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Harmonisation - Extended confiscation: Council Framework Decision 2005/212/JHA

- The Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property is intended:
- “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 offense related to organized crime”.

The Framework Decision proposes three models of extended confiscation (Article 3) quite “consistent with guarantees”

- (a) where a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case (conviction; full belief of the court; proof of illicit origin; temporal connection);
- (b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case (conviction; full belief of the court; proof of illicit origin; temporal connection; similar nature of the criminal activity)
- (c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person (conviction; full belief of the court; proof of illicit origin; disproportionate value of the property).

requirements and safeguards

- **conviction** of the owner for listed serious offences connected to organised crime;
- **high standard of proof** (“where a national court based on specific facts is fully convinced”: the criminal standard, beyond every reasonable doubt, or, at least, clear and convincing evidence);
- **the demonstration of the illicit origin of the proceeds;**
- **temporal connection** (“has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable”);
- **the origin from similar criminal activities;**
- **the disproportionate value of the property**

“at least”

- **However, the expression “at least” used by the Framework Decision allows Member States to introduce more extended confiscation powers with fewer safeguards**
- **Some, in fact, of the confiscation models adopted in the MS are inconsistent with the Framework Decision provisions (it is possible to apply confiscation without conviction for a crime, temporal connection, the proof of the criminal origin...).**
- **It would have been better if the Framework decision had imposed some guarantees to improve mutual recognition.**

Directive n. 42/2014 - maximal legislative option: minimum rules

- Among the **several policy options** representing different degrees of EU level intervention, **Member States preferred the maximal legislative option, which would considerably enhance:**
- the **harmonisation of national rules on confiscation and enforcement,**
- in this direction the recital n. 5 insists that the Directive's aim is **“the adoption of minimum rules”**, which
- **“will approximate the Member States’ freezing and confiscation regimes,**
- **thus facilitating mutual trust and effective cross-border cooperation”**.

These common minimum rules concern:

- the confiscation of **proceeds** and **instrumentalities** of crime,
- including in cases of **illness** or **absconding** of the suspect or accused person, where criminal proceedings have already been initiated;
- confiscation of the **value**
- **extended** confiscation;
- **third party** confiscation.

Dir. 2014/42, Art.14 and recital 38: In the effort to achieve the difficult balance between efficiency and safeguards, it is stated:

- “This Directive respects the fundamental rights and observes the principles recognised by
- the Charter of Fundamental Rights of the European Union (‘the Charter’) and
- the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’), as interpreted in the case-law of the European Court of Human Rights.
- This Directive should be implemented in accordance with those rights and principles”.

Art. 4 confiscation

1. Member States shall take the necessary measures to enable the **confiscation**, either in whole or in part, of

- **instrumentalities and proceeds or**
- **property the value of which corresponds to such instrumentalities or proceeds,**
- **subject to a final conviction for a criminal offence,**
- **which may also result from proceedings in absentia.**

Article 2

Definitions

‘proceeds’ means

- **any economic advantage derived directly or indirectly from a criminal offence;**
- **it may consist of any form of property and**
- **includes any subsequent reinvestment or transformation of direct proceeds and**
- **any valuable benefits;**

Recital 11 (reinvestment/income or other benefits)

- There is a need to clarify the existing concept of proceeds of crime
- to include the **direct proceeds** from criminal activity and
- all **indirect benefits**, including
- subsequent **reinvestment or transformation** of direct proceeds.
- Thus proceeds can include any property including that which has been transformed or converted, fully or in part, **into other property**, and ..
- It can also include the **income or other benefits** derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.

Recital 14

- the concept of proceeds as defined in this Directive
- should be interpreted in the similar way
- as regards **criminal offences not covered by this Directive**
- “ Framework Decision 2001/500/JHA requires Member States to enable the **confiscation of instrumentalities and proceeds of crime following a final conviction** and to enable the **confiscation of property the value** of which corresponds to such instrumentalities and proceeds. **Such obligations should be maintained for the criminal offences not covered by this Directive**”

Art. 8 (10)

- Where, as a result of a criminal offence, **victims** have claims against the person who is subject to a confiscation measure provided for under this Directive,
- Member States shall take the necessary measures to ensure that
- the confiscation measure **does not prevent those victims from seeking compensation for their claims.**

gross or net profit

- In the Vienna Convention against drug trafficking of 1988,
 - in the Palermo Convention against organized crime of 2000 and
 - in the New York Convention against corruption of 2003
 - the term "proceeds" is used - proceeds, not profits - to refer to the object of confiscation.
 - According to these Conventions, goods obtained or derived directly or indirectly from the commission of a crime constitute proceeds.
 - It seems, as argued by some judges of the North American Supreme Court, that
 - the United Nations Conventions choose to attribute to the concept of product a **very broad meaning,**
- clearly aimed at adopting **the principle of gross profit.**

Conventions on laundering, search, seizure, confiscation of 1990 of Strasbourg (**explanatory report**)

- always uses the term "proceeds" and in
- "art. 1, a) "«proceeds» means any economic advantage deriving from crimes“
- it is established, in particular in the **explanatory report**, that in the notion of "economic advantage"
- **costs should not be taken into account**, while taking into account the variety of solutions national;
- “differences in national legislation or legal practice in this respect between parties should not be invoked as an obstacle to the international co-operation”.

saving

- Directive 2018/1673 includes tax offenses among the predicate offenses of money laundering and, therefore,
- implicitly the profit corresponding to the **tax evaded** and
- recalls a broad notion of proceeds of crime where in recital no. (13) specifies that
- "this Directive should not distinguish between situations in which the property derives directly from the criminal activity and situations in which it derives indirectly from the criminal activity, in line with the broad definition of 'proceeds' set out in Directive 2014/42/EU".
- Even if the Directive does not make any express reference to profit savings, which should fall within this definition of an asset that "derives indirectly from criminal activity".

Confication by equivalent

property the value of which corresponds to

- such instrumentalities or
- proceeds
-

'instrumentalities' means

- any property
- used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences
- the Directive provides for **the confiscation of the value of instrumentalities of crime,**
- which assumes an **unjustified punitive nature,** even in the absence of conviction.

Recital 14: Member States are free to define the confiscation of property of equivalent value as **subsidiary or alternative** to direct confiscation, as appropriate in accordance with national law.

- **subsidiary sanction** to direct confiscation, and therefore applicable only where, despite having ascertained the existence of the profit and its amount, it is no longer possible to subtract it directly;
- or as an **alternative measure**, a sort of autonomous confiscation that can also allow of targeting forms of profit that could not be subject to direct confiscation, such as, for example, immaterial profit or savings profit.

Third party confiscation

- is allowed only under specific conditions, i.e.
- where the acquiring third party paid an amount lower than market value and
- should have suspected that the assets are proceeds of crime,
- after an assessment showing that confiscation of assets directly from the person who transferred them is unlikely to succeed.

the rights of third party

- This rule introduces **two well-balanced and appreciable criteria to protect the rights of third party:**
- **bona fide and**
- **the payment of the market value (an appropriate price);**
- (such criteria are already used within some legal systems and have been introduced by CAFRA 2000)

four models of (extended) confiscation in the comparative survey

- In the comparative survey of current law systems it is possible to identify four models of confiscation intended to fight organised crime:
- the criminal penalty;
- confiscation based on the presumption of the illegal destination of the assets;
- confiscation of the suspected illicit proceeds, based on the assumption of the illegal source of the proceeds,
- and *actio in rem* (non-conviction based confiscation)

Extended
confiscation

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graph TD; A[Extended confiscation] --> B[CONFISCATION Penalty]; A --> C[Confiscation: presumption of illicit destination]; A --> D[Confiscation: presumption of illicit origin]; A --> E[Non-conviction based confiscation: actio in rem];
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CONFISCATION
Penalty

Confiscation:
presumption of
illicit destination

Confiscation:
presumption of
illicit origin

Non-conviction
based
confiscation:
actio in rem

I: The confiscation penalties

- These penalties allow confiscation of all or part of the property of a convicted person, irrespective of whether the assets are procured illegally or legally.
- the *Vermögensstrafe* (patrimonial sanction) in Germany, § 43a StGB
- the *confiscation générale* in France, which affects also the legal persons (Article 229-49 French Penal Code)
- Criminal forfeiture, United States

II : confiscation based on the presumption of the criminal destination of the assets

- belonging to the convicted person
- it is therefore possible to confiscate all the assets of the defendant **because of the suspicion of their availability for the criminal organization.**
- § 72 swStGB, - *Vermögenseinziehung*
- § 20b öStGB (*Erweiterter Verfall*)
- § 13 of the **British *Prevention of Terrorism (Temporary provisions) Act 1989*** (replaced by [Terrorism Act 2000](#), the [Prevention of Terrorism Act 2005](#) and the [Terrorism Act 2006](#); see also [Terrorism \(Northern Ireland\) Act 2006](#))

The **third** model of confiscation: extended confiscation

- can embrace a larger range of assets of the person convicted, because it is not necessary to ascertain the link between the crime and the proceeds, **the origin of the money from the crime.**
- The **presumption of the illegal origin** of the assets follows the conviction for some crimes;
- the **owner must give evidence of the legal origin of his assets.**

- **Erweiterter Einziehung (Verfall) § 73 a StGB (73d)**
- **Decomiso ampliado (art. 127 - Ley organica 2010 - Spain)**
- **Art. 240 bis Italian c.p. (art. 12 sexies d.l. 306/'92)**
- **British confiscation (Proceeds of Crime Act 2002 as amended)**
- **Erweiterter Verfall § 20b (2) ÖStGB**
- **comiso ampliado, § 7 Portuguese Law no. 5/2002,**
- **France, extended confiscation art. 131-21, § 5 Criminal Code (and general confiscation, § 6)**

double presumption

(reversal of the burden of proof?)

- I: conviction for even just one organised crime related offence leads one to suppose that the convicted individual has been engaged in crime on a continuous basis, i.e., **has been involved in the commission of crimes other than the one proved in the specific case.**
- II: **his assets derive from these crimes** (it is reasonable to suppose that **the assets of an individual convicted for an offence that the law deems to be connected to organised crime derive from prior unlawful activities**)

The Directive has adopted the third model

Art. 5: extended confiscation

- “Member *States* shall adopt the necessary measures to enable the *confiscation*, either in whole or in part, 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*”

The scope of the extended confiscation

- **the crimes listed in art. 3, corresponding to the crimes listed in Article 83(1) TFEU as set out in existing Union legislation**
- **other criminal activities not specifically listed in Article 83(1),**
- **where those activities are committed by participating in a criminal organization as defined in Framework Decision 2008/841/JHA on the fight against organised crime (art. 3, I).**

art. 3 of the Directive, last §

- The last paragraph of art. 3 of the Directive, amended by LIBE Commission (amendment n. 28), spreads out the definition of criminal offences covered by the Directive:

“as well as other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein” (art. 83, § 2 TFUE)

The scope: recital n. 20

- Moreover in the recital n. 20 the scope of the directive is extended not only to the
- offences committed in the context of organised crime (recitals n. 1 and 19), but also
- “with the intention of **generating regular profits** from criminal offences” (“habitually committed serious offences aimed at creating gain”).
-

Reinforced civil standard

- *“a court, on the basis of the circumstances of the case, including the specific facts and available evidence,.....*

- ***is satisfied that the property in question is derived from criminal conduct”:***

the expression ***“is satisfied”*** demands a **lower standard of the proof than the *“fully convinced”***, used in the Framework decision n. 212/2005, art. 3.

Recital n. 21 requires: “*is substantially more probable*, that the property in question has been obtained from criminal conduct than from other activities”

- “Extended confiscation should be possible **where a court is satisfied that the property in question is derived from criminal conduct.**
- This does not mean that it must be established that the property in question is derived from criminal conduct.
- **Member States** may provide that it could, for example,

be sufficient for the court to consider on the balance of probabilities, or to reasonably presume

- **that it *is substantially more probable*,**
- **that the property in question has been obtained from criminal conduct** than from other activities.
- In this context, the court has to consider the **specific circumstances of the case,**
- including **the facts and available evidence** based on which a decision on extended confiscation could be issued”.