

RECOVER PROJECT
“ESTABLISHING THE SUBJECT MATTER OF THE REGULATION”:
NATIONAL CONFISCATION MODELS COVERED BY THE REGULATION no.
1805/2018. TYPES, FEATURES AND SAFEGUARDS.

NATIONAL REPORT FOR GERMANY

1.- German Legal Confiscation System at a glance.

Germany did notify the Commission the timely transposition of the Directive 2014/42/EU into its national legal system by means of the Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung (Vermögensabschöpfungsgesetz) of 13th April 2017, getting into force on the 1st July 2017, amending the German Criminal Code (Strafgesetzbuch, hereinafter StGB) and the German Act on Regulatory Offences (Ordnungswidrigkeitengesetz, hereinafter OWiG). This implementation triggered relevant changes at national level in relation to several legal concepts. Namely as regards to non-conviction-based confiscation (hereinafter NCBC); extended confiscation and its scope of application; third-party confiscation; safeguards, etc.¹

The German substantive legal framework on confiscation is currently regulated in Section 73 to 76b of the StGB within Title VI of Book I (General Part), under the heading "Of the accessory consequences". In addition, Confiscation is also specifically provided in Section 29a of the OWiG.

Since the creation of the Criminal Code in 1871, the German system of asset recovery has been structured in principle according to criminal law and is carried out exclusively by the criminal justice system. Until 1975, only the confiscation of instrumentalities and objects of crime was provided for. In contrast, the profit from a criminal offence was to be skimmed off by imposing a fine that included the profit. This is still the system of administrative offences law today (Section 17(2) OWiG²). Since 1975, on the other hand, the fine under the StGB has been calculated solely according to the number of daily sentences based on guilt and the income of the convicted person, so that possible proceeds from the offence can no longer be added to this.

After the introduction of property confiscation in the form of confiscation of the value obtained from a criminal offence in section 73 of the Criminal Code in 1975, the basis of calculation was changed and expanded in 1992 within the Criminal law (for regulatory offences there the amount of the confiscation still is oriented at the net principle, Section 29a(3) OWiG) by the fact that since then the gross rather than the net principle has applied. This means that the object obtained or its value is confiscated in full even if the offender spent money to obtain it. As a rule, this is not deducted from the value to be confiscated. Even though, after this reform, many in German criminal law scholarship assumed that confiscation thus constituted a penalty, neither the legislature nor the Federal Constitutional Court saw it that way. Both assumed and still assume that confiscation of the entire value obtained, calculated according to the gross principle, does not constitute a penalty either, but rather a kind of skimming off of unjust enrichment, as provided for in civil law in Section 812 et seq. of the Civil Code (BGB). Sections 818(4) and 819(1) BGB provide that a person who knows that he has wrongfully obtained money cannot refuse to hand over the value if he has already spent it. The same idea is behind confiscation on the basis of the gross principle

¹ An informal translation of the relevant piece of substantive and procedural German legislation on confiscation is attached to this Report.

² Section 17(2): If the law threatens to impose a regulatory fine for intentional and negligent action without distinction as to the maximum regulatory fine, the maximum sanction for a negligent action shall not exceed half of the maximum regulatory fine imposable.

from the perspective of the legislator and the Federal Constitutional Court. Therefore, they also maintain that this confiscation of assets is not a penalty, but only a surrender of the unjust enrichment that the offender has obtained through a criminal offence.

With the 2017 Reform, there was an interesting change in the wording within the Laws on confiscation in Section 73 et seq. StGB. Until 2017, the German criminal law used the term “Verfall” for the confiscation of the proceeds under Section 73 et seq. StGB and the term “Einziehung” for the confiscation of the instrumentum sceleris, productum sceleris and obiectum sceleris under Section 74 et seq. StGB. Since no conceptual distinction was made between the two institutes in Directive 2014/42/EU and both German terms ultimately mean confiscation of objects or assets, the legislator has decided to now refer to both institutes uniformly as confiscation. However, the substantive differences between the two institutes have been retained. For example, confiscation under Section 73 et seq. StGB only requires an unlawful act, without the offender having to have acted culpably. In contrast, confiscation under Section 74 et seq. StGB continues to require culpable commission of the offense as well.

The denial of the punitive nature of confiscation by the legislature and the Federal Constitutional Court means that neither the prohibition of double punishment (*ne bis in idem*) nor the strict prohibition of retroactivity apply to confiscations. Therefore, confiscation may be ordered even after the person concerned has previously been convicted or acquitted of a criminal offence, for instance if he or she acted without guilt. With the reform of 2017, the legislator ordered that its confiscation of the obtained is also possible if the underlying crime had already taken place before the recast of Sections 73 et seq. StGB as of 1.7.2017, unless a decision on the confiscation of property had already been made by that date (Art. 316h EGStGB = Einführungsgesetz zum StGB; Act of the Introduction of the Criminal Code). At the end of 2020, the possibility of retroactivity for confiscation after tax evasion was further extended (Art. 316j EGStGB).

In two judgements in 2021 and 2022, the Federal Constitutional Court ruled that this was a genuine retroactive effect, which, however, could not be measured against the prohibition of retroactivity under criminal law due to the lack of a punitive nature of the confiscation.³ Although the general prohibition of retroactivity is affected, the overriding importance of the confiscation of criminally obtained assets justifies this encroachment on the legal position of the owner.

Nevertheless, the nature of confiscation as a criminal sanction regulated by criminal law and enforced by the criminal justice system means that confiscation proceedings are initiated by the public prosecutor's office and conducted before the criminal courts in accordance with criminal procedural law. Therefore, the rules of evidence to be applied in criminal proceedings also formally apply, and not the changes in the burden of proof provided for in civil procedure law. Therefore, the state must always prove that the conditions for confiscation exist. The burden of proof for this cannot be shifted to the person concerned.

³ BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 07. April 2022 - 2 BvR 2194/21 -, Rn. 1-95.

"The main argumentation line of BVerfG in both cases was that both Art. 316h and 316j EGStGB do introduce a retroactive effecting of legal consequences („real“ retroactivity), which is in principle impermissible under constitutional law (Art. 20 para. 3 GG). It is, however, acknowledged in the constitutional jurisprudence that there is an exception and the „real“ retroactivity is permissible and compatible with the GG when there are overriding interests of the common good (*überragende Belange des Gemeinwohls*) that take precedence over the principle of legal certainty (*Prinzip der Rechtssicherheit*) and the protection of legitimate expectations of the person (*Grundsatz des Vertrauensschutzes*).

Such an aim of overriding importance is the one mentioned by the German legislator in the relevant explanatory memorandums of both Art. 316h and 316j EGStGB, namely that crime does not pay. Aim of the legislator with the criminal asset confiscation laws is to eliminate the – lasting up to the present and usually on a large scale – disruptions to the assets order resulting from criminal activities such as organised crime or tax evasion, making both offenders and legal community realise that an accumulation of illegally obtained assets will not be recognised by the legal order and thus cannot enjoy any permanence. "

(BVerfGE 156, 354-415, **Rn. 151**; BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 07. April 2022 - 2 BvR 2194/21 -, **Rn. 83-84**).

The illegal assets acquisition and its persistent tainting justifies the not worthy protection of the affected person's reliance on the maintenance of dishonestly acquired rights (*das Vertrauen in den Fortbestand unredlich erworbener Rechte grundsätzlich nicht schutzwürdig ist*).

BVerfGE 156, 354-415, **Rn. 161**; BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 07. April 2022 - 2 BvR 2194/21 -, **Rn. 91**.

Also, the criminal judge must be convinced that the legal conditions for confiscation exist. It is not enough for him to consider it more likely that they are present than that they are not.

Until the 2017 reform, confiscation of the proceeds of a crime in criminal proceedings was severely limited by the fact that the priority was to enforce the right of the victim of the crime to compensation for damages. As a result, confiscation occurred at all in only a portion of criminal offences. With the 2017 reform, the legislature fundamentally changed this. Now, the state can also confiscate the value obtained through a crime if there is a claim by the victim for damages due to the crime (e.g., the victim of a fraud is entitled to repayment of money; until 2017, this claim preceded a confiscation). Only if the victim has already enforced his or her claim for damages against the offender and has therefore recovered his or her money is confiscation of what has been obtained precluded (Section 73c(1) StGB).

After the state has confiscated the assets obtained from the offender as a result of his crime, it returns them to the victims of the crime insofar as they can assert a claim to them. If the victims' total claims for damages exceed the amount of money that could be confiscated from the offender, the confiscated amount is paid to each victim on a pro rata basis.

In general terms, the German legal regime of confiscation can be summarized as follows:

1.a.- Direct confiscation (Section 73⁴ and 74⁵ StGB)

Direct confiscation refers to a judicial order concerning property or other values related to a specific crime. It is not necessary, that the perpetrator or the participants have been convicted for that crime. Rather, it is sufficient that they have committed an unlawful act, even if this was not culpable and therefore a guilty verdict must be ruled out. There is no restriction of confiscation to certain criminal offences. It is therefore possible in the case of both intent and negligence if the offender has obtained something from the act.

Until 2017, the confiscation of crime proceeds from offenders and participants was not restricted by a catalog of underlying crimes, but it was precisely subordinate to the claims of victims of the crime, so that confiscation often did not take place. Today, confiscation of the proceeds of crime is mandatory for all offences under the Criminal Code and outside of it. Theoretically, it must therefore be examined in every criminal case whether the perpetrator or pure participant has obtained an asset from the charged crime. This must then be confiscated. This does not mean that in every criminal case the confiscation of assets is actually ordered. However, if the court is convinced that the offender has obtained something from the criminal act, this must be confiscated.

Something obtained is any increase in the economic value of property that has accrued to the perpetrator or participant. This does not necessarily have to be a thing or a right. A de facto, economically beneficial position of possession is also sufficient. In view of the aforementioned bread and butter principle, expenses incurred by the perpetrator in obtaining this asset may not be deducted. If the offender or participant has derived any benefits from the proceeds, the court also orders the confiscation of the

⁴ Section 73: Confiscation of proceeds of crime from offenders and participants

(1) If the offender or participant has obtained anything by or for an unlawful act, the court orders the confiscation of that which was obtained.

(2) If the offender or participant has derived any benefits from the proceeds, the court also orders the confiscation of the benefits.

(3) The court may also order confiscation of objects which the offender or participant has obtained

1. by way of sale of the object obtained or as compensation for its destruction, damage or confiscation or
2. on the basis of a right obtained.

⁵ Section 74: Confiscation of products of crime, means of crime or objects of crime from offenders and participants

(1) Objects arising from the commission of an intentional offence (products of crime) or used in its commission or preparation or designated for such commission or preparation (means of crime) may be confiscated.

(2) Objects relating to an offence (objects of crime) are subject to confiscation pursuant to specific provisions.

(3) The confiscation is admissible only if, at the time of the decision, the offender or participant owns the object or is entitled to it. This also applies to confiscation which is prescribed or available under a specific provision beyond subsection (1).

benefits (Section 73(2) StGB). Furthermore, as part of the direct confiscation of the proceeds of a crime, the criminal court may also order confiscation of objects which the offender or participant has obtained by way of sale of the object obtained or as compensation for its destruction, damage or confiscation or on the basis of a right obtained (Section 73(3) StGB).

The scope of the assets to be confiscated was expanded somewhat in 2017. Until then, only assets obtained "aus der Tat" were subject to confiscation. Today, assets obtained "durch die Tat" are sufficient. This is also intended to implement Art. 2 No. 1 and Art. 4(1) of the Directive 2014/42/EU. Accordingly, cash withdrawn with a checking card is also obtained if the checking card was previously obtained by deception. Finally, what the perpetrator or a participant has obtained "for the act" is also confiscated, i.e. any remuneration. If a participant initially obtains everything and then wants to divide it among the accomplices, the full amount can be confiscated from him.

If the conditions of Section 74 StGB are met, the products of crime (*productum sceleris*), the means of crime (*instrument sceleris*) or the objects of crime (*obiectum sceleris*) may be confiscated. Unlike confiscation of proceeds under Section 73 StGB, this confiscation is not mandatory; thus, the court has discretion. In addition, confiscation under Section 74 StGB is limited to intentional crimes, which must also be culpable. Therefore, case law affirms a punitive character with regard to this confiscation of products of crime, means of crime or objects of crime. In some cases, the same object may be subject to confiscation of both the proceeds of an offence under Section 73 StGB and the product of the offence under Section 74(1) StGB. In such a case, the court must consider in each case whether the requirements of one or the other provision can be fully affirmed. If the conditions for confiscation under Section 73 StGB are also affirmed, the confiscation of the object in question must be ordered, even if this is left to the discretion of the court for the confiscation of the product of the offence under Section 74(1) StGB.

1.b.- Confiscation of the value (Section 73c⁶, 73d⁷, 74c⁸ StGB; Section 29a OWiG⁹)

⁶ Section 73c: Confiscation of value of proceeds of crime

If the confiscation of a particular object is impossible due to the nature of that which was obtained or for some other reason or because confiscation of a surrogate object has not been ordered as required by section 73 (3) or section 73b (3), the court orders the confiscation of a sum of money equal to the value of that which was obtained. The court also makes such an order in addition to confiscating an object to the extent that its value falls short of the value of that which was originally obtained.

⁷ Section 73d: Calculation of value of obtained object; estimate

(1) When calculating the value of an object obtained, any expenditure on the part of the offender, participant or the other person is to be deducted. An amount spent or used in the commission or preparation of the unlawful act is not deducted, however, unless it was used to comply with an obligation against the injured party.

(2) The scope and value of that which was obtained and the amount which is to be deducted may be estimated.

⁸ Section 74c: Confiscation of value of products of crime, means and resources used, and objects of crime from offenders and participants

(1) If it is impossible to confiscate a particular object because the offender or participant has sold or used up the object or frustrated its confiscation in some other way, the court may order the confiscation of an amount of money from the offender or participant which is equivalent to the value of the object.

(2) The court may also issue such an order in addition to or instead of the confiscation of an object if the offender or participant has encumbered said object, prior to the decision as to the confiscation having been handed down, with the right of a third party, the expiry of which cannot be ordered or cannot be ordered without compensation being made (section 74b (2) and (3) and section 75 (2)). If the court issues such an order in addition to the confiscation, the amount of the equivalent sum of money is determined based on the value of the encumbrance on the object.

(3) The value of the object and of the encumbrance may be estimated.

⁹ Section 29a: Confiscation of the Value of the Proceeds of an Offence

(1) If the perpetrator has gained something by means of or for an act which may be sanctioned by a regulatory fine, and if a regulatory fine has not been assessed against him for the act, the confiscation of a sum up to the amount of the pecuniary advantage gained may be ordered.

(2) The ordering of the confiscation of a sum up to the amount stated in subsection 1 may be directed against another party who is not the offender if

1. he has obtained something by means of an act which may be sanctioned by a regulatory fine and the offender acted for him,
2. what has been acquired
 - a) was transferred to him free of charge or without lawful reason, or
 - b) was transferred, and he recognised or should have recognised that what has been acquired originates from an act which may be sanctioned by a regulatory fine, or
3. what has been acquired
 - a) has passed to him as an inheritance, or
 - b) was transferred to him as a person entitled to a compulsory portion or a legatee.

Value confiscation refers to a confiscation measure targeting property of equivalent value to the proceeds or instrumentality of a crime. It is applicable most often in cases where criminals transform proceeds of crime into other property in order to hide its illicit origin and camouflage any audit trail. In case of impossibility of direct confiscation (because it is not possible to trace them, they are out of reach of the courts, they have been destroyed, their value has decreased or for any other circumstance) assets are confiscated in an amount that corresponds to their value, adding the profits obtained with them.

Value confiscation is also provided for in cases where the value of the confiscated property is lower than the value of the goods, effects, or profits at the time of acquisition. Even if they are of legitimate origin.

If an initially obtained thing is no longer in the offender's property, the value of the thing is confiscated (Section 73c StGB). If the thing obtained can still be confiscated, but its value falls short of the originally obtained increase in property value, compensation for the value of the thing can be confiscated in addition to the thing. The value to be confiscated may be estimated by the court (Section 73d(2) and 74c(3) StGB; Section 29a(4) OWiG).

The value confiscation is mandatory as a consequence of the unjustified wrongdoing of the perpetrator or the participant, which fulfilled the requirements of a criminal offence.

If the unjustified wrongdoing is a regulatory offence only, the value confiscation is not mandatory. If the perpetrator has gained something by means of or for an act which may be sanctioned by a regulatory fine, and if a regulatory fine has not been assessed against him for the act, the confiscation of a sum up to the amount of the pecuniary advantage gained may be ordered (Section 29a(1) OWiG).

If the confiscation of products of crime, means and resources used, and objects of crime from offenders and participants on the basis of Section 74 StGB is impossible, because the offender or participant has sold or used up the object or frustrated its confiscation in some other way, the court may order the confiscation of an amount of money from the offender or participant which is equivalent to the value of the object (Section 74c(1) StGB). The court may also issue such an order in addition to or instead of the confiscation of an object if the offender or participant has encumbered said object, prior to the decision as to the confiscation having been handed down, with the right of a third party, the expiry of which cannot be ordered or cannot be ordered without compensation being made (Section 74c(2)). The requirements for confiscation under Section 74 StGB (see 1.a) must also be met here, i.e. the perpetrator or participant must have culpably committed an intentional criminal act. As under Section 29a(1) OWiG, these two decisions are also left to the discretion of the court.

1.c.- Non-conviction-based confiscation -NCBC- or “autonomous/independent confiscation” (Section 76a StGB)¹⁰

The first sentence numbers 2 and 3 shall not apply if what has been acquired was previously transferred to a third party who did not recognise or could not be expected to recognise that what has been acquired originates from an act which may be sanctioned by a regulatory fine, for a fee and with a lawful reason.

(3) The expenditure of the offender or of the third party shall be deducted when determining the value of what has been acquired. What was expended or used for the commission of the offence or its preparation shall however not be allowed.

(4) The extent and value of what has been acquired, including the deductible expenditure, may be estimated. Section 18 shall apply *mutatis mutandis*.

(5) If no regulatory fining proceedings are initiated against the perpetrator, or if they are discontinued, confiscation may be ordered in its own right.

¹⁰ Section 76a: Independent confiscation

(1) If it is impossible to prosecute or convict a specific person for a criminal offence, the court independently orders that the object be confiscated or rendered unusable, provided that, in all other respects, the conditions under which the measure is prescribed by law are met. If confiscation is permissible, the court may independently order it subject to the conditions of sentence 1. Confiscation is not ordered if there is no request to prosecute, authorisation to prosecute or request to prosecute from a foreign state, or if a decision with regard to said confiscation has already been taken and become final.

(2) Under the conditions of Sections 73, 73b and 73c, it is even permissible for the court to independently order the confiscation of the proceeds of crime and to independently confiscate the value of the proceeds of crime in those cases in which the prosecution of the offence has become barred by the statute of limitations. Under the conditions of Sections 74b and 74d, the same applies to instances in which the court independently orders confiscation of a dangerous object, confiscation of materialised content or rendering unusable.

Non-conviction-based confiscation refers to a confiscation measure taken in the absence of a criminal conviction. Directive 2014/42/EU covers cases where a criminal conviction is not possible because the suspect has become ill or fled the jurisdiction, but the court is nevertheless convinced in a criminal procedure that the assets are of criminal origin, and a conviction would have been reached had it not been for the illness or the absconding of the defendant. So, confiscation is also possible in cases where the initiated criminal proceedings could not move forward, and no conviction can be handed down. Under the German legal system NCBC is provided in Section 76a(1)-(3) StGB when the prosecution or conviction of a particular person is not possible.

In addition, pursuant to Section 76a(4) StGB, since 2017 it has also been possible to confiscate an item seized on suspicion of an underlying criminal offence. In this respect, these are not criminal proceedings in the true sense of the term, but rather proceedings against the item ("in rem"), which are, however, conducted before a criminal court on the basis of criminal law in accordance with the rules of criminal procedure law; thus, these are precisely not confiscation proceedings under civil law. However, this only applies if the suspicion related to one of the crimes explicitly listed in the list of offences in Section 76a(4) of the Criminal Code. These are typically serious organized crime offences.

So, in Germany NCBC is possible for the confiscation of the proceeds of all criminal offences due to:

- ✓ the persistent illness or death of the perpetrator
- ✓ absconding or fleeing of the investigated person (Section 76a(1) StGB),

(3) Subsection (1) is also to be applied if the court dispenses with imposing a penalty or if the proceedings are terminated based on a legal provision which allows this to be done at the discretion of the public prosecution office or of the court, or as they may decide by mutual consent.

(4) An object seized on suspicion that one of the offences referred to in sentence 3 has been committed, and any uses made thereof, are, as a rule, to be separately confiscated even in those cases in which the object derives from an unlawful act and it is impossible to prosecute or convict the person affected by the confiscation for the underlying offence. If the confiscation of an object is ordered, ownership of the property or the right to it devolves to the state once the order becomes final; section 75 (3) applies accordingly.

Offences for the purposes of sentence 1 are

1. under this Code:

- a) preparing a serious violent offence endangering the state under section 89a and financing terrorism under section 89c (1) to (4),
- b) forming criminal organisations under section 129 (1) and forming terrorist organisations under section 129a (1), (2), (4) and (5), in each case also in conjunction with section 129b (1),
- c) pimping under section 181a (1), also in conjunction with (3),
- d) dissemination, procurement and possession of child pornographic content in the cases under section 184b (2),
- e) human trafficking, forced prostitution and forced labour on a commercial basis and by a gang under sections 232 to 232b as well as human trafficking organised by a gang for the purpose of exploitation of labour and exploitation involving deprivation of liberty under sections 233 and 233a,
- f) money laundering under section 261 (1) and (2);

2. under the Fiscal Code (*Abgabenordnung*):

- a) tax evasion subject to the conditions of section 370 (3) no. 5,
- b) smuggling on a commercial basis, with the use of violence or as a gang under section 373,
- c) receiving, holding or selling goods obtained by tax evasion in the case under section 374 (2);

3. under the Asylum Act (*Asylgesetz*):

- a) incitement to submit fraudulent applications for asylum under section 84 (3),
- b) incitement, on a commercial basis or by a gang, to submit fraudulent applications for asylum under section 84a;

4. under the Residence Act (*Aufenthaltsgesetz*):

- a) smuggling of foreigners into the federal territory under section 96 (2),
- b) smuggling of foreigners into the federal territory resulting in death as well as smuggling on a commercial basis and by a gang under section 97;

5. under the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*):

intentional offences under sections 17 and 18;

6. under the Narcotics Act:

- a) offences as defined by a provision included by reference in section 29 (3) sentence 2 no. 1, subject to the conditions set out therein,
- b) offences under section 29a, section 30 (1) nos. 1, 2 and 4 as well as sections 30a and 30b;

7. under the War Weapons Control Act (*Gesetz über die Kontrolle von Kriegswaffen*):

- a) offences under section 19 (1) to (3) and section 20 (1) and (2) as well as section 20a (1) to (3), in each case also in conjunction with section 21,
- b) offences under section 22a (1) to (3);

8. under the Weapons Act (*Waffengesetz*):

- a) offences under section 51 (1) to (3),
- b) offences under section 52 (1) no. 1 and no. 2 (c) and (d) as well as (5) and (6).

- ✓ when the prosecution has become barred by statute of limitations (Section 76a(2) StGB) and
- ✓ any other exemption from liability or extinction of criminal liability.

Furthermore, after the death of the accused person, their heir can be subject of a third-party confiscation (Section 73b(1) No. 3 StGB).

The procedural framework is mainly covered by the special provisions governing independent confiscation proceedings, as they are laid down in the Section 437 of the German Code of Criminal Procedure (Strafprozeßordnung – StPO).¹¹ It is necessary to clarify that the indications of illegal acquisition of an object mentioned therein are not rules of evidence, the existence of which would require an NCBC to be ordered. They are only intended to provide the court with a guideline. If the judge is not convinced of the illegal origin of an object despite the presence of all three explicitly mentioned aspects, he must refuse its NCBC. If, on the other hand, he is convinced of it, although none of the three explicitly mentioned situations are present, he must, of course, justify the NCBC particularly well. However, he may also order it in this case. The principle of free judicial assessment of evidence (*Grundsatz der freien richterlichen Beweiswürdigung* – Section 261 StPO) is respected.

The German law enables confiscation without a prior conviction in those given cases and it is noteworthy that NCBC is mandatory under the German legal system.

1.d.- Extended confiscation (Section 73a¹² StGB)

Extended confiscation concerns orders which go beyond the direct proceeds of a given investigated offence. The order follows a criminal conviction, targeting property “beyond the direct (and concrete) proceeds of the crime for which the offender was convicted, where the property seized is derived from criminal conduct.” A direct link between the property and the offence, such as in the case of standard confiscation measures, is not needed if the court assesses that the offender’s property was derived from another unlawful conduct. Therefore, extended confiscation enables deprivation of property belonging to a convicted person when the circumstances of the case indicate that the property is derived from criminal conduct.

Until 2017, extended confiscation was only possible in relation to certain crimes typically attributable to organized crime. In the meantime, extended confiscation must be considered for all criminal offences. If the court is convinced that the requirements are met, the order is mandatory.

Under the German legal system, the court must ‘decide, based on well-founded objective evidence’ that the property derives from illegal activities. After taking evidence, the court must be convinced of the origin of the objects to be confiscated from other crimes than those charged. In this regard, the circumstances set forth in Section 437 StPO for the NCBC (Section 76a(4) StGB) shall also be given particular weight for the affirmation of an extended confiscation of proceeds of crime.

This powerful type of confiscation is intended to cover cases in which, based on well-founded objective evidence, it is determined that certain goods or effects come from a previous criminal activity, but their

¹¹ Section 437: Special provisions governing independent confiscation proceedings

When giving its decision on independent confiscation pursuant to section 76a (4) of the Criminal Code, the court may, in particular, base its conviction as to whether the object was derived from an unlawful act on the gross imbalance between the value of the object and the legitimate income of the person concerned. It may also take the following into account when reaching its decision:

1. the outcome of the investigations into the offence giving rise to the proceedings,
2. the circumstances under which the object was found and secured, and
3. the person concerned’s other personal and economic circumstances.

¹² Section 73a: Extended confiscation of proceeds of crime from offenders and participants

- (1) If an unlawful act has been committed, the court orders the confiscation of objects belonging to the offender or participant even in those cases in which the objects were obtained by other unlawful acts or for such acts.
- (2) If the offender or participant participated in some other unlawful act prior to the confiscation having been ordered in accordance with subsection (1) and if a new decision is to be taken regarding the confiscation of objects belonging to the offender or participant, the court takes account of the order which has already been issued.

specific legal origin is not determined. The factors to be particularly assessed by the court are the following (see Section 437 StPO):

- The disproportion between the value of the given goods/financial situation and lifestyle with the lawful income of the convicted person.
- The outcome of the investigations into the offence giving rise to the proceedings.
- The circumstances under which the object was found and secured.
- The person concerned's other personal and economic circumstances.

1.e.- Third-party Confiscation (Section 73b StGB¹³, Section 29a(2) OWiG¹⁴)

Third-party confiscation refers to a confiscation measure made to deprive someone other than the offender – the third party – of criminal property, where that third party is in possession of property transferred to him or her by the offender. It is used most often when criminals transfer property to a knowing third party to maintain its enjoyment without being the legal owner, thus attempting to avoid the confiscation of such property in case of conviction.

It should be noted for Germany that legal entities cannot be charged with a criminal offence. If a natural person has obtained something for a company as the perpetrator of a criminal offence (e.g. corruption), a third party confiscation must be carried out against the company in order to recover the proceeds. On the other hand, companies can be the addressees of fines under the Act on Regulatory Offences (OWiG), so that the fine imposed on a company under Section 17 OWiG can be increased by the amount of money to be recovered. Similarly, direct confiscation of value may be ordered against a company pursuant to Section 29a(1) OWiG. However, Section 29a(2) OWiG also provides for third party confiscation against natural and legal persons. Since the reform of 2017, the same requirements apply in principle to this as to criminal third-party confiscation under Section 73b StGB.

In Germany, third party confiscation was already permitted before the 2017 reform. However, its prerequisites were not regulated, which is why case law established various constellations for third

¹³ Section 73b: Confiscation of proceeds of crime from other persons

(1) The order of confiscation referred to in sections 73 and 73a is made against another person who is not the offender or participant if

1. that person has obtained something by committing the offence and the offender or participant acted on said person's behalf,
2. the object so obtained
 - a) was transferred to that person free of charge or without legal reason or
 - b) was transferred to that person and said person recognised, or ought to have recognised, that the object obtained was derived from an unlawful act or
3. the object so obtained
 - a) has devolved to that person in the capacity as heir or
 - b) has been transferred to that person in the capacity as a party entitled to the compulsory portion in an estate or as a beneficiary under a will.

Sentence 1 nos. 2 and 3 has no application if the object obtained was previously transferred, for a fee and on the basis of a legal reason, to a third party who did not recognise or did not have reason to recognise that the object obtained was derived from an unlawful act.

(2) If, subject to the conditions of subsection (1) sentence 1 no. 2 or 3, the other party obtains an object which is equivalent in value to the object obtained or benefits which have been derived from such object, the court orders their confiscation as well.

(3) Subject to the conditions of subsection (1) sentence 1 no. 2 or 3, the court may also order the confiscation of whatever was obtained

1. by way of sale of the object obtained or as compensation for its destruction, damage or confiscation or
2. on the basis of a right obtained.

¹⁴ Section 29a(2): The ordering of the confiscation of a sum up to the amount stated in subsection 1 may be directed against another party who is not the offender if

1. he has obtained something by means of an act which may be sanctioned by a regulatory fine and the offender acted for him,
2. what has been acquired
 - a) was transferred to him free of charge or without lawful reason, or
 - b) was transferred, and he recognised or should have recognised that what has been acquired originates from an act which may be sanctioned by a regulatory fine, or
3. what has been acquired
 - a) has passed to him as an inheritance, or
 - b) was transferred to him as a person entitled to a compulsory portion or a legatee.

The first sentence numbers 2 and 3 shall not apply if what has been acquired was previously transferred to a third party who did not recognise or could not be expected to recognise that what has been acquired originates from an act which may be sanctioned by a regulatory fine, for a fee and with a lawful reason.

party confiscation in landmark decisions. The legislator then explicitly included these constellations in Section 73b(1) No. 1-3 StGB. The same requirements apply to third party confiscation under the law on administrative fines pursuant to Section 29a(2) No. 1-3 OWiG.

The three cases are:

- The offender or participant has obtained something by committing the offence and the offender or participant acted on said person's behalf Section 73b(1) No. 1 StGB).
- The object so obtained was either transferred to that person free of charge or without legal reason or it was transferred to that person and said person recognised, or ought to have recognised, that the object obtained was derived from an unlawful act or (Section 73b(1) No. 2 StGB)
- The object so obtained has either devolved to that person in the capacity as heir or it has been transferred to that person in the capacity as a party entitled to the compulsory portion in an estate or as a beneficiary under a will (Section 73b(1) No. 3 StGB).

Confiscation of products of crime, means of crime or objects of crime from other persons is also possible under the conditions of Section 74a StGB¹⁵.

1.f.- Pre-trial precautionary measures: freezing of assets.

To prevent the destruction, transformation, removal, transfer, or disposal of property with a view to its eventual confiscation, a freezing order can be issued in the pre-trial stage.

The procedure for this in Germany is governed by Section 111b - 111q of the Code of Criminal Procedure. The court decides on the application of the public prosecutor. In doing so, it basically has a free discretion, i.e. it does not have to seize the asset. Only if there are urgent reasons for ordering the confiscation of the asset at the end of the proceedings, the court shall confiscate the asset. This does not mean that the object must be seized under these conditions. However, as a rule, the object will be confiscated unless, exceptionally, good reasons can be given against it.

Until the 2017 reform, such a seizure of assets was possible for a maximum of one year, so that afterwards - if there were no criminal proceedings or confiscation proceedings - the asset had to be returned to the owner. Since 2017, this time limit has been dropped (Section 111b(1) StPO¹⁶), so that today it is also possible to seize assets for longer than one year. This applies even if there are no urgent reasons for assuming that the asset will subsequently be confiscated. This is very problematic because without a maximum period and without relatively strict requirements, a seizure based solely on mere suspicion can in fact last indefinitely. This clearly violates the fundamental rights of the owner to his property (Art. 17 EU Charter of Fundamental Rights; Art. 1st Additional Protocol to the European Convention on Human Rights (ECHR)), which is in fact seized from him without a legally binding confiscation order, and to a fair trial and an effective legal remedy (Art. 47 EU Charter

¹⁵ Section 74a: Confiscation of products of crime, means of crime or objects of crime from other persons

Where a statute refers to this provision, objects may also be confiscated in derogation from Section 74 (3) if, at the time of the decision, the person who owns them or has a right to them

1. contributed at least recklessly to the objects being used as the means of crime or if they were the object of crime or
2. acquired the objects in a reprehensible manner in the full knowledge of the circumstances which would have allowed for their confiscation.

¹⁶ Section 111b: Seizure to secure confiscation or rendering unusable of object

(1) If it is reasonable to assume that the conditions for the confiscation or rendering unusable of an object are met, the object may be seized to secure enforcement. If there are cogent reasons justifying this assumption, such seizure is, as a rule, to be ordered. Section 94 (3) remains unaffected.

(2) Sections 102 to 110 apply accordingly.

of Fundamental Rights; Art. 6 and 13 ECHR), as it is enshrined in Art. 8(1) of the Directive 2014/42/EU.

2. For each model of confiscation, which is the object of the confiscation and its meaning/interpretation?

2.a.- Direct confiscation is mandatory in relation to the following categories of properties, whose also apply to NCBC (Section 73 et seq. StGB); it is not mandatory for the *productum sceleris*, the *instrumentum sceleris* and the *obiectum sceleris* according to Section 74 StGB.

- 1) Goods/property of any type derived directly from a criminal offence
- 2) Goods, means, or instrumentalities intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences
- 3) Proceeds of crime whatever are the changes they may have undergone, saved expenses or opportunities for use

2.b.- Confiscation of the value (Section 73c StGB: mandatory; Section 74c StGB and Section 29a OWiG: not mandatory) only refers to properties and proceeds. This means, instrumentalities are excluded.

2.c.- Extended confiscation basing on Section 73a StGB refers to objects only (that is, in contrast to direct confiscation under Section 73 StGB, no saved expenses or opportunities for use).

2.d.- Third-party confiscation basing on Section 73b StGB refers to properties and proceeds. For instrumentalities, there is a possibility to confiscate them in Section 74a StGB¹⁷.

2.e.- Pre-trial Freezing (Section 111b StPO) is applicable in any case of a possible subsequent confiscation. Section 111b StPO refers to goods, means, instruments and profits in its first section, goods, and effects in the second section and goods, instruments and profits in the third one.

3.- Which is the (material) scope of its introduction?

3.a.- Direct confiscation.

Germany follows the ‘all crimes’-approach. It covers confiscation related to criminal offences covered by Directive 2014/42/EU, as well as confiscation related to other criminal offences. The criminal offences covered by this StGB provision should therefore not be limited to particularly serious crimes that have a cross-border dimension (Article 82 of the TFEU).

This also apply to third-party confiscation and pre-trial freezing.

3.b.- Confiscation of the value.

Legally speaking the scope of value confiscation is the same as direct confiscation. In this respect, the wording of Section 73c(1) StGB is very clear: “If the confiscation of a particular object is impossible due to the nature of that which was obtained or for some other reason or because confiscation of a surrogate object has not been ordered as required by section 73(3) or section 73b(3), the court orders the confiscation of a sum of money equal to the value of that which was obtained.”. It is the same with Section 74c StGB according to the confiscation of the value of products of crime, means and resources used, and objects of crime from offenders and participants.

3.c.- Extended confiscation.

¹⁷ Section 74a: Confiscation of products of crime, means of crime or objects of crime from other persons

Where a statute refers to this provision, objects may also be confiscated in derogation from section 74 (3) if, at the time of the decision, the person who owns them or has a right to them

1. contributed at least recklessly to the objects being used as the means of crime or if they were the object of crime or
2. acquired the objects in a reprehensible manner in the full knowledge of the circumstances which would have allowed for their confiscation.

Since 2017, extended confiscation in Germany has been provided for all crimes, not just the Euro-crimes listed in Directive 2012/42/EU.

4.- Which are the elements to be realized and/or to be assessed for its application?

4.a.- Direct confiscation.

According to Section 73 StGB, a conviction of the offender or participant for the alleged crime is not necessary. It is sufficient but necessary, that the offender or participant has fulfilled with his or her wrongdoing all requirements of a criminal offence under German law without a justifying reason. It does not matter, whether the criminal offence is basing on intent or negligence. Furthermore, there must be a link between the illegal wrongdoing and the proceed of it.

4.b.- Confiscation of equivalent value.

The requirement for the application of the confiscation of the value is the impossibility to confiscate the assets referred to in Section 73 StGB, that is, the impossibility of seizing the property and assign it to the State. The causes of this impossibility may differ. Section 73c StGB expressly refers to the nature on of the goods but subsequently also mentions “any other circumstances”. In addition, a confiscation of the value is possible, if the confiscation of a surrogate object has not been ordered as required by Section 73(3) or Section 73b(3) StGB.

If the conditions of Section 74c StGB¹⁸ are met, the confiscation of value of products of crime, means and resources used, and objects of crime from offenders and participants is also possible.

Finally, confiscation of the value implies the need of an estimation of the goods (Section 73d, 74c(3) StGB; Section 29a(4) OWiG).

4.c.- Non conviction-based confiscation (NCBC).

Decomposing Section 76a(4) StGB the following application requirements emerge in time sequence:

1. The initiation of criminal preliminary proceedings (*Ermittlungsverfahren* or *Anlassverfahren* – Section 160 StPO) under the suspicion of the commission of one of the listed serious crimes under Art. 76a para. 4 sent. 3 StGB, which derive from the wide area of terrorism and organised crime and are in essence profit-oriented. This is the so called “linking offence” (*Anknüpfungstat*) and in contrast with the extended confiscation of Art. 73a StGB should not be proven *in concreto*. No conviction for a crime is therefore obligatory. Instead an initial suspicion (*Anfangsverdacht*) under Section 152(2) StPO for one of the listed crimes suffices.

2. The asset seizure (*Sicherstellung* – Section 111b StPO) for one of the listed linking offences.

3. The prosecution or conviction of the suspect/through the seizure affected person is not possible and therefore the termination of the subjective criminal preliminary proceedings follows. Thus, it comes to the opening of the independent NCBC proceedings. The prosecution should submit a request, stating its suspicion for the illegal origin of the assets. Such a suspicion can be based on any, not further identifiable, so called “origin offence” (*Erwerbstat*). The main novelty in comparison with all other new confiscation forms is that neither the linking offence nor the origin offence should be established under

¹⁸ Section 74c: Confiscation of value of products of crime, means and resources used, and objects of crime from offenders and participants

(1) If it is impossible to confiscate a particular object because the offender or participant has sold or used up the object or frustrated its confiscation in some other way, the court may order the confiscation of an amount of money from the offender or participant which is equivalent to the value of the object.

(2) The court may also issue such an order in addition to or instead of the confiscation of an object if the offender or participant has encumbered said object, prior to the decision as to the confiscation having been handed down, with the right of a third party, the expiry of which cannot be ordered or cannot be ordered without compensation being made (section 74b (2) and (3) and section 75 (2)). If the court issues such an order in addition to the confiscation, the amount of the equivalent sum of money is determined based on the value of the encumbrance on the object.

(3) The value of the object and of the encumbrance may be estimated.

the criminal level of proof (no need to prove the concrete offences). No overstretched proof requirements are needed (*keine überspannte Anforderungen*), hence the term “genuine NCBC”. A casual link (*berriühren*) however between assets and origin offence should exist in order to establish the illegal origin. This link can also be established with the help of various indicators (Section 437 StPO).

4. The court, in order to proceed to the NCBC order, should be fully convinced of the illegal origin of the assets, namely that the assets originate from any criminal offence (origin offence). In order to facilitate the judge, the German legislator has already provided for some criteria/indicators which support the illegal origin of the assets. These criteria were no epiphany of the German legislator but derive from the former jurisprudence on the extended confiscation and the Directive 2014/42/EU. The standard of proof should be the one “beyond any reasonable doubt” and the court judgment should be based on an overall evaluation of the circumstances of the case with the help of the indicators.

5. The German NCBC should, moreover, not be time-barred under Section 76b StGB. An autonomous 30-year limitation period was also inserted with the 2017 Reform Act and the new law also covers cases before its enforcement, if the proceedings have already been started by there not yet existing a final decision of the Court on the issue.

Additionally, the following aspects shall be evaluated, among others (Section 437 StPO):

- The disproportion between the value of the given goods/financial situation and lifestyle with the lawful income of the convicted person.
- The outcome of the investigations into the offence giving rise to the proceedings.
- The circumstances under which the object was found and secured.
- The person concerned’s other personal and economic circumstances.

4.d.- Extended confiscation.

The note that truly characterizes this modality of confiscation is that the affected goods do not come from the crime that is prosecuted, but from the criminal activity of the investigated person. Therefore, the accreditation of a cause-effect relationship between the prosecuted crime and the good is not needed. However, it is necessary that the court is convinced that the perpetrator has also obtained these objects by his criminal act. The circumstantial evidence mentioned in Section 437 StPO for ordering a NCBC may also apply here.

So, we need:

- a) A decision of the court on the confiscation basing on Section 73 StGB.
- b) Confiscation based on well-founded objective evidence, proving that the goods or assets were obtained through criminal activity.

Additionally, the following aspects shall be evaluated, among others:

- The disproportion between the value of the given goods/financial situation and lifestyle with the lawful income of the convicted person.
- The outcome of the investigations into the offence giving rise to the proceedings.
- The circumstances under which the object was found and secured.
- The person concerned’s other personal and economic circumstances.

4.e.- Extended confiscation from a previous continued criminal activity.

There is no difference to the extended confiscation as laid down under 4.d.

4.f.- Third-party confiscation.

According to Section 73b StGB and Section 29a(2) OWiG, following criteria should be met:

5.- Which is the legal nature?

Traditionally, the confiscation in Germany is of a criminal nature. Nevertheless, the confiscation of proceeds according to Section 73 et seq. StGB is not an additional penalty. It should be seen as a criminal sanction *sui generis* basing on the similar ideas as the unjustified enrichment, as it is enshrined on the field of private law in Section 812 et seq. BGB. The leading principle for the confiscation in criminal law is the idea that crime does not pay. Against that background, even the NCBC is of a very criminal nature, regulated in the criminal code and executed by the criminal justice bodies on the basis of the criminal procedure law.

With the confiscation of the products of crime, means of crime or objects of crime from offenders and participants according to Section 74 et seq. StGB it is different. That confiscation is basing on the guilt of the offender. Therefore, most of the German scholars and courts see a similarity to a criminal penalty.

5.a.- Direct confiscation and confiscation of the value.

Direct confiscation of goods, properties, means, effects, or instrumentalities is an accessory consequence of an illegal wrongdoing. A conviction of the wrongdoer is not necessary, because the confiscation is even possible, if the wrongdoer did not act with personal guilt, i.e. with criminal intent or negligence.

Confiscation does not appear in the catalogue of penalties within Section 38 et seq. StGB - though it has a clear punitive component - nor within security measures provided under Section 61 et seq. StGB, despite of it is sometimes based on the danger of recidivism. In addition, it is not civil liability either, because it is possible to confiscate assets whose value does not serve to compensate the victim. Therefore, the confiscation under German criminal law is seen as a third category together with penalties and security measures, shaping confiscation as a type of criminal sanction *sui generis* to avoid unjustified enrichment for the offenders (crime does not pay).

Because confiscation under Section 73 StGB also requires only the existence of an unlawful act of the offender or a participant, but not a conviction of the offender or the participant for it, the ordering of confiscation does not necessarily mean that the person concerned is actually guilty. On the contrary, direct confiscation may be ordered even if the offender has not acted culpably. Therefore, the ordering of confiscation under German law is not a violation of the presumption of innocence.

5.b.- NCBC.

The German legislator in the explanatory memorandum of the 2017 Reform Act gives a common answer to the legal nature of all kinds of criminal asset confiscation regulated in Section 73 et seq. StGB. It repeatedly refers to the non-criminal but restitutive nature of the measure (*quasi-konditioneller (bereicherungsrechtlicher) Charakter der Vermögensabschöpfung*). Its exclusive function is the restoration of the *status quo ante*, the reallocation of the assets in the legal sphere, the restitution to either the State or the victim. It is after all a criminal law institute similar to the civil law instrument of “unjust enrichment” (*ungerechtfertigte Bereicherung* – Section 812 et seq. BGB).

At a doctrinal level the opinions differ, and the issue of the legal nature of the German NCBC is not considered definitively resolved. Part of the doctrine argues, following the logic of the German legislator, that the German NCBC has no criminal character, as it is a procedure against the assets (*ad rem*) and not against a person. It is considered therefore not a penalty but a criminal measure *sui generis* with a character similar to unjust enrichment. Others support the criminal character of the measure, seeing under the Reform Act 2017 a “strengthening” of the already since 1992 applicable “gross principle” (*Bruttoprinzip*). A pure gross principle would mean that all assets without deduction of the expenses for generating illegal profits fall under confiscation. And this would reasonably attribute to the confiscation a punitive surplus.

With the 2017 Reform Act follows, however, a new calculation form of the assets under confiscation, namely a two-stage control under Section 73 StGB in conjunction with Section 73d StGB. First, all assets obtained are taken into account and, in a second, step the deduction of the costs for their acquisition follows, excluding all those consciously made illegal expenses, namely the one for the preparation or commission of a crime. A “concretisation and mitigation” of the gross principle takes place under the new confiscation regime and therefore does not anymore support the previous reasoning about the criminal nature of the criminal asset confiscation.

In the German jurisprudence both the Federal Court of Justice (*Bundesgerichtshof* – BGH)¹⁹ and the BVerfG share the view of the legislator that the criminal asset confiscation has not a punitive but a restitutive nature. The BVerfG had already ruled in its fundamental decision from 2004 based on a grammatical, systematical, and historical interpretation that the previous extended confiscation form (known as *erweiterter Verfall* – Section 73d StGB a.F. = old version) did not have any punitive or quasi-punitive character. Aim of this confiscation form was not to inflict any harm to those affected by the confiscation person, but simply to correct the irregular asset allocations (*vermögensordnende und normstabilisierende Ziele*). Moreover, the Court held the “gross principle” in line with the restitutive nature of the confiscation considering the approximation to the civil logic of the unjust enrichment (Section 817(2) BGB)²⁰.

In its recent decision from 2021²¹, the BVerfG confirmed with an *obiter dictum* that the criminal asset confiscation is not an additional punishment (*Nebenstrafe*) subject to the principle of individual culpability, but a measure (Section 11(1) No. 8 StGB) *sui generis* with restitution-like character (*Maßnahme eigener Art mit kondiktionsähnlichem Charakter*). The aims of prevention (*präventiv-ordnenden Charakter*) and restoration (*Opferentschädigung*) support the previous main function.

One can therefore conclude, in a complexity reduction attempt, that legislation, jurisprudence and the major part of the theory agree on the non-criminal nature of all forms of the German criminal asset confiscation (Section 73 et seq. StGB).

5.c.- Extended confiscation.

After the introduction of the possibility of extended confiscation in 1992, there were discussions among legal scholars as to whether this was compatible with the principle of guilt, because the mere finding of assets that could have come from other crimes would have been sufficient according to the wording of the norm. In response, the Federal Supreme Court ruled that the judge must be convinced not only of the offense underlying the direct confiscation, but also of the origin of the other assets from other offenses. The rules of evidence established for this purpose in case law were explicitly adopted by the legislature in 2017 in Section 437 StPO for NCBC. However, they can and should continue to be relevant for the judge's conviction of the criminal origin of assets in the context of an extended confiscation.

The situation also changed in 2017 because, until then, extended confiscation was only provided for a catalog of offenses oriented toward organized crime. Particularly in the case of typical organized crime offenses involving the proceeds of property (e.g., drug trafficking), it was obvious that, in addition to the assets stemming from the one offense, other cash in particular was suspected of stemming from drug transactions if there was no good other explanation for its acquisition.

With the deletion of this list of offenses from Section 73a StGB and thus the reference to organized crime, such a presumption is no longer so obvious in practice today. Merely because a perpetrator or participant has obtained something from some crime does not necessarily mean that he has also obtained other assets typically from crimes. Therefore, especially in the case of established criminal offenses that do not typically belong to organized crime (e.g., one-time fraud or theft), the court today must examine

¹⁹BGH, NJW 2019, 1891, 1892, Rn. 42 considers Art. 103 para. 2 GG not applicable because of the non-criminal character of the criminal asset confiscation under Art. 73 et seq. StGB.

²⁰BVerfGE 110, 1 - 33, Rn. 60 et seq.

²¹BVerfG, Beschluss des Zweiten Senats vom 10. Februar 2021 - 2 BvL 8/19 - BVerfGE 156, 354-415, Rn. 1-163. See also Press Release No. 20/2021 of 05 March 2021 available in English.

very carefully whether the circumstances as formulated in Section 437 StPO are actually sufficient to convince the court that the person concerned also acquired his other assets in a criminal manner.

The burden of proof for the illegality of the origin of the values still lies on State, i.e. the Public Prosecutor and the Criminal Court. The provisions in Section 437 StPO, which established in statute the previous case law on extended confiscation for NCBC, now apply *mutatis mutandis* to the court's decision to order extended confiscation. Specifically, this means:

Additionally, the following aspects shall be evaluated, among others:

- The disproportion between the value of the given goods/financial situation and lifestyle with the lawful income of the convicted person.
- The outcome of the investigations into the offence giving rise to the proceedings.
- The circumstances under which the object was found and secured.
- The person concerned's other personal and economic circumstances.

5.d.- Third-party confiscation.

The confiscation action against the third party is of criminal nature as well.

6.- For each model of confiscation, which is the procedure for its application?

The Procedure for confiscation and asset seizure is regulated in Section 421 - 443 StPO.

6.a.- Direct confiscation, confiscation of value and extended confiscation.

The judicial authority responsible for carrying out the criminal investigations in its first stages is the Public Prosecutor. Some measures, such as seizure or freezing of assets, are not under the remit of competences of the prosecutors and can only be allowed by the Investigating Judge as provided in Section 111b StPO.

Direct confiscation, extended confiscation and confiscation of value pursuant to Sections 73, 73a and 73c of the Criminal Code are ordered by means of a judgment, which may, but need not, be combined with a criminal judgment against the offender or participant. Thus, on the one hand, even without a criminal conviction, the court may order such confiscation if, according to the court's conviction, the person concerned committed the criminal act (even if he cannot be convicted for it). On the other hand, confiscation can also be ordered in subsequent proceedings if the outcome of the criminal proceedings against the offender is awaited first and a separate decision on confiscation is then taken only after the conclusion of these proceedings.

After the order of confiscation of an object under Section 73 or 74 StGB, the conditions of Section 73c or 74c StGB arise, so that the value of the object can no longer be confiscated at all or can only be confiscated in part, Section 76 StGB²² also provides for the subsequent order of confiscation of the value of the object. Additionally, all instruments and proceeds of crime must be confiscated whenever there is a final decision of the court on the confiscation.

Insofar as there are civil claims by the victims of the underlying crimes that have not yet been met, the state must meet these from the seized assets. However, if the civil claims of the victims of the crimes have expired prior to the order of confiscation, e.g. through fulfillment or settlement (this does not apply to statute of limitations of the claims), confiscation can no longer be ordered in this respect pursuant to

²² Section 76: Subsequent order for confiscation of equivalent sum of money

If an order for the confiscation of an object is inadequate or unenforceable on account of one of the conditions of section 73c or 74c having arisen or becoming known after the order was made, the court may subsequently order confiscation of the equivalent sum of money.

Section 73e(1) StGB²³. If it is not sufficient for this purpose, as in insolvency proceedings, each victim is paid a share of the amount claimed (for details, see Section 111i StPO²⁴).

Upon the opening of the main proceedings, a party to confiscation proceedings has the same rights as a defendant, unless otherwise provided by this statute (Section 427(1) StPO).

6.c.- Third-party confiscation.

A third-party confiscation may be ordered both in a criminal proceeding against the accused offender or participant in the underlying offense and thereafter in a stand-alone proceeding against the third party. If the confiscation order is made against a person who is not an accused, the court orders that said person become a party to the confiscation aspect of the criminal proceedings (party to confiscation proceedings (*Einziehungsbeteiligter*), Section 424(1) StPO).

6.d.- Freezing early confiscation.

The Procedure for confiscation and asset seizure is regulated in Section 111b – 111q and 443 StPO.

7.- Safeguards.

7.a.- Direct and extended confiscation, NCBC and third-party confiscation.

Proportionality clause (Section 74f StGB²⁵) allows the relevant judicial authority to decide on the proportionality of the confiscation of products, instruments and objects on the basis of Section 74 et seq. StGB only (not on the basis of Section 73 et seq. StGB as well). If the civil compensation owed to the victim has been fully satisfied, a confiscation of the same value is impossible (Section 73e StGB).

7.b.- NCBC. In these cases, the law provides for specific safeguards:

²³ Section 73e: Preclusion of confiscation of proceeds of crime or of equivalent sum of money

(1) Confiscation under the terms of Sections 73 to 73c is precluded inasmuch as the injured party's claim to the return of the object obtained or compensation of the sum of money equal to the value of the object obtained to which the injured party is entitled as a consequence of the offence has expired. This does not apply to claims which have lapsed under the statute of limitations.

(2) In the cases under Section 73b, also in conjunction with Section 73c, confiscation is also precluded inasmuch as the value of the object obtained no longer forms part of the assets of the person affected at the time the order is issued, unless the person affected was aware or recklessly unaware at the time at which unjust enrichment ceased to be given of the circumstances which otherwise would have allowed the confiscation to be ordered against the offender or participant.

²⁴ Section 111i: Insolvency proceedings

(1) If every person has become entitled, by virtue of the offence, to claim the sum of money equal to the value of that which was obtained and if insolvency proceedings have been opened against the debtor's assets, the security interest referred to in section 111h (1) in respect of the object or the proceeds generated by its realisation expires as soon as it forms part of the insolvency estate. The security interest does not expire in respect of objects located in a state in which the opening of the insolvency proceedings is not recognised. Sentences 1 and 2 apply accordingly to a lien in respect of the security deposited pursuant to section 111g (1).

(2) If there are several entitled persons within the meaning of subsection (1) sentence 1 and either the value of the object secured by means of enforcing the asset seizure or the proceeds generated by its realisation are not sufficient to satisfy their claims, then the public prosecution office files a request to open insolvency proceedings against the debtor's assets. The public prosecution office does not file such a request to open insolvency proceedings if there is justified reason to doubt that the insolvency proceedings will be opened on the basis of such request.

(3) If a surplus remains following the final distribution, the state acquires a lien up to the amount of the attached assets over the debtor's claim to surrender of such surplus. The insolvency administrator surrenders the amount of the surplus to the public prosecution office.

²⁵ Section 74f: Principle of proportionality

(1) If confiscation is not prescribed, it may not be ordered in the cases under Sections 74 and 74a if it would be disproportionate to the act committed and the blameworthiness of the person affected by the confiscation. In the cases under Sections 74 to 74b and 74d, the court reserves the confiscation if its purpose can also be attained by means of a less incisive measure. Consideration is, in particular, to be given to instructions

1. to render the objects unusable,
2. to remove particular fittings or distinguishing marks from or to modify the objects by other means or
3. to dispose of the objects in a specific manner.

If the instructions are complied with, the reservation of the confiscation is revoked; otherwise, the court subsequently orders the confiscation. If confiscation is not otherwise prescribed, it may be limited to a part of the objects.

(2) In cases of rendering unusable under the terms of Section 74d (1) sentence 2 and (3), subsection (1) sentences 2 and 3 applies accordingly.

If all application requirements of Section 76a(4) StGB are present, the decision on confiscation is at the discretion of the court, although as a rule confiscation must take place and may only be dispensed with in exceptional cases to avoid disproportionate confiscation orders (KG, Beschluss vom 30. September 2020 – 4 Ws 46/20 – 161 AR 97/20, NZWiSt 2021, 74).

7.c.- Third-party confiscation.

As regards to Third-party confiscation the StGB establishes specific safeguards:

The person who may be affected by the confiscation may take part in the criminal proceedings once their intervention is ordered, although this intervention will be limited to such aspects as directly affect their assets, rights or legal position and may not be extended to matters relating to the criminal liability of the accused.

The third party affected by the confiscation will be summoned.

The person affected by the confiscation will be summoned to court in accordance with the provisions of this Act. The summons will indicate that the trial may be held in their absence and that it may, at any event, decide on the confiscation sought.

The person affected by the confiscation may act through their legal representative at the trial, without it being necessary for them to be physically present at it.

Non-appearance of the person affected by the confiscation will not prevent the trial from continuing.

The appeals provided for in this law may be lodged against the judgment.

8.- Is the trial *in absentia* possible in your legal system to apply the confiscation?

If a party to confiscation proceedings fails to appear at the main hearing despite having been properly notified of the date of the hearing, the main hearing may be conducted in his or her absence; section 235 does not apply. The same applies if the party to confiscation proceedings leaves the main hearing or does not return once the interrupted main hearing is resumed (Section 430(1) StPO).

9.- Constitutional and human-rights principles for each model of confiscation and main judgments passed regarding them.

9.a.- Non-retroactivity principle.

Although in Germany all confiscations under Sections 73 et seq., 76a StGB are criminal in nature, the prohibition of retroactivity does not apply due to the special provision in Articles 316h²⁶ and 316j²⁷ EGStGB. Rather, the right of confiscation introduced in 2017 also applies to cases in which the offense underlying the confiscation took place before the reform came into force. The Federal Constitutional

²⁶ Art 316h: Transitional Provision to the Act on the Reform of Criminal Asset Forfeiture

If a decision is made on the order to confiscate the proceeds of an offense or the value of the proceeds of an offense for an offense committed before 1. July 2017, is decided after that date, notwithstanding Section 2(5) of the Criminal Code, Sections 73 to 73c, 75(1) and (3) and Sections 73d, 73e, 76, 76a, 76b and 78(1) sentence 2 of the Criminal Code, as amended by the Criminal Asset Recovery Reform Act of 13 April 2017 (Federal Law Gazette I p. 872), shall apply. The provisions of the Criminal Asset Forfeiture Reform Act of April 13, 2017 (Federal Law Gazette I p. 872) shall not apply in proceedings in which a decision ordering the forfeiture or forfeiture of value has already been issued by July 1, 2017.

²⁷ Art 316j: Transitional Provision to the Annual Tax Act 2020

If a decision on ordering the confiscation of the proceeds of an offence or the value of the proceeds of an offence for an offence committed before 29 December 2020 is made after that date, notwithstanding section 2(5) of the Criminal Code, the second sentence of section 73e(1) of the Criminal Code, as in force on 29 December 2020, shall apply if

1. it is an offence committed under the conditions specified in Section 370 (3) sentence 2 number 1 of the Fiscal Code, or
2. the extinction within the meaning of Section 73e (1) sentence 2 of the Criminal Code occurred after July 1, 2020 due to the statute of limitations pursuant to Section 47 of the Fiscal Code, or
3. the extinction within the meaning of Section 73e (1) sentence 2 of the Criminal Code occurred after December 29, 2020.

Court has declared this retroactive effect to be constitutional. Although it was a retroactive encroachment on the owners' fundamental right to property, it did not violate Article 103(2) of the Basic Law (Grundgesetz), which states the general prohibition "nullum crimen, nulla poena sine lege" in the absence of a punitive character of the confiscation. However, the general prohibition of genuine retroactivity was justified in this case because the confiscation of criminally obtained assets was of particular importance in view of the principle that "crime does not pay". (BVerfGE 156, 354 = NJW 2021, 1222).

Confiscations under Section 74 et seq. StGB have a quasi-criminal character. The prohibition of retroactivity has always applied to them pursuant to Section 2(5) StGB.²⁸

9.b.- Right to a fair trial.

The concerned person has effective remedies against the decision of the court on the confiscation. A problem is the lack of effectiveness of remedies against the freezing decisions in the pre-trial stage.

9.c.- Presumption of innocence.

Because confiscation according to Section 73 et seq. StGB (not according to Section 74 et seq. StGB) is not a penalty under German law and is not based on the guilt of an offender, the presumption of innocence does not apply to it.

9.d.- *Ne bis in idem* principle.

As the legislator and the Federal Constitutional Court have denied the criminal nature of confiscation under Section 73 et seq. StGB, the *ne bis in idem* principle does not apply. Therefore, even after a confiscation order has been issued under Section 75 StGB, a confiscation order may still be issued subsequently.

Berlin, 1 May 2023.

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²⁸ Section 2: Temporal application

(1) The penalty and any incidental legal consequences are determined by the law which is in force at the time of the act.
(2) If the threatened penalty is amended during the commission of the act, the law which is in force at the time the act is completed is to be applied.
(3) If the law in force at the time of the completion of the act is amended before judgment, the most lenient law is to be applied.
(4) A law which was intended to be in force only for a determinate time is, as a rule, still to be applied to acts committed whilst it was in force even after it ceases to be in force. This does not apply to the extent that a law provides otherwise.
(5) Subsections (1) to (4) apply accordingly to the confiscation and rendering unusable of objects.