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1. Introduction

This chapter provides a comparative analysis of the procedural aspects of the legislation regulating the confiscation procedures in six European countries. The respective procedures differ rather strongly in both design and in substance. This finding can hardly surprise, since the domestic procedural part of the confiscation process remains mostly untouched by international and European legislation.

This is for instance different for the international cooperation aspects of confiscation. The United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC) both contain obligations related to international cooperation in confiscation and asset recovery cases.¹ At the European level, the influence of the European Union on this topic is even stronger. Council Framework Decision 2006/783/JHA and (as of 19 December 2020) Regulation (EU) 2018/1805 oblige EU member states² to apply the principle of mutual recognition to the recognition and execution of foreign confiscation orders.

As a consequence, the legal instruments regulating this cooperation are under a strong international and European influence. The grounds for non-recognition and non-execution are for instance limited in the recent Regulation (see article 19 thereof). The substantial aspects of confiscation are also increasingly affected by European legal instruments. Directive 2014/42/EU strives at a certain harmonization of confiscation laws of the member states³ and therefore prescribes member states to, among other things, introduce forms of extended and non-conviction based confiscation.

The international and European influence on the *procedural* aspects of national confiscation regimes however remains rather minimal. They are considered to fall under the institutional autonomy and discretion of the member states. This does not mean that the European legislation leaves procedural aspects of confiscation completely untouched. The harmonizing nature of the European instruments might have an influence on the confiscation procedure as well. This is because the EU is increasingly looking to approximate the national laws in order to allow for forms of confiscation that are new to some of these legislations, more particularly extended confiscation.⁴ This might have procedural consequences for the confiscation procedures of these member states, for instance as to questions concerning (the division of) the burden of proof and the standard of proof applied by judges.

¹ See article 13 UNTOC and articles 54-56 UNCAC.

² Except for Denmark and Ireland, see Recitals 56 and 57 preceding the Regulation.

³ See Recital 19 preceding the Directive.

⁴ See further chapter of this volume.

Extended confiscation is laid down in article 5, paragraph 1 of Directive 2014/42/EU. Under this provision, member states must enable the confiscation of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where:

‘a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.’⁵

The reference to the disproportionality between the property held by the defendant and his lawful income as a relevant circumstance suggests that the burden proof might lay (partly) with the defendant. A closer look on this European instrument however shows that the member states still enjoy much discretion in applying rules of evidence. Although this provision seems to aim at introducing forms of extended confiscation in the member states, it does not strictly oblige member states to do so. The cited article of the Directive merely obliges to allow for confiscation in cases where the court is satisfied that the property in question stems from crime. The suggested alteration or division of the burden of proof (on the basis of the disproportionality of the property to the lawful income) is not imperatively prescribed by the Directive.⁶

The term ‘satisfied’ in article 5 of the 2014 Directive (cited above) furthermore suggests that a *lower standard of proof* may be introduced in confiscation procedures. But again, the precise design of the procedure is left to the member states. The directive leaves them discretion as to the question how to interpret the term ‘satisfied’.⁷ They are not obliged to implement a lower standard of proof than the usual ‘beyond a reasonable doubt’ or comparable standards such as the ‘innermost conviction’ of the judge.⁸

This also apparent from the wording of Recital 21 preceding the Directive, which states that member states *may provide* that it is sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable that property has been obtained from criminal conduct. It is stated nowhere that lower standards of proof *must* be applied.

⁵ Article 5, paragraph 1.

⁶ See also Recital 21 preceding the Directive, which states that the fact ‘that the property of the person is disproportionate to his lawful income *could be* among those facts giving rise to a conclusion of the court that the property derives from criminal conduct’ (italics added). See also Recital 10 preceding the Council Framework Decision 2005/212/JHA, which states that the aim of that instrument was to ‘ensure that all Member States have effective rules governing the confiscation of proceeds from crime, *inter alia*, in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organized crime.’ Article 3 of that framework decision however did not oblige any alteration to the onus of proof in national law.

⁷ K. Ligeti, M. Simonato, ‘Asset Recovery in the EU: Towards a Comprehensive Enforcement Model beyond Confiscation? An introduction’, in: K. Ligeti, M. Simonato (eds.), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU*, Oxford/Portland: Hart 2017, p. 5-7.

⁸ At the international level, article 12, paragraph 7 UNTOC, stipulates that States Parties ‘*may consider* the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings’ (italics added).

These two questions of the burden of proof and the standard of proof are thus, just as other procedural aspects of confiscation, still left to the discretion of the member states. That triggers the need to analyse and compare the national systems. By assessing a possible ‘common ground’ and by mapping relevant differences, a state-of-the-art picture can be provided, which might prove useful in case harmonization at the (international or) European level will be sought in the future. In order to contribute to the further discussion on how to improve confiscation in the European Union, this chapter therefore provides an overview of the procedural aspects of the studied confiscation regimes and compares these regimes on several crucial aspects.

This analysis is based on the country reports on the confiscation regimes in Belgium, Italy, France, Germany, Romania and the Netherlands, as published in chapters of this book.⁹ More specifically, part 2.3 of the questionnaire for the country reports deals with the procedural aspects of confiscation and therefore chapters 2.3 of the country reports form the basis of this horizontal analysis.¹⁰ This chapter follows the questions of this part of the questionnaire, hence dealing with the legal provisions regulating the confiscation proceedings (§ 2), the authorities requesting and imposing confiscation (§ 3)¹¹, the standard of proof applied when imposing a confiscation order (§ 4), time limits in place for such a decision (§ 5) and the rights and guarantees of the person addressed and the legal remedies open to him (§ 6). The chapter ends, in § 7, with a conclusion.

2. Provisions regulating the confiscation proceedings

Before describing the specific features of confiscation procedures in more detail, a first, short typology of all six confiscation regimes might provide some clarification. Practically all of the regimes differentiate between forms of confiscation and the procedural rules often differ accordingly. It is therefore necessary to sketch these types of confiscation, in order to understand their procedural characteristics. This description is accompanied by mentioning the relevant legal provisions regulating the confiscation proceedings.

In *the Netherlands*, three criminal sanctions can be identified as serving a confiscation purpose.¹² They differ in their scope: the confiscation order (*ontnemingsmaatregel*) of article 36e of the Dutch Criminal Code (CC) can solely target the proceeds of crime, whereas the withdrawal from circulation (*onttrekking aan het verkeer*, hereinafter: withdrawal, art. 36b-36d CC) and the forfeiture (*verbeurdverklaring*, art. 33-33a CC) can also aim at the instrumentalities of criminal offences, including for instance the objects used to commit or prepare the offence. The confiscation order is value-based, while the other two sanctions target specific objects; they are forms of object-based confiscation. The withdrawal specifically targets ‘dangerous’ objects, of which the uncontrolled possession is in breach of the law or contrary to the public interest.

⁹ If information was unclear or missing in a country report, the authors thereof were asked to provide additional information.

¹⁰ Except for the Italian country report, which deals with the procedural aspects of confiscation in § 2.2.

¹¹ I choose to take questions 2.3.2 and 2.3.3 of the questionnaire together in one paragraph.

¹² Besides from these sanctions imposed by a judge, out-of-court means of confiscation are also in place, both consensual (see art. 74 CC and 511c CCP) and unilaterally by the public prosecutor (art. 257a CCP). These forms of confiscation are not an integral part of the analysis.

All of these sanctions¹³ are ascribed a criminal nature by the Dutch legislature and they are imposed in criminal proceedings.

The confiscation order can however only be imposed in a separate procedure that is governed by a specific title in the Dutch Code of Criminal Procedure (art. 511b-511i), although this procedure can be parallel to the criminal trial. The judge always has to provide to separate rulings.¹⁴ The sanction of forfeiture is imposed in the regular criminal trial. The withdrawal is usually also imposed in the criminal trial, but it can also be the result of a specific, separate procedure.

Belgian law provides for two forms of confiscation, either as an accessory penalty in addition to a main penalty (criminal confiscation) or as a safety measure aimed to put dangerous products or objects out of circulation. The latter is independent of a criminal conviction. The former is the most prominent in the country report and therefore the main object taken into account in this comparative analysis.

This criminal confiscation is governed by articles 42 to 43^{quater} of the Belgian Penal Code. Besides from these provisions, specific rules apply to confiscation in relation to certain criminal offences.¹⁵ This form of criminal confiscation aims at property related to the criminal offence or, if this property cannot be transferred, a sum of money equivalent to the value thereof. It can aim at *corpus delicti*, instruments of the offence, proceeds of the offence (objects that have been produced by the offence, e.g. counterfeit banknotes and illegal narcotics), profits derived or generated by the offence, additional patrimonial benefits removed from the offence (extended confiscation), and assets of a criminal organization. Different rules govern these different types of objects liable to confiscation and dependent on the mentioned type of property confiscated (*corpus delicti*, instruments of the offence etc.), differences exist on whether confiscation is compulsory or optional, on whether confiscation ‘by equivalent’ (payment of a sum of money equivalent to the value of the property that should have been confiscated), extended confiscation and third-party confiscation are possible.

In *France*, article 132-21 of the Criminal Code lays down the legal regime for criminal confiscation. It differentiates between several types of confiscation, and is supplemented by special legal regimes allowing for specific forms of confiscation after conviction for a specific criminal offence (such as theft or corruption). Since in French law the confiscation measure (with the exception when it concerns customs confiscation) is part of the ‘regular’ criminal law and is imposed as a criminal sanction, the general rules of criminal procedure, as laid down in the Code of Criminal Procedure, apply to its imposition. Articles 706-141 and further of the French criminal code furthermore provide for legal provisions concerning the enforcement of confiscation measures. The confiscation is primarily a penalty, but may in some cases present itself as a security

¹³ Although the confiscation order and the withdrawal are characterized as non-punitive ‘measures’ and the forfeiture qualifies as punitive ‘penalty’, this difference is not regarded as having an impact on the practical application of these sanctions.

¹⁴ A current legislative proposal aims to amend the law in such a manner, that confiscation orders will as rule be imposed in the regular criminal procedure and only in ‘difficult’ cases a separate procedure will be followed.

¹⁵ A preliminary draft to change the Belgian legislation with an aim of enhancing consistency and simplification is currently under discussion.

measure, in which case it is not primarily targeted at a person, but at the property itself.¹⁶ It can be imposed as an additional, alternative or principal penalty. The French confiscation sanctions can be imposed after a conviction for a criminal offence for which the Criminal Code stipulates that confiscation is possible.

Under *German* law, confiscation is considered a criminal ‘measure’. Confiscation proceedings are part of the criminal proceedings and therefore governed by rules of criminal procedural law. The different types of confiscation are laid down in sections 73 until 76a of the German criminal code (*Strafgesetzbuch, StGB*). The confiscation measure can target both illegal profits from crime and objects that were generated by or used in the commission or preparation of the crime. It requires a criminal conviction, either by judgement or by penal order (*Strafbefehl*).¹⁷ In case no link can be established between the offence the defendant is charged with and the objects to be confiscated, extended confiscation is a possibility.

Confiscation of illegal profits (section 73 StGB) and extended confiscation (section 73a StGB) are considered to be of a restorative nature since they aim at reallocating assets.¹⁸ They require the commission of a criminal offence, but not the establishment of personal guilt of the defendant relating to the offence giving rise to confiscation. This is different for confiscation of objects generated by or used for the commission or preparation of the offence (section 74 paragraph 1 StGB), which is considered to be a punitive sanction. Such confiscation requires personal guilt of the defendant and is part of the sentencing process. No personal guilt is however needed if it concerns confiscation of objects that pose a danger or that are supposed to be used for the commission of a crime (section 74b paragraph 1, under b StGB). Such confiscation does not aim at punishing the offender, but at protecting the general public. It is hence considered to be a preventive measure.

Both mentioned forms of confiscation can furthermore take the shape of so-called ‘independent confiscation’ (section 76a StGB). This is a form of non-conviction based confiscation in case the defendant cannot be prosecuted or convicted, but the court establishes the elements of a criminal offence (and other requirements for confiscation). The inability to convict can be the result of either factual or legal obstacles to prosecution, e.g. if the prosecution is time-barred. This legal instrument enables confiscation in case the defendant is dead, is ill and unable to stand trial, or if he cannot be identified. This latter type is called ‘non-conviction based confiscation of proceeds of unknown origin’ (section 76a paragraph 4 StGB) and mainly serves a preventive aim. It is the only form of ‘independent’ confiscation that is limited to a list of specific offences.¹⁹

Romanian confiscation law knows three different types of confiscation: criminal confiscation, non-conviction based confiscation and extended confiscation. They are all ascribed a predominantly criminal nature and are hence regulated by the Romanian Criminal Code and the Code of Criminal Procedure. The first type of confiscation is

¹⁶ For this reason, the confiscation is in that case for instance not subject to the principle of the necessity of penalties.

¹⁷ This is a simplified procedure by which a judge rules on the case without a public oral hearing.

¹⁸ Although scholars have argued that since a gross profit is confiscated (thereby excluding criminal costs from the calculation of the profit), the confiscation holds the character of a criminal (punitive) sanction, both the German Constitutional Court and the German Supreme Court confirm the restitutive character of the criminal confiscation measure.

¹⁹ Compare paragraphs 1-3 with paragraph 4 of section 76a StGB.

governed by article 112 of the Romanian Criminal Code and serves as a security measure. It can be imposed on a person who has committed an unjustifiable criminal offence, also in case no penalty is imposed on him. A conviction for this offence is not necessary, so non-conviction based confiscation is also possible under this legal provision. In that case, confiscation should however only be ordered insofar as it is not incompatible with the reason for closing the case, for instance when the statute of limitations is reached or a complaint required to start the criminal proceedings was withdrawn.²⁰ This criminal confiscation can aim at objects produced by an offence, (intended to be) used to commit an offence, used after an offence in order to escape or to ensure the retention of the proceeds of the offence, given to bring about the commission of an offence, acquired by the offence or the possession of which is prohibited by criminal law. Criminal confiscation is considered to be of a mandatory nature.

The second type of confiscation is regulated by article 112¹ of the Criminal Code. This extended confiscation is possible if the defendant is convicted of one of the seventeen types of offences listed in that article, that offence is likely to procure a material benefit and is endangered with a term of imprisonment of at least four years. In that case, imposition of a confiscation order is possible if the value of the assets acquired by the defendant in a period of five years before and after the commission of the offence, 'clearly exceeds' his lawfully obtained revenues. The court must be convinced that these assets originate from criminal activity similar to those provided in the list of (types of) offences.

In *Italian* law lastly, a great variety of forms of confiscation exist. This is due to several legislative interventions targeted at mafia types of crime. First of all, there is 'traditional confiscation', which has been in place for a long time. It can aim at objects that have served or were used to commit the crime, or the items that constituted the product or the profit of the crime. It is governed by article 240 of the Italian Penal Code and provisions of the Italian Code of Criminal Procedure. There is a specific provision relating to assets that are the profit or product of computer crimes. These laws do not, however, contain a comprehensive framework, since implementing and transitional provisions also play an important role on this topic.

This traditional confiscation can be optional or mandatory, dependent on the assets that are targeted. It is optional if it concerns assets that served or were used to commit the offence, and assets that are the product or profit of the crime. In this case, confiscation is only possible in the event of a conviction. Confiscation is mandatory if it aims at assets constituting the price of the crime or the compensation given or promised to induce, instigate or cause another person to commit the crime, or at assets related to specific computer crimes. It is also mandatory if there are assets whose manufacture, use, carrying, possession or disposal constitutes a crime. In that case no conviction is necessary.

Confiscation can also take the shape of extended confiscation, in case the defendant is convicted (or has plea bargained) for a specifically listed offence and there is a disproportion between the value of the assets and his income declared for tax purposes or his occupation. This extended confiscation (or confiscation 'by disproportion') is laid down in article 240bis of the Italian Penal Code.

Besides from such traditional confiscation, the so-called Anti-Mafia Code contains several possibilities to confiscate assets. Confiscation is a preventive measure here, which is applied *ante delictum*, prior to a conviction ('preventive confiscation').

²⁰ In this respect, attention should be paid to judgement of the European Court of Human Rights on 1 March 2007, appl.no. 30810/03 (Geerings v. the Netherlands).

This form of confiscation is imposed by a specialized magistrate. It has both subjective and objective requirements. The first relate to the defendant: it must concern a ‘dangerous subject’, a person who is suspected of participating in mafia associations or associations devoted to the commission of serious crimes, or a person who lives off the commission or the proceeds of crime. These people must, as a second requirement, contain ‘social dangerousness’. They must have a predisposition for crime, which must be inferred from their personality. The objective requirements on the other hand relate to the asset to be confiscated. They must be available to the defendant and there must be ‘sufficient clues’ (regarding seizure prior to preventive confiscation) that they stem from an illegal origin.

Preventive measures can be personal (affecting the person) or material (affecting assets). As of 2008, material measures can be imposed irrespective of the imposition of any personal measures, although the ‘social dangerousness’ of the person in charge of the asset must still be established. This dangerousness does not need to exist at the time of the imposition; it is sufficient that the defendant was dangerous to society in the past and has accumulated considerable wealth.

Due to the variety of the Italian confiscation landscape, an all-encompassing overview cannot be provided here. It is important to notice that other important forms of confiscation exist, such as but not limited to administrative confiscation, confiscation relating to labour law, urban confiscation (which has spurred both academic debate and several judgements by the European Court of Human Rights) and vehicle confiscation.

3. Authorities requesting and imposing confiscation orders

In France, Belgium and the Netherlands criminal confiscation is imposed as part of the criminal sentencing process. Therefore, in these countries confiscation sanctions can only be imposed by a criminal judge. They can be requested by public prosecutors, but whether such a request is a prerequisite depends on the legal system, the type of confiscation sanction and the object it targets. In the Belgian system for instance, it depends on the object to be confiscated whether a request by the public prosecutor is necessary. In case the confiscation is mandatory, no requisition is required. In case confiscation is optional, the judge²¹ has discretion on the matter and – thus – the public prosecutor must request confiscation.

The German confiscation measures are also imposed by a criminal judge, either in the final judgement in the regular criminal trial or by means of a penal order, (*Strafbefehl*). There is however a specialized option in place: the court has the option to postpone the confiscation decision if it would considerably delay the regular criminal trial. In that case, a separate confiscation procedure is followed. In both cases, confiscation is ordered *ex officio* without a request by the public prosecutor. This is different if it concerns non-conviction based confiscation (so-called ‘independent’ confiscation); in that case a request by the prosecution service or the private prosecutor is required. The judge then has discretion concerning the possible imposition of the confiscation.

Apart from such imposition of confiscation by rather ‘regular’ authorities, confiscation is regularly characterized by special procedures. Confiscation is seen as ‘something different’, for which particular legal arrangements are deemed necessary. Similar to the mentioned postponed procedure in German law, in the Netherlands the

²¹ The judge imposing a confiscation sentence can either be a court of law or an investigating court, when it decides as a court of judgement ‘on a suspension of the pronouncement of the sentence or internment’.

imposition of a confiscation order (*ontnemingsmaatregel*) can only take place in a procedure that is legally separated from the regular criminal procedure. Although both procedures can take place simultaneously and before the same judges, it is always required that two separate decisions are taken.²² None of the other criminal sanctions have such a special position in Dutch criminal law.

Italian law also has special procedures in place in order to confiscate assets. Given the many legislative efforts to target serious (mafia type) crimes, this can hardly surprise. Here, the authorities imposing the confiscation differ according to the type of confiscation. Traditional confiscation (art. 240 Italian Penal Code) is imposed by either the trial judge who pronounces the sentence of conviction, or the enforcement judge. The latter is a judge who decides on issues relating to the effective enforcement of the sentence. He is competent in case confiscation is mandatory, and he is obliged to order the confiscation if the trial judge hasn't ruled on it in the trial stage.

Extended confiscation as laid down in article 240bis Italian Penal Code can solely be imposed by the enforcement judge after a request by the public prosecutor.²³ He does so in a procedure that has, in principle, an informal character without hearing the parties. The defendant however has the possibility to oppose the decision by the enforcement judge within 30 days. In that case, a hearing in chambers will be scheduled in which cross-examination is applied. Whether the confiscation is imposed with or without a public hearing therefore depends on the actions of the defendant or other interested parties.²⁴

Confiscation as a *preventive measure* is imposed by a specialized magistrate, who decides after a simplified, inquisitorial procedure that shows strong differences from the regular penal procedure. This procedure is independent from the regular criminal procedure, although it is still part of the same *genus*: the imposing magistrate here is part of a specialized section of a criminal court.

All types of Romanian confiscation are imposed by a criminal court. A public prosecutor, or any other party that is competent to formulate requests with regard the criminal action can request their imposition. The procedure that leads to this imposition depends on whether it concerns criminal or extended confiscation on the one hand, or non-conviction based confiscation on the other. Criminal and extended confiscation are ordered when the final decision on culpability is rendered. In general, this is the decision in which the defendant is convicted and sentenced to a penalty. Romanian criminal law furthermore offers two 'solutions' that exist after the court has ruled on the culpability. The court may at that point also choose not to order the execution of the penalty (but to waiver the imposition of the penalty), or to postpone the enforcement of a penalty. In both these options, (regular) criminal confiscation can be ordered as well.

Non-conviction based confiscation is – per its nature – not imposed in a decision convicting the defendant. It can be ordered in the mentioned situations where the court decides to waiver the imposition of the penalty or to postpone the enforcement of the penalty, but also in the situation where the public prosecutor decides to drop the charges

²² This distinguishes this Dutch system from the German, *optional* postponed confiscation procedure. In the Netherlands, a similar *optional* division of the criminal trial and the procedure leading to the imposition of a confiscation order is currently under discussion.

²³ At first, postponement of the imposition was the result of judicial practice. It was later codified in the law.

²⁴ This 'extremely simple procedure' is followed when extended confiscation is ordered by the enforcement judge, after that the conviction becomes final.

or to close the case. In that decision, the public prosecutor can propose the confiscation of assets.²⁵ An affected party such as the defendant can then challenge this proposal within 30 days. When the proposal is challenged, a superior public prosecutor analyses the complaint. If that does not lead to annulment of the proposed confiscation, the affected party can formulate a complaint with the Preliminary Chamber Judge. The judge will rule on the case after a public hearing in which all affected persons are heard.²⁶ He will either accept the proposal of the prosecutor and order the confiscation of the assets, or reject the proposal in which case no confiscation will be ordered.

4. Standard of proof

As seen in § 1 of this chapter, the European instruments suggest that member states may allow judges to apply a lower standard of proof in confiscation procedures, for instance when using a form of extended confiscation. The member states are however not obliged to do so. To what extent do national confiscation laws actually allow for a lower standard of proof? This is one of the most prominent aspects in discussions concerning confiscation.²⁷ I understand the ‘standard of proof’ to mean the degree of conviction required of the judge when he makes a decision. Is it for instance enough that the judge deems one scenario (‘the assets stem from crime’) more plausible than the other (‘the assets have a legal origin’)?²⁸

The French law on criminal confiscation is silent on the standard of proof that applies to the confiscation decision. It is therefore assumed that the regular standard of proof applies: the ‘innermost conviction’ of the judge, which must be based on evidence ‘which was submitted in the course of the hearing and contradictorily discussed before him’.²⁹

The criminal confiscation in Belgium is a criminal sanction following a conviction for a criminal offence. It hence requires a prior conviction of the accused to a principal sentence, which must be based on the regular standard of conviction of the judge. A form of extended confiscation is also possible in Belgium. In that case, the judge orders confiscation of property that is not directly related to the sanctioned offence. It is not clear which standard of proof must be reached in order for such an extended confiscation. The Belgian law determines that if the defendant has acquired property over a relevant period of time, while there are serious and concrete indications that these benefits stem from offences which can give rise to an economic benefit, and that are of the same category of offences for which the defendant has been convicted, it is up to the defendant to credibly assert the contrary. This form of confiscation raises a question as to the applicable standard of proof, but whether the standard of proof is in fact lowered, is not clear from Belgian law.

²⁵ This ‘solution’ is not limited to the confiscation decision; it can for instance also entail the invalidation of a document.

²⁶ See article 5491 of the Romanian Code of Criminal Procedure.

²⁷ See for instance J. Boucht, ‘Extended Confiscation: Criminal Assets or Criminal Owners?’, in: Ligeti & Simonato 2017, p. 130-133.

²⁸ Closely tied to this matter is the question who bears the burden of proof; what should the public prosecutor prove and what can be expected from the defendant in this respect? Is he ought to prove that his assets stem from legal conduct, or is it enough if he makes a reasonable claim that it doesn’t concern criminal assets?

²⁹ The public prosecutor furthermore has to prove the ‘adequacy’ of the confiscation, which means that the confiscation is necessary and a proportionate punishment of the offender.

The two Dutch confiscation sanctions that can target the proceeds of crime (confiscation order and forfeiture) require a conviction for a criminal offence.³⁰ This conviction can only be reached if the judge is ‘convinced’ of the guilt of the defendant. For the subsequent imposition of a withdrawal or forfeiture, no specific standard of proof is stipulated. The decision to impose one of these two sanctions does not need to be substantiated with evidence, since it is part of the regular sentencing process.

This is different for the confiscation order, which requires the judge to calculate the illegally obtained profits on the basis of evidence. The legislature has expressed that when the court conducts this calculation, it can apply a ‘reasonable and fair division of the burden of proof’. In literature, it is argued that this ‘division’ cannot go as far as to reverse the burden of proof. This burden must in this view always lie with the public prosecutor. The defendant is then in the position to actively oppose the public prosecutor’s claim. Much can be expected from him in this respect, since the public prosecutor and the judge can apply evidentiary presumptions and general rules (e.g. by means of extrapolation or by assuming certain prices in the criminal market), which must then be disputed by the defendant.

Under this confiscation sanction, confiscation is possible if ‘sufficient indications’ exist that the defendant has committed offences for which he has not been convicted, or if it is ‘plausible’ that such offences have led to a financial advantage. It is debated whether these two terms indicate a lower threshold to come to a decision. Although the legislature has sometimes referred to the civil standard of ‘balancing of probabilities’, he has denied the suggestion that the burden of proof is reversed. In literature, it is argued that the judge must be ‘convinced’ before coming to a confiscation decision and that the desired mitigation of the evidential rules can be found in the non-applicability of the minimum evidential rules (see § 6). The Dutch Hoge Raad has not (yet) clarified this issue in its case law.

Three of the compared jurisdictions explicitly *do* allow for a lower degree of conviction to be used in confiscation proceedings: Germany, Romania and Italy. Under German law, the types of confiscation show some differences as to the relevant standard of proof. When it concerns regular confiscation of illegal profits (section 73 StGB) a high standard of proof applies: the court must rule beyond a reasonable doubt that the proceeds were derived from the offence that the defendant was charged with. This is different for extended confiscation and non-conviction based confiscation of proceeds of unknown origin (sections 73a and 76a paragraph 4 StGB).³¹ For these forms of confiscation the court must be fully convinced that the assets stem from criminal conduct. The court may however base that finding on a balance of probabilities test, in which the gross disproportionality between the value of the property and the legal income of the defendant plays a role. This specific standard of proof is laid down in section 437 of the German Criminal Procedure Code and is, according to the legislature, similar to the standard of proof applied in civil cases.

³⁰ In both Belgian and Dutch law, the confiscation of assets with the aim of avoiding the circulation of objects that are dangerous or harmful to health and public safety does not require a prior conviction for a criminal offence.

³¹ For confiscation of objects generated by or used for the commission or preparation of the offence (section 74 StGB) a criminal conviction of the offence is necessary. Therefore, the applicable standard of proof is also ‘beyond a reasonable doubt’.

In case of confiscation of proceeds of unknown origin, no defendant is identified. It is considered a form of *in rem* confiscation. Extended confiscation however requires the finding that the defendant has committed the offence that the object stems from, even though he has not been convicted of that offence. Such finding can hence be based on a civil standard of proof.

In Romanian law, criminal confiscation as governed by article 112 of the Romanian Criminal Code requires a conviction for a criminal offence. The standard of proof for this type of confiscation is therefore that of ‘beyond a reasonable doubt’. Extended confiscation as defined by article 112¹ CC requires that the court is ‘convinced’ of the illicit origin of the assets. The applicable standard of proof is however that of the balance of probabilities. The public prosecutor must prove that it is more likely that the assets originate from criminal activities (similar to the criminal offence that generated the conviction) than of a legal source. The Romanian Constitutional Court has in fact confirmed that the standard of proof of ‘beyond a reasonable doubt’ should not be used in this context.

The different confiscation options in Italian law also allow for different evidential regimes. If it concerns *traditional* confiscation, the court must indicate the link between the asset and the crime. This is different when it comes to *extended* confiscation. In that case, a possible disproportion between the value of the assets and the legal income of the defendant or his occupation gives rise to the presumption that the assets stem from a criminal origin. This presumption can be overcome if the defendant justifies the origins of these assets. In case law this is seen as a ‘burden of allegation’. Whereas the conviction for a criminal offence should be based on the regular standard of ‘beyond a reasonable doubt’, this decision concerning the origin of the assets is made on a standard that is lower than that.

The far-going *preventive* confiscation under Italian law can be imposed using several assumptions as well. These assumptions are applicable for both the subjective and the objective requirements described in § 2. As for the requirement that the defendants are ‘dangerous subjects’³², there must be ‘clues indicating a reasonable probability that the subject belongs to these categories of people’. Another requirement is the ‘social dangerousness’ of the defendant at the time of assuming ownership of the asset. It cannot be based on mere suspicions, but needs to be grounded on objectively identifiable conduct and clear circumstances.

The objective requirements relate to the assets, which must be available to the defendant and must be of an illegal origin. For both of these requirements, assumptions can be used. Any transfer or assignment of assets during two year prior to the proposal of the preventive measure involving family members, relatives, in-laws or permanent cohabitants can be assumed to be fictitious. The same assumption can be used for transfers and assignments that were performed free of charge or fiduciary. As for the origin of the assets, there must be ‘sufficient clues’ of an illegal source. One of such clues can be a disproportion between the value of the assets and the declared income of the defendant and his or her occupation. According to Italian case law, this standard of ‘sufficient clues’

³² People suspected of participating in mafia associations or associations devoted to the commission of serious crimes, or people who live off the commission of crimes, and the proceeds resulting from them.

is a lower degree of conviction than ‘beyond a reasonable doubt’.³³ This is hence the second place in Italian confiscation law where a lower standard of proof is applied.

Hence, this study shows that a civil law standard of proof (as is often used in confiscation regimes in Anglo-American legal systems³⁴) has also made an introduction in some of the confiscation legislations on the European mainland. When applying extended confiscation, where illegal assets are calculated on the basis of a disproportion between the value of assets and legal income, some legal systems allow for a civil law standard of proof to be applied. If the judge rules that it is more plausible that it concerns illegal assets than that the assets stem from a legal origin, he can decide to have them confiscated. For other systems, it is still under debate what the exact standard entails. Hence, future will tell whether this development will spread throughout Europe.

5. Time limits

In case the confiscation is issued in a regular criminal trial, no specific time limits are in place. This is always the case in France and Belgium and for some of the confiscation sanctions in the Netherlands and Romania.

The Italian confiscation options of extended confiscation and confiscation as a preventive measure are regulated by some specific time limits. For example, preventive *seizure* ceases to be effective if preventive *confiscation* is not ordered within a year and a half from the moment the judicial administrator gains the assets (art. 24, paragraph 2 Anti-mafia Code). If the decision is appealed, confiscation becomes ineffective if the Court of Appeal doesn’t rule within a year and a half from the moment the appeal is presented (art. 27, paragraph 6 Anti-mafia Code). The imposition of extended confiscation (see § 2) takes place without a hearing of the parties, unless one of them opposes the decision within 30 days of the announcement or notification of the decision.

As seen in § 2, the confiscation measure in Germany can be issued in both the regular criminal procedure and in a separate, postponed procedure. In the latter case, the court should decide on the confiscation within six months after the conviction has become final, although this rule is not strictly binding. German law also provides for a form of ‘independent’, non-conviction based confiscation. In that case, no specific time limits are in place. Similar to the possible postponed confiscation procedure in Germany, one of the confiscation sanctions in the Netherlands is imposed in a separate procedure. This procedure must be initiated within two years after the conviction in the criminal trial in first instance. The confiscation judgment must be passed within six weeks after the closing of the examination in court (this is two weeks for regular criminal trials), but there are no strict time limits within which this examination should be conducted.

In Romania, non-conviction based confiscation is imposed by means of a request by the public prosecutor in his decision to drop the charges or close the case. Then, the defendant can oppose the proposed confiscation in a public court procedure, by intervening in the procedure within 30 days. The procedure that follows is not limited by any strict time limits.

³³ It is however stated that none of these assumptions bring about an actual reversal of the burden of proof on the defendant. If the defendant is unable to meet the burden of allegation on the mentioned aspects, that fact has circumstantial value only.

³⁴ See for instance C. King, ‘Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau’, in: Ligeti & Simonato (eds.) 2017, p. 81-86.

In every instance, article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) must be respected, which dictates that the judgement must be given ‘within a reasonable time’. Given the results of the comparison of the six jurisdictions, this criterion often turns out to be the only criterion in place to govern the imposition of confiscation sanctions. In some countries (e.g. the Netherlands), the value of the confiscation order is, as a rule, mitigated in case this time limit is not met. None of the six country reports account of structural unreasonable delays of confiscation procedures.

6. Rights, guarantees and legal remedies

As § 4 has showed that many of the compared confiscation regimes allow for a system in which a strong burden lies on the defendant to substantiate his claim and, in some cases, for the application of a civil law standard of proof, the legal guarantees of the defendant are of particular importance. After all, the European Court of Human Rights has ruled that such confiscation systems are not inconsistent with the presumption of innocence, as long as the assumptions are used within reasonable limits that take into account the importance of what is at stake, and the rights of the defence are maintained. The practical possibilities that the defendant has to rebut the presumptions, and the safeguards offered to him are therefore essential.³⁵ Two specific safeguard aspects of confiscation law are investigated in the six country reports: the rights and guarantees of the defendant in the procedure in which the confiscation is imposed, and the legal remedies available to him in order to appeal the imposition of the confiscation.

Rights and guarantees

In France and Belgium, where the confiscation is imposed as a part of the criminal sentence, the full set of rights and guarantees of the criminal procedure apply to the imposition of the confiscation measure. This is the same for Germany, as long as it concerns confiscation measures addressed to the defendant (instead of *in rem*, non-conviction based confiscation). Under Dutch law two of the available confiscation sanctions are imposed in the regular criminal trial as well. Since a conviction is required for the imposition of both the confiscation order and the forfeiture, at least one offence must be proven in a procedure in which the defendant enjoyed all the regular rights and guarantees of the criminal procedure.

Dutch confiscation law however also provides for confiscation of assets that were not obtained from the facts for which the defendant has been convicted. Other offences can also be ground for confiscation. They are solely dealt with in the separate procedure in which the confiscation order (*ontnemingsmaatregel*) is imposed. In this procedure, most of the ‘regular’ rights and guarantees apply, but the legislature has made some alterations, most notably by declaring the rules concerning the use of evidence not applicable in confiscation procedures; the minimum evidential rules do not fully apply. The calculation of the obtained financial advantage can therefore be based on the statement of one witness only, whereas the *unus testis, nullus testis* rule applies in regular criminal procedures. Furthermore, courts can (as a result of case-law of the *Hoge Raad*)

³⁵ ECtHR 5 July 2001, appl.no. 41087/98 (Phillips v. United Kingdom) and ECtHR 23 September 2008, appl.nos. 15085/06 and 19955/05 (Grayson & Barnham v. United Kingdom). See already ECtHR 7 October 1988, appl.no. 10519/83 (Salabiaku v. France). See J. Boucht, ‘Civil asset forfeiture and the presumption of innocence under article 6(2) ECHR’, *New Journal of European Criminal Law* 2014, p. 252-255.

apply a higher threshold in ruling on request by the defendant to summon and hear witnesses and experts. In addition, the obligation to summon and hear witnesses who have made an incriminating statement but who have later altered that statement (if that statement is the only evidence directly linking the defendant to the offence), does not apply in confiscation cases. The defendant in this procedure hence holds a legal position that is less strong than the legal position of the defendant in the regular criminal trial.

Under Italian confiscation law, the applicable rights and guarantees vary depending on the type of confiscation. If the confiscation is applied following a conviction, the defendant will have enjoyed every guarantee offered to him in the regular criminal procedure. If it concerns *preventive* confiscation however, his rights are less guaranteed. Such confiscation is imposed by a specialized magistrate, who decides after a procedure that shows strong differences from the regular penal procedure. This is a simple procedure in which the rights and guarantees of the regular criminal procedure do not apply fully. The right to a defence council does apply, but this is not clear for – for instance – the right not to incriminate oneself.

Legal remedies

The six compared confiscation regimes all provide for the possibility to lodge an appeal against a confiscation decision.³⁶ Only when special procedures are in place, a special legal remedy is sometimes available. In Belgium, France and the Netherlands confiscation sanctions are part of a criminal sentence³⁷ and are therefore subjected the regular rules governing appeal proceedings. Some differences occur in the level of scrutiny exercised by the appeal and cassation courts. In Belgium for instance, the Court of Cassation in principle does not exert control on the imposed confiscation, since it deems it a question of sentencing that is supremely determined by the trial judge. This is different in the Netherlands, where the decisions confiscation order (*ontnemingsmaatregel*) is imposed by a separate judgement that is subject to the regular possibilities to lodge an appeal and appeal in cassation. The appeal here only targets the confiscation decision, and the confiscation decisions are under full control of the Dutch court in cassation (*Hoge Raad*).³⁸

Romanian confiscation orders are subject to the regular possibilities of appeal as well. The special ‘solution’ that can be applied in order to impose non-conviction based confiscation in case the public prosecutor decides to drop the charges or close the case (see § 3), is (within three days) subject to a complaint at the Preliminary Chamber Judge at the higher court. His or her decision on the matter is final.

As a rule, German confiscation law also offers the regular appeal possibilities, since the confiscation decision can be part of the criminal conviction or by means of a penal order (*Strafbefehl*). These different appeal options represent the regular legal remedies in the German legal system.³⁹ In case of a postponed and therefore separated

³⁶ Under Belgian confiscation law, the appeal judge can impose confiscation even when the judge in first instance has not order any confiscation.

³⁷ Even though the Dutch confiscation order (art. 36e CC) is imposed in a separate procedure, this procedure is regarded as a continuation of the criminal procedure.

³⁸ The court is bound by the decisions of the criminal court in the corresponding regular criminal trial.

³⁹ In the first case, the confiscation can be challenged on appeal on grounds of fact and/or law (*Berufung*) and on appeal on grounds of law only (*Revision*). If the confiscation is imposed by means of a penal order, it can be appealed by means of an objection (*Einspruch*).

confiscation procedure or an independent confiscation procedure, the court decision is given without a public hearing. It can be challenged by means of an immediate complaint (*sofortige Beschwerde*). The court may however, on request by the parties or *ex officio*, decide to hold a trial. In that case, the confiscation is imposed by judgement, which is open to the mentioned regular forms of appeal.

A similar division is in place in Italian confiscation law. Here, regular confiscation that is imposed with the criminal conviction can be appealed, both at the appellate court and the court of cassation. Furthermore, the enforcement procedure can be used to challenge the validity of the enforcement order. The possibilities to appeal a confiscation however diminish in case confiscation is imposed as a preventive measure. Such confiscation can only be appealed by means of a so-called ‘revocation’. When this remedy is applied, the confiscation can be rendered ineffective if the conditions for application of the confiscation are no longer valid. The formalities of this revocation are the same as those of revision of criminal final judgements. Therefore, revocation can only be applied when new decisive evidence is discovered after the proceedings, facts (ascertained with definitive penal judgements) arise or become known after the conclusion of the proceedings, the ruling was motivated exclusively or in a decisive manner on false documents, falsehood during the trial or events that pertain to crimes. The possibilities of ‘revocation’ are hence stricter than regular appeal options. A full reconsideration of the merits of the case is not provided for this form of (preventive) confiscation. He can however challenge the preventive confiscation measure before the Court of Cassation for ‘violation of the law’.

7. Conclusion

The type of procedure followed in order to impose a confiscation differs throughout and also within the six compared jurisdictions. Some of these differences are merely the result of the legal tradition of the specific country, whereas other differences are the result of developments specifically initiated in respect to confiscation and its promotion by the legislature. In several jurisdictions, confiscation is regarded as an instrument of particular importance, which therefore justifies specific legal provisions and procedures. This begs the question what can be learned from the previous evaluation of the six country reports. In my opinion, this analysis provides useful insight into the state-of-the-art in the six jurisdictions on some of the issues that are sometimes seen as problematic, most notably the issues relating to rights and guarantees and the standard of proof.

As for the rights and guarantees in place for defendants facing a possible confiscation, the picture is quite clear: whereas some countries have lowered the legal protection (e.g. the Netherlands, Italy), most of the compared jurisdictions have granted the defendant in the confiscation procedure the same rights and guarantees that apply in the criminal proceedings (France, Belgium and Germany).

A lower level of protection of the defendant is also visible on the issue of the standard of proof. As seen in § 1, this is an increasingly controversial matter in confiscation proceedings, also since EU instruments suggest this as an area where member states can make adjustments in order to enhance the effectivity of confiscation law. Generally speaking, confiscation procedures require an active rebuttal of the statement of public prosecutor by the defendant. This especially holds true when it concerns extended confiscation. In certain circumstances (for instance after a conviction

for certain offences) defendants are required to credibly assert and sometimes substantiate a legal origin of unexplainable assets.⁴⁰

In three of the compared legal systems, this has gone as far as to bring about a lower burden of proof than that of conviction ‘beyond a reasonable doubt’. In those cases, the court can order confiscation even though it is not as convinced of the illegal origin of assets as would be required to convict the defendant of a criminal offence. In two other systems (the Netherlands and Belgium), it is as of yet not fully crystalized whether a lower threshold is in place. Although the wording of the Dutch law (‘sufficient indications’) seems to imply that this is in fact the case, there is debate on this issue in academic literature.

Whether this development will spread to the other European jurisdictions, is hard to predict. In my opinion, it can be highly doubted whether national procedures governing the imposition of confiscation sanctions will be harmonized in the near future. Practically all of the compared confiscation procedures are developing, but only few of these *procedural* developments seem to be the direct result of European legislation. Procedural issues like these are usually strongly connected to the legal tradition of the country. This is in itself not problematic. Successful confiscation can be achieved by different means; it does not seem to be confined to a specific procedural design. And although questions relating to evidence (such as the burden and standard of proof) increasingly attract the interest of the European legislature (see § 1), the aspirations of the European legislation are at this moment still rather modest on this issue. Although it could be argued that this has the potential to undermine the effectiveness of confiscation procedures, there is no solid (empirical) proof of such a claim. For now, European law leaves the member states with enough discretion to make their own decisions on how to design their evidential rules in confiscation procedures.

⁴⁰ See also this volume on extended confiscation.