non-conviction based confiscation of proceeds of unknown origin” (*verurteilungsunabhängige Einziehung von Vermögenswerten unklarer Herkunft*, section 76a para 4 StGB).

Whereas independent confiscation orders (section 76a paras. 1 to 3 StGB) share the legal qualification of the corresponding standard type of confiscation measures (see above 3.a.-b., c.-f.), the legal materials remain silent on the exact nature of section 76a para 4 StGB. The explanatory memorandum only states that the measure constitutes an individual type of confiscation that adheres to the Italian concept of *misura di prevenzione* or the English model of civil confiscation<sup>50</sup>. Indeed, the new instrument seems to serve mainly preventive functions because it is supposed to target cash of unknown origin that has been found at airports or during drug controls of vehicles<sup>51</sup>. In any case, it represents a “hybrid scheme” because many features, such as the standard of proof (see below) or the *ad rem* character are more common for public law or civil law than traditional criminal (procedural) law<sup>52</sup>.

As has been mentioned above (see above 1.3), the court may issue an independent confiscation order if the offender cannot be prosecuted or convicted (section 76a para. 1 StGB). In contrast to the former version, the scope of the provision applies to factual and legal obstacles to prosecution (e.g. the *ne bis in idem* principle)<sup>53</sup>. In other words, the elements of a criminal offence have been established, yet the offender cannot be convicted because, for instance, he or she is unknown, has died, has absconded, is permanently unable to stand trial<sup>54</sup>. The court, however, must not issue an independent confiscation order if the prosecution requires a request of the victim or an authorization of a public entity that has not been filed (section 76a para. 1 sent. 3 StGB) or if the (potential) addressee of the confiscation order is protected by immunity under international law (sections 18, 19 Courts Constitution Act – *Gerichtsverfassungsgesetz* – GVG)<sup>55</sup>.

Furthermore, confiscation of proceeds of crime (section 73 StGB) and its value (section 73c StGB) may be ordered independently if the prosecution of the crime is time-barred (section 76a para. 2 StGB); the same applies to the preventive confiscation of *product*

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<sup>50</sup> BT DRS 18/9525 73 (“*eigenständiges Einziehungsinstrument*”).

<sup>51</sup> BT DRS 18/9525 48. Section 76a para 4 StGB is harshly criticised by scholars, see for instance H. SCHILLING, Y. HÜBNER, “‘Non-conviction-based confiscation’ - Ein Fremdkörper im neuen Recht der strafrechtlichen Vermögensschöpfung?”, *Strafverteidiger*, 2018, 49 ff. ; D. TEMMING, “§ 437”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck, 2018, para 3; A. BURGHART, “§ 437”, in H. SATZGER - W. SCHLUCKEBIER, *Strafprozessordnung: Kommentar*, Köln: Carl Heymanns Verlag, 2018, para 6. In favor, F. MEYER, “Die selbstständige Einziehung nach § 76a StGB-E, oder: Don't bring a knife to a gunfight”, *Strafverteidiger*, 2017, 343.

<sup>52</sup> See F. MEYER, “Abschöpfung von Vermögen unklarer Herkunft”, in *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* (2018), 246 ff.

<sup>53</sup> BT DRS 18/9525 72. Prior to the reform, the scope of the provision was limited to factual obstacles.

<sup>54</sup> BT DRS 18/9525 72; A. ESER, F. SCHUSTER, “§ 76a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 6.

<sup>55</sup> A. ESER, F. SCHUSTER, “§ 76a”, in A. SCHÖNKE - H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 9.

*vel instrumenta sceleris* (section 74b StGB). This derogation from the general rules of statutory limitation on prosecution (section 78 para. 1 StGB) has not been foreseen in the reform proposal of the government<sup>56</sup>, but has been brought up by the Parliament's Committee on Legal Affairs (*Ausschuss für Recht und Verbraucherschutz*) which argued that the amendment reinforced the restitutive purpose of the confiscation of proceeds (section 73 StGB, see above A.I.1.b.). Besides, with regard to extended confiscation, the perpetrator should no longer be able to avoid confiscation by claiming that prosecution of the offence through which the assets had been obtained was time-barred<sup>57</sup>. Therefore, the legislator provided for an autonomous limitation period of 30 years that applies to extended confiscation irrespective of whether or not prosecution of the offence is time-barred (section 76b para. 1 StGB)<sup>58</sup>. According to Art. 316h EGStGB, the new provisions apply to offenses which have been committed before the law entered into force. Referring to the alleged penal nature of confiscation, it has been argued that this were in breach with the principle of non-retroactivity<sup>59</sup>. The Federal Court of Justice rejected this argument and held that the confiscation of proceeds, due to its restitutive nature, did not fall within the material scope of the principle *nulla poena sine lege praevia* (Art. 103 para. 2 GG)<sup>60</sup>. Only recently, however, the Court held that Art. 316h para. 1 EGStGB might not be in line with the general principle of non-retroactivity, applying to all statutes (so-called *Verbot der echten Rückwirkung*, Art. 20 para. 3 GG).<sup>61</sup> This is why it has referred the matter to the German Constitutional Court for decision (so-called *konkrete Normenkontrolle* – “specific judicial review”, Art. 100 para. 1 GG). Nevertheless, as far as confiscation qualifies as punitive sanction (section 74 StGB), the general rules on statutory limitation applies (section 78 para. 1 StGB)<sup>62</sup>.

Finally, the court may issue an independent confiscation order if criminal proceedings against the suspect have been closed under the rules of discretionary prosecution (sections 153 ff. StPO) or if the court has ordered a discharge (section 76a para. 3 StGB).

As independent confiscation is not an autonomous type of confiscation, it basically refers to the standard types of confiscation measures and the corresponding substantive requirements (see above 1.3). As a consequence, it depends upon the respective type of measure whether independent confiscation is mandatory or facultative (see above 1.3). Nevertheless, it is at the discretion of the public prosecutor whether or not file a request for independent confiscation (section 435 para. 1 StPO; see above 3.c.-f.).

In contrast to independent confiscation orders (section 76a paras 1 to 3 StGB), the non-conviction based confiscation of proceeds of unknown origin (section 76a para. 4 StGB) has a scope that is limited to an exhaustive list of offences linked to terrorism and organized crime (section 76a para. 4 sent. 3 StGB)<sup>63</sup>. In particular, the list covers money laundering (section 261 StGB), participation in criminal or terrorist organisations (sections 129 and 129a StGB) and preparation and financing of terrorist offences (sections 89a, 89c StGB), human trafficking (§§ 232 ff. StGB), serious tax fraud and smuggling (section 370 para 3 No. 5 and section 373 Fiscal Code, *Abgabenordnung* – AO), smuggling of migrants (section 96 para. 2

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<sup>56</sup> BT DRS 18/9525 72 f.

<sup>57</sup> BT DRS 18/11640 82.

<sup>58</sup> The period of 30 years aligns with the longest period of prescription under civil law (sections 197, 852 BGB), M. HEGER, “§ 76b”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 2.

<sup>59</sup> See, for instance, F. HENNECKE, “Ein Ende der Verjährung: Zur Verfassungsmäßigkeit des ‘Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung’”, *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 2018, 121 ff.

<sup>60</sup> BGH *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 2018, 241.

<sup>61</sup> BGH, Beschluss v. 07.03.2019, 3 StR 192/18

<sup>62</sup> A. ESER, F. SCHUSTER, “§ 76a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 7.

<sup>63</sup> BT DRS 18/9525 73.

and 97 Residence Act, *Aufenthaltsgesetz – AufenthG*), trafficking in drugs (section 29 para 1 No. 1, para 3 Narcotics Act, *Betäubungsmittelgesetz – BtMG*) and weapons (sections 19 ff. Military Weapons Control Act, *Kriegswaffenkontrollgesetz – KrWaffKontrG*, sections 51, 52 Weapons Act, *Waffengesetz – WaffG*).

Basically, the confiscation is subject to two conditions (section 76a para. 4 sent. 1 StGB): (1) The proceeds (1) must have been seized in the framework of proceedings initiated on the grounds of one of the catalogue offences mentioned above and (2) originate from a criminal offence (which is not necessarily a catalogue offence)<sup>64</sup>. Like extended confiscation (section 73a StGB, see above 1.2), the confiscation of assets of unknown origin may be ordered only if the court is fully convinced that they are proceeds of a criminal activity<sup>65</sup>. In its conviction, the court may rely on the fact that the value of the proceeds is grossly disproportionate to the legal income of the defendant (section 437 sent. 1 StPO). In this case, it is upon the defendant to prove the legal origin of the assets<sup>66</sup>. Scholars have criticized that such a rule was tantamount to a reversal of the burden of proof and, therefore, in breach with the presumption of innocence<sup>67</sup>. According to the legal materials, proceedings *ad rem* have not to comply with the strict rules on evidence in criminal proceedings, but, due to the preventive nature of the confiscation order, may be modified in analogy to civil court proceedings<sup>68</sup>. In any case, section 437 StPO does not affect the free evaluation of evidence by the court (section 261 StPO)<sup>69</sup>. To that end, the court may take into consideration: the findings of the criminal investigation, the circumstances under which the proceeds have been seized, and the economic and personal situation of the defendant (section 437 sent. 2 no. 1 to 3 StPO).

If the aforementioned conditions are fulfilled, the court ought confiscate the proceeds even if the person affected by the seizure cannot be convicted. The court is not obliged to, but supposed to confiscate the proceeds in question (“confiscation as a rule, not as an exception”). It may only refrain from confiscation where – based on the circumstances of the case – such an order would be incompatible with the proportionality principle, and the case-law of the European Court of Human Rights<sup>70</sup>. According to the legal materials, the provision shall only apply subsidiary to sections 73-73c, 76a paras 1-3 StGB.

### 1.5 Third-Party Confiscation (Art. 6 Directive 2014/42/EU)

Third-party confiscation as defined by Art. 6 of the Directive is provided for in section 73b StGB (*Einziehung von Taterträgen bei anderen*)<sup>71</sup>. Section 73b StGB does not constitute a different type of confiscation, but simply extends the scope of application of sections 73, 73a StGB whose scope is limited to the confiscation of assets held by the offender (*Einziehung von Taterträgen bei Tätern und Teilnehmern*)<sup>72</sup>.

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<sup>64</sup> BT DRS 18/9525 73.

<sup>65</sup> BT DRS 18/9525 73.

<sup>66</sup> BT DRS 18/9525 92.

<sup>67</sup> R.E. KÖLLNER, J. MÜCK, “Reform der strafrechtlichen Vermögensabschöpfung”, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 2017, 593, 598; see also H. SCHILLING, Y. HÜBNER, “‘Non-conviction-based confiscation’ - Ein Fremdkörper im neuen Recht der strafrechtlichen Vermögensschöpfung?“, *Strafverteidiger*, 2018, 49, 51 ff.

<sup>68</sup> BT DRS 18/9525 92; see also F. MEYER, “Abschöpfung von Vermögen unklarer Herkunft”, in *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* (2018), 246, 249.

<sup>69</sup> BT DRS 18/9525 92; BT DRS 18/11640 89.

<sup>70</sup> BT DRS 18/9525 73.

<sup>71</sup> A corresponding legal basis exists for the confiscation of *producta vel instrumenta sceleris* (section 74a StGB).

<sup>72</sup> T. RÖNNAU, *Die Vermögensabschöpfung in der Praxis*, München: C.H. Beck, 2015.

According to German law, the court may confiscate assets of third-parties acquired by representation or by transfer: In the first case, the perpetrator has acted for a third party, i.e. a natural or legal person other than the perpetrator or the accomplice and the represented person has acquired the object to be confiscated thereby (section 73b para 1 sent. 1 No. 1 StGB).<sup>73</sup> The conditions are met if the perpetrator committed the offence on behalf of the third party and the latter has benefitted directly, i.e. without any further transaction, from the criminal conduct<sup>74</sup>. In the second case, the third party acquired the assets free of charge (section 73b para. 1 sent. 1 no. 2 lit. a StGB; see also Art. 6 para. 1 Directive 2014/42/EU), the third party knew or at least should have known (negligence) that the relevant assets originate from a criminal offence (section 73b para 1 sent. 1 No. 2 lit. b StGB; see also Art. 6 para. 1 Directive 2014/42/EU) or if the third party has acquired the assets by inheritance or legacy (section 73b para 1 sent. 1 No. 3 StGB). In the latter case, it is not required that the third party has inherited the proceeds from the perpetrator<sup>75</sup>. However, section 73b para 2 No. 2 and 3 StGB do not apply if the assets have been previously acquired by a *bona fide* third-party so that the *bona fide* third party holds a legitimate claim on the proceeds (section 73b para 1 sentence 2 StGB; see also Art. 6 para. 2 Directive 2014/42/EU)<sup>76</sup>.

Like the standard types of confiscation of criminal proceeds (sections 73, 73a StGB), third-party confiscation applies to any crimes, and its imposition is mandatory (see above 1.1 and 1.2). The court shall only refrain from confiscation to the extent the proceeds are no longer part of the third party's assets and the party neither knew nor ought to have known at that time that the relevant property had been derived from criminal activity, section 73e para 2 StGB.

Liable to confiscation is every object the third-party has acquired by representation or transfer (§ 73b para. 1 StGB) and benefits and surrogates the third party has acquired by transaction or inheritance (§ 73b para 2 StGB) or surrogates of the objects acquired by the third party (section 73b para. 3 StGB).

## 2. Procedural Aspects

### 2.1 Freezing

#### 2.1.1 Procedures for the freezing of assets

Freezing orders are provisional measures aiming at securing the confiscation of objects; the legal and procedural framework forms part of the rules on criminal investigations (sections 111b ff. StPO). The provision distinguish between the freezing (seizure) of criminal proceeds – *Beschlagnahme* (section 111b StPO) – and the freezing of assets in order to secure value-confiscation – *Vermögensarrest* (section 111e StPO). In principle, a freezing order requires authorization by a criminal court (section 111j para 1 sentence 1 StPO). However, in

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<sup>73</sup> BT DRS 18/9525 66.

<sup>74</sup> M. HEGER, “§ 73b”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2018, para. 2.

<sup>75</sup> L. FLECKENSTEIN, *Die strafrechtliche Abschöpfung von Taterträgen bei Drittbegünstigten*, Berlin: Duncker & Humblot, 2017, 235.

<sup>76</sup> BT DRS 18/9525 67, referring to BGHSt 45, 235, 247; see also M. HEGER, “§ 73b”, in K. KÜHL, M. HEGER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck 2018, para 5.

urgent cases (*Gefahr im Verzug*), the freezing order may be issued by the prosecution service or, if moveable assets are at stake, even by its agents (*Ermittlungspersonen der Staatsanwaltschaft*, section 152 “Court Constitution Act” (*Gerichtsverfassungsgesetz – GVG*)), e.g. by police or customs officers (section 111j para 1 sentences 2, 3 StPO). If the prosecution service has seized immovable property, it yet ought to apply for court confirmation of the order within one week (section 111j para 2 StPO). However, its failure to do so does not impair the validity of the order because the person concerned is entitled to apply for a court decision at any time (section 111j para 2 sentence 3 StPO, see below 2.1.4)<sup>77</sup>.

### 2.1.2 Conditions for the imposition of a freezing order

The court (or, if permitted, the public prosecution service or its agents) may order the seizure or the freezing of assets if there are grounds to believe that they are subject to confiscation (section 111b para 1 sent. 1 and section 111e para 1 sent. 1 StPO). The court ought to issue a freezing order if there are cogent reasons to believe that they are liable to confiscation (section 111b para 1 sentence 2, section 111e para 1 sentence 2 StPO); thus, the freezing order should be the rule rather than the exception<sup>78</sup>. In any case, assets may only be seized if there is a need to secure them (so-called *Sicherungsbedürfnis*), i.e. if they are at risk of being concealed, moved or dissipated<sup>79</sup>. The StPO does not oblige the court to decide upon a request for a freezing order within a specified time.

### 2.1.3 Duration of the freezing order

The law does not specify the duration of the measure. However, a freezing order must be revoked as soon as the proceeds no longer need to be secured<sup>80</sup>. As a matter of fact, the former provision – ex-section 111b para 3 StPO – stipulated a maximum period of six months which could be – depending on the degree of suspicion – prolonged for another twelve months<sup>81</sup>. According to the legal materials, the legislator however decided to abolish this system because it had turned out to be too cumbersome to work with in practice<sup>82</sup>.

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<sup>77</sup> M. HUBER, “§ 111j”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck 2018, para 5.

<sup>78</sup> See BT DRS 18/9525 75.

<sup>79</sup> BT DRS 18/9525 49, 75; OLG Hamburg *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* 2019, 106. See also A. BURGHART, “§ 111b”, in H. SATZGER, W. SCHLUCKEBIER, *Strafprozessordnung: Kommentar*, Köln: Carl Heymanns Verlag, 2018 para 9.

<sup>80</sup> BT DRS 18/9525 49, 75; see also OLG Frankfurt *StrafRechtsReport* 2018, 15.

<sup>81</sup> Former section 111b para 3 StPO read as follows: “If there are no cogent grounds, the court may revoke the order ... after a maximum period of six months. Where certain facts substantiate the suspicion of the offence and the time limit referred to in the first sentence is not sufficient given the particular difficulty or particular extent of the investigations or for another important reason, the court may, upon application by the public prosecution office, extend the measure provided the grounds referred to justify their continuation. Unless there are cogent grounds, the measure shall not be continued for longer than a period of twelve months” (The translation has been taken from *The German Code of Criminal Procedure*, [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0771](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0771). For a detailed explanation, see B. SCHMITT, “§ 111b”, in L. MEYER-GÖBNER, B. SCHMITT, *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, München: C.H.Beck, 2016, para 8.

<sup>82</sup> BT DRS 18/9525 49, 75.

#### 2.1.4 Rights and legal remedies of the person addressed by a freezing order

If proceeds are seized by the prosecution service or its agents, the person concerned may apply for a court decision at any time, section 111j para 2 sentence 3 StPO (*Herbeiführung einer gerichtlichen Entscheidung*)<sup>83</sup>. In this case, the court will review the legality of the freezing order and its conformity with the proportionality principle (see above B. I. 4.)<sup>84</sup>. Even though the law does not provide for a duty to inform the addressee of the freezing order of his/her right to apply for a court decision, such a duty is derived from an analogy to the corresponding rule on seizure of potential evidence (section 98 para. 2 sent. 5 StPO)<sup>85</sup>.

The decision of the court (the freezing order or the decision on the motion lodged by the applicant) may be challenged by a complaint (*Beschwerde*, sections 304 ff. StPO). The decision on the complaint is subject may be appealed again if the assets that have been seized (frozen) on the grounds of section 111e StPO, i.e. to secure value-confiscation, are worth more than 20,000 EUR (section 310 para 1 No. 3 StPO)<sup>86</sup>.

#### 2.1.5. Legal remedies against unlawful freezing orders

If the accused has suffered (economic) damages caused by a freezing order and is acquitted of the relevant offense or criminal proceedings are terminated for other reasons, he or she may claim compensation based on section 2 of the Act for the Reparation for Damages Sustained by Prosecution (*Strafverfolgungsentschädigungsgesetz – StrEG*), regardless of whether or not the order was valid<sup>87</sup>. Nevertheless, the claim is excluded if the court has confiscated the assets, section 5 para 1 No. 4 StrEG, or if the accused caused the seizure by intentional or grossly negligent conduct (section 5 para 2 StrEG)<sup>88</sup>. Furthermore, he or she may file an action based upon the “state liability claim” (*Staatshaftungsanspruch*) under section 839 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) in connection with Article 34 of the Basic Law (*Grundgesetz – GG*).<sup>89</sup> According to Article 34 GG, the state is liable for intentional and negligent violation of professional duties of civil servants who have caused individual harm or damages. The claim must be lodged with a civil court<sup>90</sup>.

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<sup>83</sup> Section 111j para 2 sentence 3 StPO applies even if the freezing order has already been executed, see F. BITTMANN, “§ 111e”, in *Münchener Kommentar zur Strafprozessordnung*, München: C.H.Beck, 2014, para 17.

<sup>84</sup> See, with regard to the proportionality principle, BVerfG *Neue Juristische Wochenschrift* 2005, 3630; BVerfG *Neue Zeitschrift für Strafrecht* 2006, 639; OLG Frankfurt *StrafRechtsReport* 2018, 15; OLG Köln, Beschluss v. 26.11.2018 – 2 Ws 685/18.

<sup>85</sup> F. BITTMANN, “§ 111e”, in *Münchener Kommentar zur Strafprozessordnung*, München: C.H.Beck, 2014, para 10.

<sup>86</sup> G. CIRENER, “§ 310”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck, 2018, para 1 ff.

<sup>87</sup> T. RÖNNAU, *Die Vermögensabschöpfung in der Praxis*, München: C.H.Beck, 2015, 242.

<sup>88</sup> See K. CORNELIUS, “§ 5 StrEG”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck, 2018, para 1 ff. If the requirements are fulfilled, the damages caused by the seizure will be reimbursed by the *Bundesland* whose court decided at first instance, section 15 StrEG.

<sup>89</sup> Cf. K. CORNELIUS, “§ 1 StrEG”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck 2018, para 10.

<sup>90</sup> For more background information see T. RÖNNAU, *Die Vermögensabschöpfung in der Praxis*, München: C.H.Beck, 2015, 248 ff.

## 2.2 Freezing of third-parties' assets

As far as substantive criminal law allows for confiscation of third parties' assets (see above 1.5), the procedural rules on freezing orders apply accordingly to third parties<sup>91</sup>.

As far as compensation claims are concerned, the scope of the StrEG is limited to accused persons and, thus, does not apply to third parties<sup>92</sup>. However, a third party may claim compensation based on the "state liability claim" (see above 2.1.5). Furthermore, *bona fide* third parties may claim compensation for the damage caused by preventive confiscation of *product vel instrumenta sceleris* (section 74b paras 2 and 3 StGB).

## 2.3 Confiscation

### 2.3.1 Procedures for the confiscation of assets

Confiscation proceedings form part of criminal proceedings and, thus, are governed by the criminal procedural law (sections 421 ff. StPO). In general, the court will decide upon confiscation in its final judgement (i.e. conviction based confiscation). The court may also impose confiscation by penal order (*Strafbefehl*, section 407 para. 2 sent. 1 No. 1 StPO). The court, however, may postpone the decision on confiscation where a joint decision on sentencing and confiscation would considerably delay a conviction and the determination of the sentence (section 422 StPO). As a rule, the court should decide upon confiscation within six months after the conviction has become final (section 423 para 2 StPO)<sup>93</sup>. In any case, the court orders confiscation *ex officio*, without a request (e.g. of the public prosecutor) being necessary.

In contrast, independent confiscation and confiscation of proceeds of unknown origin (section 76a StGB) requires a request of the prosecution service or the private prosecutor (section 435 StPO, see above 1.3); it is within the discretion of the public prosecutor to make such a request<sup>94</sup>. The non-conviction based confiscation order will be imposed by a criminal court in accordance with criminal procedural law.

### 2.3.2 Standard of proof for the imposition of a confiscation order

Ordinary confiscation, section 73 StGB, is subject to a high standard of proof: it must be proven beyond reasonable doubts that the relevant proceeds have been derived from the offense the perpetrator has been charged with<sup>95</sup>. Extended confiscation, section 73a StGB, lowers the burden of proof in relation to the illicit origin of the proceeds: The court must be intimately convinced that the assets stem from criminal conduct, yet no link to a particular criminal conduct needs to be established. In this regard, extended confiscation (section 73a StGB, see above 1.2) and non-conviction based confiscation of proceeds of unknown origin (section 76a para 4 StGB) are subject to a specific standard of proof (section 437 StPO): The court must be fully convinced of the illicit origin, yet may base confiscation on a balance of

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<sup>91</sup> F. BITTMANN, "§ 111b", in *Münchener Kommentar zur Strafprozessordnung*, München: C.H.Beck, 2014, para 2.

<sup>92</sup> T. RÖNNAU, *Die Vermögensabschöpfung in der Praxis*, München: C.H.Beck, 2015, 244.

<sup>93</sup> D. TEMMING, "§ 423", in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck, 2018, para 4.

<sup>94</sup> D. TEMMING, "§ 435", in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck, 2018, para 7.

<sup>95</sup> See T. RÖNNAU, *Die Vermögensabschöpfung in der Praxis*, München: C.H.Beck, 2015, 193 ff. The reason must also be stated in the judicial decision.

probabilities test; in particular, the court may rely on the fact that the value of the property is grossly disproportionate to the legal income of the affected person (section 437 sentence 1 StPO). In any case, section 437 StPO does not affect the free evaluation of evidence by the court (section 261 StPO). To that end, the court may draw upon the findings of the criminal investigation (section 437 sent. 2 no. 1 StPO), the circumstances under which the proceeds have been seized (section 437 sent. 2 no. 2 StPO), and the economic and personal situation of the defendant (section 437 sent. 2 no. 3 StPO). According to the legal materials, the standard of proof shall be similar to the standard applied in civil court proceedings (see supra 1.4)<sup>96</sup>.

### 2.3.3 Time limits for the issuing of a confiscation order

As the confiscation order usually forms part of the final judgement, German law does not provide for a time limit for issuing the confiscation order. A time-limit is only foreseen where confiscation proceedings have been separated from the main proceedings on the verdict and the punishment: As a general rule (which is not strictly binding), the court should decide upon confiscation within six months after the conviction has become final (section 423 para 2 StPO).

In independent confiscation proceedings, the competent court is not obliged to take a decision upon a request for independent confiscation proceedings within a certain time-limit, either. In this case, the request of the prosecution service has the same function as the indictment, and, the fundamental right to a trial “within reasonable time” (Art. 6 para. 1 ECHR) notwithstanding, there is no specified time-limit for the court to open the main proceedings and to render its judgement.

### 2.3.4 Rights and legal remedies of the person addressed by a confiscation order

As far as the confiscation order is (or shall be) addressed to the defendant, the procedural rights and guarantees of the accused person apply (e.g. the privilege against self-incrimination, the right to consult with defence counsel, the right to be heard and to examine witnesses etc.).

As part of the conviction (see above 1.1.), confiscation can only be challenged on appeal on grounds of fact and law (*Berufung*, sections 312 ff. StPO) and/or on appeal on grounds of law (*Revision*, sections 333 ff. StPO)<sup>97</sup>. If confiscation has been imposed by penal order (*Strafbefehl*, sections 407 ff. StPO), the defendant can file an objection (*Einspruch*, sections 410 ff. StPO).

In separated (sections 422, 423 StPO) and independent confiscation proceedings (sections 435, 436 StPO, i.e. non-conviction based confiscation, sections 76a StGB), the decision of the court will be rendered without a public hearing (section 423 paras 2, section 436 para. 2, section 434 paras. 2 StPO) and may be challenged by immediate complaint (*sofortige Beschwerde*, sections 311 StPO). Upon request of the parties or *ex officio*, the court may hold a trial; in this case, confiscation will be imposed by judgment that may be challenged either on appeal on grounds of fact and law or on appeal on grounds of law (section 423 para. 3, sections 436 para 2, 434 para 3 StPO).

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<sup>96</sup> BT DRS 18/9525 92; for a critical view see H. SCHILLING, Y. HÜBNER, “ ‘Non-conviction-based confiscation’ - Ein Fremdkörper im neuen Recht der strafrechtlichen Vermögensschöpfung?”, *Strafverteidiger*, 2018, 49, 54 ff.

<sup>97</sup> M. MEIBNER - M. SCHÜTRUMPF, *Vermögensabschöpfung: Praxisleitfaden zum neuem Recht*, München: C.H.Beck, 2018, para. 203.

## 2.4 Third-party confiscation

In case of third-party confiscation, the court shall order the person concerned to participate in (confiscation) proceedings (*Einziehungsbeteiligung*) unless the third party declares in writing that he does raise any objections to the confiscation of the relevant assets (section 424 para. 1 and 2 StPO). The court may abstain from such order where participation of the third party is not feasible or if the third party is a foreign organisation pursuing action directed against the existence or security of the German state or against its constitutional principles and if it is to be assumed that the organisation, or one of its agents, made the object available to promote such action; in the latter case, the affected person shall be heard (section 425 para. 1 and 2 StPO). If, before the court has order the participation, indications arise that a third party might be affected by the confiscation order and, thus required to participate in proceedings, this person shall be heard if this appears feasible; the provisions on the interrogation of the defendant shall apply accordingly (section 426 StPO).

The third party required to participate (*Einziehungsbeteiligter*) has the same rights, guarantees and remedies as the accused person (section 427 para. 1 sent. 1 StPO). In particular, the third party has the right to consult with counsel (section 428 StPO), must be served with the indictment and notified of the date and place where the trial will be held (section 429 para. 1 StPO). The third party has a right to participate in the trial, but the court may conduct the hearing in the absence of the third party (section 430 para. 1 StPO). The third party has the right to file applications to take evidence, but this right is limited as far as evidence is related to the accused person's guilt (section 430 para. 2 StPO). In appellate proceedings, the review of the confiscation order shall extend to the verdict only if the third party was not heard concerning the question of guilt earlier in the proceedings or if the verdict has been appealed by the convicted person (section 431 para. 1, 2 StPO). The underlying rationale of these provisions is that the scope of the third party's rights is limited to the decision on whether or not the (specific) conditions for third-party confiscation requirements are met<sup>98</sup>.

A third party that is not formally addressed by the confiscation order (*Nebenbetroffene*), may be required to participate in proceedings if there are grounds to believe that the confiscation order will affect the third party's rights (section 438 para. 1 StPO); in this case, the aforementioned rules apply accordingly (section 438 para. 1 sent. 2, para. 3 StPO). Under certain conditions, the court may order that the participation does not extend to the establishment of the defendant's guilt (section 438 para. 2 StPO).

## 3. Mutual Recognition Aspects

### 3.1 Freezing

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

The mutual recognition of freezing orders of another EU Member State is regulated in sections 94 ff. of the "Act on International Cooperation in Criminal Matters (*Gesetz über die*

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<sup>98</sup> H. PUTZKE, H. SCHEINFELD, "§ 431", in C. KNAUER, *Münchener Kommentar zur Strafprozessordnung*, München: C.H.Beck, 2019, para 4.

*internationale Rechtshilfe in Strafsachen – IRG*)<sup>99</sup>. These rules modify the general provisions on mutual legal assistance and requests of another states to execute seizure and freezing orders (sections 66, 67 IRG), and thereby implement Framework Decision 2003/577/JHA into German law.

### 3.1.2 Competent authorities for the execution of freezing orders from another EU member State

In principle, international cooperation in criminal matters falls within the competence of the federal government (section 74 para. 1 IRG), but the government may delegated its competence to the federal states (*Bundesländer*, section 74 para. 2 IRG)<sup>100</sup>. The competence to grant requests for mutual legal assistance and for the execution of freezing orders in particular has been further delegated to the public prosecution services at the district courts (*Staatsanwaltschaft beim Landgericht*)<sup>101</sup>. The seizure of assets, however, requires an authorization of the local court in whose district the assets are located (section 94 para. 1 and section 67 para 3 IRG). In cases of emergency, the prosecution service or its agents (see above) may seize the objects without a court order (section 94 para. 1 and section 67 para 4 IRG).

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

The public prosecution service shall refuse the recognition and execution of a freezing order if one of the following grounds applies (mandatory grounds for refusal):

- The convicted person has already been finally tried for the same offence on which the request is based by another state than the requesting state provided that the sanction has already been enforced or can no longer be enforced under the law of the convicting state (section 94 para 2 No. 2 IRG; see also Art. 8 para. 1 lit. a Regulation (EU) 2018/1805). This refusal ground shall, however, not apply if the request serves the preparation of a confiscation order and the confiscation could have been ordered separately under section 76a StGB (see above 1.3 and 1.4). As a matter of fact, the provision is subject to several flaws: Section 94 para 2 No. 2 IRG is supposed to implement Art. 7 para 1 lit. c of Framework Decision 2003/577/JHA enabling Member States to refuse a request if judicial assistance would infringe the *ne bis in*

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<sup>99</sup> The translations of the IRG have been inspired by M. BOHLANDER, W. SCHOMBURG, in: W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, eds., *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H.Beck, 2012, Act on International Cooperation in Criminal Matters, 581 ff. The IRG is accompanied by the “guidelines for international assistance in criminal matters” (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten – RiVaSt*) which are however only legally binding for judicial authorities, i.e. have no external effects.

<sup>100</sup> See the corresponding agreement between the federal government and the government of the federal states of 28 April 2004, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, I 3.

<sup>101</sup> M. BÖSE, “§ 94 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 3; see e.g. the circular on the competences in international cooperation in criminal matters in the state of Northrhine-Westphalia of 16 December 2016 (*Ausübung der Befugnisse im Rechtshilfeverkehr mit dem Ausland in strafrechtlichen Angelegenheiten, Berichtspflichten und die Zusammenarbeit im Europäischen Justiziellen Netz sowie mit transnationalen Verbindungsstellen - Gemeinsamer Runderlass des Justizministeriums - 9350 - III. 19 -, des Ministeriums für Inneres und Kommunales - 424 - 57.01.48 - und des Finanzministeriums - S 1320 - 5 - V B 5/S 770 - 4 - V A 1 - vom 16. Dezember 2016 - JMBI. NRW S. 16 - GRdE-RHSt*), No. 1.1.2.1.

*idem* principle<sup>102</sup>. Due to the fact that the latter does not yet specify the conditions under which the principle applies, the legislator based section 94 para 2 No. 2 IRG on Art. 54 CISA denoting that the provision is to be interpreted in line with the case-law of the Court of Justice<sup>103</sup>. On the other hand, the legislator has taken the view that independent confiscation (section 76a StGB) is not barred by a final judgement in which the court did not render a decision on confiscation (section 421 StPO)<sup>104</sup>. In contrast, the decision not to order confiscation shall be final and, thus, must not be overruled by an independent confiscation order.<sup>105</sup> Scholars have criticized this understanding, due to its negative effect on legal certainty.<sup>106</sup> These concerns support a rather restrictive interpretation of the exception from the *ne bis in idem* principle in cross-border cooperation (section 92 para. 2 sent. 1 No. 2 sent. 2 IRG) as it must be doubted whether it is in line with the transnational effect of the *ne bis in idem* principle (Art. 50 CFR, Art. 54 CISA)<sup>107</sup>.

- The object to be seized or frozen is subject to a ban on seizure aiming at the protection of professional secrets (section 94 para. 2 sent. 1 No. 1 IRG, referring to section 97 StPO; see also Art. 7 para. 1 lit. b Framework Decision 2003/577/JHA; Art. 8 para. 1 lit. b Regulation (EU) 2018/1805). exists pursuant to s. 77(1) in conjunction with s. 97 of the Strafprozessordnung or
- The freezing certificate is incomplete and does not contain the required information (section 95 para. 1 IRG; see also Art. 7 para. 1 lit. a Framework Decision 2003/577/JHA; Art. 8 para. 1 lit. c Regulation (EU) 2018/1805): the name and address of the issuing judicial authority (No. 1), the description of the assets (No. 2) and the suspect (No. 3), the reasons for the freezing order (No. 4) and a description of offence and its legal assessment (No. 5 and 6). However, before the request is refused, the competent authority may set a deadline for submission, completion or correction (section 95 para 2 IRG). Furthermore, it may not insist upon submission of a complete certificate if the relevant information can be gathered from the freezing order, section 95 para 2 IRG<sup>108</sup>.

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<sup>102</sup> BT DRS 16/6563 16.

<sup>103</sup> BT DRS 16/6563 16 f.; see also S. TRAUTMANN, “§ 94 IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H.Beck, 2012, para 9; L. WÖRNER, “§ 94 IRG”, in K. AMBOS, S. KÖNIG, P. RACKOW, *Rechtshilfe in Strafsachen*, Baden-Baden: Nomos, 2015, para 537.

<sup>104</sup> BT DRS 18/9525 57, 72.

<sup>105</sup> BT DRS 18/9525 72.

<sup>106</sup> A. ESER, F. SCHUSTER, “§ 76a”, in A. SCHÖNKE, H. SCHRÖDER, *Strafgesetzbuch: Kommentar*, München: C.H. Beck, 2019, para 6.

<sup>107</sup> See M. BÖSE, “§ 94 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 12 f; see also on this subject M. BÖSE, “Die transnationale Geltung des Grundsatzes *ne bis in idem*”, in C. MOMSEN, T. GRÜTZNER, *Wirtschaftsstrafrecht: Handbuch für die Unternehmens- und Anwaltspraxis*, München: C.H.Beck 2013; T. RÖNNAU, “‘Doppelabschöpfung’ im Strafverfahren - staatliches Unrecht? - Nachdenken über die Grenzen zulässiger Vermögensziehung bei grenzüberschreitenden Sachverhalten”, in W. HASSEMER, *In dubio pro libertate: Festschrift für Klaus Volk zum 65. Geburtstag*, München: C.H.Beck, 2009, 583 ff.; M. RÜBENSTAHL, H. SCHILLING, “Doppelter Verfall? - Zur Frage mehrfacher Vermögensabschöpfung bei Straftaten mit Auslandsbezug”, *Höchststrichterliche Rechtsprechung im Strafrecht*, 2008, 492.

<sup>108</sup> Nevertheless, the request may always be granted on the basis of other mutual legal assistance instruments, for instance the European Convention on Mutual Assistance in Criminal Matters, M. BÖSE, “§ 95 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 4.

- The offence on which the freezing order is based is not or – *mutatis mutandis* – would not constitute a crime or a regulator offence (*Ordnungswidrigkeit*) under German law (double criminality, section 66 para. 2 No. 1, section 67 para. 2 IRG and section 94 para. 1 IRG). However, double criminality shall not need to be established if the offence on which the request is based is under the law of the requesting State punishable by imprisonment of a maximum term of no less than three years and is a list offence (section 94 para. 1 No. 1 IRG and Art. 3 para. 2 Council Framework Decision 2003/577/JHA; see also Art. 7 para. 1 lit. d Framework Decision 2003/577/JHA; Art. 8 para. 1 lit. e and Art. 3 Regulation (EU) 2018/1805). Furthermore, the double criminality requirement shall not hinder the execution of the freezing order for the sole reason that German law does not provide for equivalent taxes or duties or does not contain similar tax, duties, customs or currency provisions as the law of the issuing Member State (section 94 para. 1 No. 2 IRG; see also Art. 8 para. 1 lit. e Regulation (EU) 2018/1805).
- The execution of the order would violate the European *ordre public* (section 73 sentence 2 IRG; see also Art. 8 para. 1 lit. f Regulation (EU) 2018/1805), for example, if the seizure would be incompatible with the proportionality principle<sup>109</sup>.

So far, there is not much case-law on the refusal grounds mentioned above. In one case, the execution of a freezing was rejected because the double criminality requirement was not met.<sup>110</sup> In another case, the freezing certificate was incomplete and did not allow for an assessment whether the conditions for recognition and execution of the order (the double criminality requirement in particular) were fulfilled<sup>111</sup>.

#### 3.1.4 Grounds for postponement

The public prosecution service may postpone the execution of a freezing order as long as its execution might damage an ongoing criminal investigation (section 94 para. 3 No. 1 IRG; see also Art. 8 para. 1 lit. a Framework Decision 2003/577/JHA; Art. 10 para. 1 lit. a Regulation (EU) 2018/1805) or the property or evidence concerned have already been subjected to a freezing order in criminal proceedings conducted by domestic authorities or authorities of a third state (section 94 para 3 No. 2 IRG; see also Art. 8 para. 1 lit. b and c Framework Decision 2003/577/JHA; Art. Art. 10 para. 1 lit. b and c Regulation (EU) 2018/1805). In the latter case, the request shall be executed as soon as the previous order has been lifted<sup>112</sup>. The decision is at the discretion of the competent authority<sup>113</sup>.

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

German law does not specify a time limit for the execution of a freezing order. Nevertheless, the order shall be executed expeditiously<sup>114</sup>, if possible, within 24 hours<sup>115</sup>.

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<sup>109</sup> M. BÖSE, “§ 94 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 14.

<sup>110</sup> OLG NÜRNBERG *Strafverteidiger* 2013, 104 f.

<sup>111</sup> OLG DRESDEN *Neue Zeitschrift für Strafrecht – Rechtsprechungs-Report* 2011, 146 f.

<sup>112</sup> BT DRS 16/6563 17.

<sup>113</sup> M. BÖSE, “§ 94 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 15.

<sup>114</sup> BT DRS 16/6563 11.

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

As a rule, the execution of a freezing order requires court authorization (see above 1.-2.). The addressee has the right to challenge the court order and lodge complaint (*Beschwerde* - section 77 IRG and sections 304 ff. StPO (see above 2.1.4). If court authorization is not required, the the person concerned may apply for a decision of the court (section 77 IRG and section 111j para. 2 sent. 3 StPO; see above 2.1.4). In principle, the legal remedies correspond to the remedies against domestic freezing orders, but the court will not review whether the imposition of the order has been in line with the domestic law of the issuing Member State, in particular, whether the freezing order is based on reasonable suspicion<sup>116</sup>. Instead, the court will assess whether the public prosecutor may execute respectively must refuse the freezing order. The court's assessment is limited to the mandatory grounds for refusal (section 94 para. 1 and 2, section 95, section 73 sent. 2 IRG) because, according to the prevailing opinion, the individual is not entitled to invoke optional refusal grounds where only public interests are at stake (section 94 para. 3 IRG)<sup>117</sup>. If the appellate court (i.e. the district court - *Landgericht*) is of the view that the requirements for executing the freezing order are not fulfilled, it refers the case to the Higher Regional Court (*Oberlandesgericht* – section 61 para. 1 sent. 1 IRG).<sup>118</sup> This provision shall ensure a uniform interpretation of the refusal grounds. In addition, the person concerned may directly file an application to the Higher Regional Court to rule on the transfer of seized objects and frozen assets to the issuing state (section 61 para. 1 sent. 2 IRG).

### 3.2 Freezing of third-parties' assets

The legal and procedural framework of cross-border execution of freezing orders applies irrespective of whether the freezing order is addressed to defendants or third parties. Any person claiming that his/her rights were infringed by the confiscation order, has a right to challenge the decision to execute the freezing order (see above 2.1.4.; see also section 61 para. 1 sent. 2 IRG). Therefore, the foregoing explanations apply accordingly.

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<sup>115</sup> M. BÖSE, “§ 96 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 1; L. WÖRNER, “§ 96 IRG”, in K. AMBOS, S. KÖNIG, P. RACKOW, *Rechtshilfe in Strafsachen*, Baden-Baden: Nomos, 2015, para 549.

<sup>116</sup> M. BÖSE, “§ 94 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 3.

<sup>117</sup> See M. BÖSE, “§ 94 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 3.

<sup>118</sup> OLG DRESDEN *Neue Zeitschrift für Strafrecht – Rechtsprechungs-Report* 2011, 146 f.; M. BÖSE, “§ 94 IRG”, in H. GRÜTZNER, P.-G. PÖTZ, C. KREB, *Internationaler Rechtshilfeverkehr in Strafsachen: Die für die Rechtsbeziehungen der Bundesrepublik Deutschland mit dem Ausland in Strafsachen maßgeblichen Bestimmungen*, Heidelberg: C.F. Müller, para 3.

### 3.3 Confiscation

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

The relevant provisions for the mutual recognition of confiscation orders are laid down in sections 88 ff. IRG that modify the general provisions on the enforcement of foreign sentences (sections 48 ff. IRG) and implement framework Decision 2006/783/JHA into German law.

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

The competent authority is the public prosecution service in whose jurisdiction confiscation would take place (section 88d para 1 sentence 1, sections 50, 51 IRG).

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

The procedure on the recognition and execution of a confiscation order is organized in two stages (section 88d IRG): First, the prosecution service will take a preliminary decision on whether the execution of the order is admissible (i.e. whether it complies with section 88a IRG and no mandatory grounds for refusal apply), and whether or not an optional ground for refusal (section 88c IRG, see below) should be invoked. If the prosecution service intends to execute the confiscation order and not to invoke a ground for refusal, it will forward a reasoned decision to the court (section 88d para. 1 IRG). The court will then review the decision of the prosecution service and, if it finds that the execution is admissible and that the prosecution service has exercised its discretion on the optional refusal grounds correctly, will declare the foreign order enforceable (section 88d para 3 sentence 1 IRG).

#### 3.3.4 Grounds for postponement

The public prosecution service shall refuse the recognition and execution of a freezing order if one of the following grounds applies (mandatory grounds for refusal):<sup>119</sup>

- The convicted person has already been finally tried for the same offense on which the request is based on by another Member State than the requesting Member State provided that the sanction has already been enforced, is currently being enforced or can no longer be enforced under the law of the convicting state (*ne bis in idem* – Art. 50 CFR, Art. 54 CISA), unless confiscation could have been ordered separately section 76a StGB (section 88a para 2 No. 3 IRG; see also Art. 8 para. 2 lit. a Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. a Regulation (EU) 2018/1805). This ground for refusal corresponds to section 94 para. 2 No. 2 IRG and from the same shortcomings (see above 3.1.3)<sup>120</sup>.
- The confiscation order has been issued in criminal proceedings in respect of criminal offences which have been committed on Germany territory (section 3 StGB) or German ships or aircraft (section 4 StGB) and is not punishable under German law (section 88a para 2 No. 1 IRG; see also Art. 8 para. 2 lit. f Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. d Regulation (EU) 2018/1805).

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<sup>119</sup> T. HACKNER, “§ 88a IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H.Beck, 2012, para 11.

<sup>120</sup>T. HACKNER, “§ 88a IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H.Beck, 2012 para 14

- The offence on which the confiscation order is based is not or – *mutatis mutandis* – would not constitute a crime under German law (double criminality, section 88a para. 1 No. 2 IRG). However, double criminality shall not need to be established if the offence on which the request is based is under the law of the requesting State punishable by imprisonment of a maximum term of no less than three years and is a list offence (section 88a para. 1 No. 2 lit. a IRG and Art. 6 para. 1 Framework Decision 2006/783/JHA; see also Art. 19 para. 1 lit. f and Art. 3 Regulation (EU) 2018/1805). Furthermore, the double criminality requirement shall not hinder the execution of the freezing order for the sole reason that German law does not provide for equivalent taxes or duties or does not contain similar tax, duties, customs or currency provisions as the law of the issuing Member State (section 88a para. 1 No. 2 lit. b IRG; Art. 8 para. 2 lit. b Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. f Regulation (EU) 2018/1805).
- The confiscation order has been rendered in the absence of the person concerned (section 88a para. 2 No. 2 IRG; see also Art. 8 para. 2 lit. e Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. g Regulation (EU) 2018/1805). This ground for refusal does not apply if the person was summoned in person and was thereby informed of the scheduled date and place of trial and of the consequences of the failure to appear at the trial (section 88a para. 3 No. 1 IRG), the person was aware of the criminal investigation, but absconded from justice (section 88a para. 3 No. 2 IRG), the person had given a mandate to a lawyer to defend him/her at the trial and the person was actually defended by that lawyer (section 88a para. 3 No. 3 IRG), or the person waived his/her right to a retrial or did not apply for a retrial within the applicable time-limits (section 88a para. 4 IRG)<sup>121</sup>.
- The execution of the order would violate the European *ordre public* (section 88 sentence 2 in conjunction with section 73 sentence 2 IRG; see also Art. 19 para. 1 lit. h Regulation (EU) 2018/1805)<sup>122</sup>.
- The enforcement is statute-barred under German law unless confiscation could have been ordered separately under section 76a para 2 StGB (section 88a para 2 No. 4 IRG; see also Art. 8 para. 2 lit. h Framework Decision 2006/783/JHA)<sup>123</sup>.
- The confiscation order could not have been issued under German law (section 88a para 2 No. 2 IRG; see also Art. 8 para. 2 lit. g Framework Decision 2006/783/JHA). Germany has also – in accordance with Art 7 para 5 of Framework Decision 2006/783/JHA – notified that its competent authorities will not recognize and execute confiscation orders under circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2 lit. d No. iv of the Framework Decision and an order of this type could not have been made under German law<sup>124</sup>.

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<sup>121</sup> Section 88a para 2 No. 2, paras 3, 4 IRG are supposed to implement Framework Decision 2009/299/JI.

<sup>122</sup> BT 16/12320 35. T. HACKNER, “§ 88a IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H.Beck, 2012, para 11.

<sup>123</sup> T. HACKNER, “§ 88a IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: Beck, 2012, para 15.

<sup>124</sup> Council document 17509/10.

The prosecution service has discretion whether or not to grant the request in the following cases (optional refusal grounds):<sup>125</sup>

- The certificate provided for in Article 4 of Framework Decision 2006/783/JHA is not produced, is incomplete, or manifestly does not correspond to the order (section 88c No. 1 IRG; see also Art. 8 para. 1 Framework Decision 2006/783/JHA; Art. 19 para. 1 lit. c Regulation (EU) 2018/1805). The issuing state must, however, at first be given an opportunity to correct or to complete the request (sections 88c No. 1, 88b para 2 IRG)<sup>126</sup>.
- The confiscation order has been issued in criminal proceedings in respect of a criminal offence which was committed on German territory or on German ships or aircraft (section 88c No. 2 IRG). In contrast to the mandatory refusal ground (section 88a para. 2 No. 1 IRG), the optional refusal ground is not combined with the double criminality requirement (see also Art. 8 para. 2 lit. f Framework Decision 2006/783/JHA).
- The confiscation order has been issued in criminal proceedings in respect of a criminal offence which was neither committed on German territory nor committed on the territory of the requesting state, and German criminal law does not apply or the act is not an offence under German law (section 88c No. 3 IRG; see also Art. 8 para. 2 lit. f Framework Decision 2006/783/JHA).
- The assets are subject to a German confiscation order and for reasons of public interest the enforcement of the German order is to be given precedence (section 88c No. 4 IRG; see also Art. 11 Framework Decision 2006/783/JHA; Art. 21 para. 1 lit. c Regulation (EU) 2018/1805). As illustrated by the term “public”, individual interests are not to be taken into account<sup>127</sup>.
- A third state has ordered the confiscation of the same assets and requested for the enforcement of the order and for reasons of public interest the enforcement of the German order is to be given precedence (section 88c No. 5 IRG; see also Art. 11 Framework Decision 2006/783/JHA; Art. 26 Regulation (EU) 2018/1805). The third state does not have to be an EU-Member State<sup>128</sup>.

So far, almost no cases have been published on the application of the aforementioned refusal grounds. In one case, the execution of a confiscation order was rejected because the order did not specify the offence so that the court could not assess whether the double criminality requirement was met<sup>129</sup>.

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<sup>125</sup> T. HACKNER, “§ 88c IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H.Beck, 2012, para 1.

<sup>126</sup> T. HACKNER, “§ 88c IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H.Beck, 2012, para 2.

<sup>127</sup> T. HACKNER, “§ 88c IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H.Beck, 2012, para 5.

<sup>128</sup> T. HACKNER, “§ 88c IRG”, in W. SCHOMBURG, O. LAGODNY, S. GLEB, T. HACKNER, *Internationale Rechtshilfe in Strafsachen: International cooperation in criminal matters*, München: C.H. Beck, 2012, para 7.

<sup>129</sup> OLG HAMM, Decision of 25 April 2013 – III-2 Ws 83/13 –, juris, para. 32 f.

### 3.3.4 Grounds for postponement

The prosecution service may postpone the execution of the confiscation order as long as there are grounds to believe that the confiscation order is simultaneously executed in another Member State (section 88d para 2 No. 1 IRG; see also Art. 10 para. 1 lit. a Framework Decision 2006/783/JHA; Art. 21 para. 1 lit. b Regulation (EU) 2018/1805) or as long as it could jeopardise ongoing criminal or enforcement proceedings (section 88b para 2 No. 2 IRG; see also Art. 10 para. 1 lit. c Framework Decision 2006/783/JHA; Art. 21 para. 1 lit. a Regulation (EU) 2018/1805).

### 3.3.5 Time limits for the execution of confiscation orders from another EU Member State

No time limits are specified for the duration of the postponement, nor does German law provide for a time-limit for the decision on the recognition and execution of the confiscation order.

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

Before the public prosecution service applies for a court decision on the execution of the confiscation order (see above 2.), the convicted person shall be heard (section 88d sent. 1 IRG). If the court decides that the confiscation order is recognized and enforceable under German law, the convicted person has the right to challenge the decision by lodging an immediate complaint (*sofortige Beschwerde*, section 311 StPO) within one week after the notification of the court decision (section 88d para 3 sentence 1 and section 55 para 2 IRG).

## 3.4 *Third-party confiscation*

The legal and procedural framework of cross-border execution of confiscation orders does not distinguish between confiscation and third-party confiscation, but has a general scope of application. As a consequence, the convicted person or any other person claiming that his/her rights were infringed by the confiscation order (third party), has a right to challenge the decision to execute the freezing order (see above 3.1.6; see also section 88d sent. 1 f with regard to the right to be heard). Therefore, the foregoing explanations on the recognition of confiscation order (see above 3.) apply accordingly.

## 4. *Management and disposal aspects*

### 4.1 *Freezing*

#### 4.1.1 *Competent authorities for the management of frozen assets*

In general, the prosecution service is responsible for the management of frozen assets, section 111m StPO. Nevertheless, it is entitled to assign this task to other authorities i.e. to its agents (section 152 GVG, see above B.I.3.), the bailiff (*Gerichtsvollzieher*) or even to private institutions, for instance, if immovable assets must be managed<sup>130</sup>. In general, the

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<sup>130</sup> BT DRS 18/9525 83.

management is undertaken by the registrar (*Rechtspfleger*), Section 31 para 1 No. 4 Registrar Act (*Rechtspflegergesetz – RPflG*).

#### 4.1.2 Power of the competent authorities on the frozen assets

The freezing of assets has the effect of prohibition of disposal (*Veräußerungsverbot*, section 111d para 1 sentence 2 StPO in conjunction with 136 BGB), which means that any disposal/transfer of the assets is void<sup>131</sup>. The prohibition of disposal does even apply if the person addressed by the freezing order becomes insolvent (section 111d para 2 StPO). Nevertheless, the assets may be handed back to the person addressed by the order against an immediate payment (section 111d para 2 sentence 1 StPO) or even be retained by the person concerned, subject to revocation at any time, for further use in the interim until conclusion of the proceedings (section 111d para 2 sentence 3 StPO)<sup>132</sup>. Furthermore, if the assets are subject to depletion or to a significant loss of value (this case especially relates to cars), or if their preservation, care or maintenance would result in disproportionately high costs or difficulties, the assets may be sold by public auction (the provisions of the Civil Procedure Code on the sale at public auctions – sections 814 ff. ZPO – apply *mutatis mutandis*, section 111p para 4 sentence 3 StPO), so-called “emergency sale” (*Notveräußerung*), section 111p para 1 StPO. An emergency sale can only be ordered by the prosecution service or – in urgent cases – by its agents. Prior to the order, the person concerned ought to be heard and informed about time and place of the sale (section 111p para 3 StPO), even though a failure to comply does not impair the validity of the order<sup>133</sup>. The person concerned may apply for a court decision which can be appealed by complaint (see above 2.1.4). In this case, the court can suspend the sale (section 111p para 5 StPO).

#### 4.1.3 Costs for the management or disposal of the frozen assets

In general, the costs of asset management are borne by the state. However, if the person addressed by the order is (eventually) convicted, he or she will have to bear the costs insofar as they have been caused by the trial (see section 465 para 1 StPO)<sup>134</sup>. As the management aims at maintaining the asset’s value<sup>135</sup> rather than earning profits, the use of such earnings is not regulated by law.

#### 4.1.4 Legal remedies against wrongful management of frozen assets

Apart from section 2 StrEG and/or the state liability claim (see above 2.1.5), the person affected might claim damages for breach of duty (based on sections 280 ff. BGB applying *mutatis mutandis*) because the freezing of assets creates a relationship between the state and the person affected – so-called *öffentlich-rechtliches Verwahrungsverhältnis* – that

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<sup>131</sup> Section 136 BGB reads as follows: “A prohibition of disposal which is issued by a court or by any other public authority within the limits of its competence is equivalent to a statutory prohibition of disposal of the kind described in section 135”. Section 135 para 1 BGB states that “[i]f the disposition of a thing violates a statutory prohibition against disposal intended solely for the protection of particular persons, the disposition is ineffective only in relation to these persons”.

<sup>132</sup> Translation inspired by *The German Code of Criminal Procedure*, [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0771](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0771).

<sup>133</sup> F. BITTMANN, “§ 111P”, in *Münchener Kommentar zur Strafprozessordnung*, München: C.H.Beck, 2014, para 3.

<sup>134</sup> The costs of asset management constitute “costs of the proceedings” in the sense of section 464a StPO, B. SCHMITT, “§ 111b”, in L. MEYER-GÖBNER, B. SCHMITT, *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen*, München: C.H.Beck, 2018 para 16.

<sup>135</sup> M. HUBER, “§ 111m”, in J.-P. GRAF, *Beck’scher Online-Kommentar StPO*, München: C.H.Beck, 2018, para 2.

corresponds to a contractual one<sup>136</sup>. Similar to the state liability claim, damages will only be awarded if a civil servant has intentionally or negligently violated a professional duty towards the person concerned. The claim must be lodged with a civil court as well, see section 40 para 2 sentence 1 of the Act on Administrative Court Proceedings (*Verwaltungsgerichtsordnung – VwGO*).

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

There is no information about practices on the management of assets located abroad, nor are there any specific rules on the management of assets in the framework of cross-border cooperation. In this regard, the rules on domestic criminal proceedings apply accordingly (section 77 para. 1 IRG and section 111m StPO). In addition, the reimbursement of costs from the issuing Member State may be waived (section 75 IRG).

#### *4.2 Freezing of third-parties' assets*

The rules on asset management and disposal apply irrespective whether the freezing order has been addressed to the defendant or a third party. As there are no peculiarities, the foregoing explanations apply accordingly.

#### *4.3 Confiscation*

##### *4.3.1 Competent authorities for the disposal of confiscated assets*

Confiscated assets will be disposed of by the prosecution service, sections 451 StPO, 63 ff. StVollstrO<sup>137</sup>. The assets will be sold, either by public auction (see above 4.1.2) or privately, section 63 paras 1, 3 StVollstrO. However, assets (once) belonging to the victim of the offense must be returned to him or her pursuant to section 459h StPO. Potential victims must be informed (even by public announcement) as soon as possible after the order has become final, see section 459i StPO<sup>138</sup>. After being informed of the confiscation, the victim will have a period of six months of receipt to claim his or her property respective share of the proceeds, see sections 459j para 1, 459k para 1 StPO.

##### *4.3.2 Modalities of disposal of confiscated assets*

The proceeds generated by disposal of confiscated assets do not have to be used for a particular purpose: If assets are confiscated, their ownership passes to the *Bundesland* whose court ruled at first instance, sections 75 para 1 sentence 1 StGB, 60 StVollstrO, thereby becoming part of the general treasury, so-called *Justizfiskus*.

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<sup>136</sup> S. DETTERBECK, *Allgemeines Verwaltungsrecht*, München: C.H.Beck, 2018, para 1272. The provisions on the „safekeeping contract“ (*Verwahrungsvertrag*), sections 688 ff. BGB apply *mutatis in mutandis*.

<sup>137</sup> In general, this task is undertaken by the registrar.

<sup>138</sup> Section 459h StPO distinguishes between three forms of victim's assets, i.e. assets that are still owned by the victim, assets whose ownership has been transferred to the state pursuant to section 75 para 1 StGB and proceeds replacing the original assets. Apart from implementing the Directive, strengthening the position of the victim in confiscation proceedings has been one of the main motives for the profound amendment of the confiscation system, see BT DRS 18/9525 54. For more details on section 459i, see C. COEN, “§ 459i”, in J.-P. GRAF, *Beck'scher Online-Kommentar StPO*, München: C.H.Beck, 2018, para 1 ff.

#### *4.3.3 National practices on the management of confiscated assets in execution of a freezing order from a different EU Member State*

As has been explained with regard to freezing orders (see above II.4.-5.), is no information about practices on the management of assets located abroad, nor are there any specific rules on the management of assets in the framework of cross-border cooperation. The only exceptions are the provisions on disposal and asset sharing (sections 56b, 88f IRG) and costs (section 57a, 75 IRG; see above 4.1.3).

The German authority may enter into an ad hoc agreement with the competent authority of the issuing Member State about the disposal, return or distribution of the assets resulting from the enforcement of the confiscation order for confiscation if reciprocity is assured (sections 56b para. 1, 88f IRG), without prejudice to the law on the protection of the German cultural heritage (section 56b para. 2 IRG). In the absence of such agreement, half of the revenue from the enforcement of the confiscation order request shall be assigned to the issuing Member States if – without deduction of costs and compensation – its value exceeds 10,000 EUR (section 88f IRG). The costs of enforcement shall be borne by the convicted person (section 57a IRG)<sup>139</sup>.

#### *4.4 Third-Party Confiscation*

The rules on asset management and disposal apply irrespective whether the confiscation order has been addressed to the defendant or a third party. Therefore, the foregoing explanations apply accordingly (see above 3.), except for the provision on the costs of the execution (section 57a IRG).

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<sup>139</sup> BT DRS 16/12320 28.