

National confiscation models (covered by the EU Regulation no. 1805/2018) and proposals of harmonization: a new directive – National Report for Germany

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I. Some preliminary remarks

**II. The German confiscation model
of today in general**

Section 17 § 4 of the Act of Regulatory Offences (OWiG) states as follows:

(4) The regulatory fine shall exceed the financial benefit that the perpetrator has obtained from commission of the regulatory offence. If the statutory maximum does not suffice for that purpose, it may be exceeded.

The German confiscation model in the StGB builds up on two pillars:

- The first pillar of the confiscation of incriminated values according to the leading principle „crime doesn't pay“ in section 73 et seq. and 76a;

- The second pillar in sec. 74 et seq., contents the confiscation of the means used to commit a criminal act (the tools for a theft), the products made by a criminal act (instrumentum sceleris resp. productum sceleris) or the objects relating to an criminal offence (obiectum sceleris)

Section 74 StGB

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.

For the purposes of the Regulation (EU) 1805/2018, only the first pillar is of interest. On that background, the German legislator states in the reasoning to the Implementation Act of the Regulation (EU) 1805/2018 as follows:

„For outgoing requests, all forms of confiscation under sections 73 et seq. of the Criminal Code (StGB) are covered by the Regulation on Seizure and Confiscation - including independent confiscation under section 76a StGB, extended confiscation under section 73a StGB and confiscation from third-party beneficiaries under section 73b StGB.“

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Section 73 StGB

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.

Section 73c StGB

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.

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.

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.

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.

(3) § 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: [...]*

From the German point of view, the Regulatory Offences, which are no part of the criminal law in a narrow sense, - nevertheless - are part of the criminal law in a wider sense.

From a German perspective, the following applies according to the explanatory memorandum of the Act on International Mutual Assistance in Criminal Matters (IRG):

„According to recital 13, the term "proceedings in criminal matters" is an autonomous concept of Union law as interpreted by the European Court of Justice (ECJ). The Freezing and Confiscation Regulation covers all types of freezing and confiscation orders issued in the context of or following proceedings relating to a criminal offence - it is thus also applicable to orders not covered by Directive 2014/42/EU. In particular, it also covers non-conviction based confiscations, provided that they were preceded by proceedings in connection with a criminal offence and were issued by a judicial authority competent in criminal matters.

Therefore, the legislator states in Section 96e § 2 of the Act of International Mutual Assistance in Criminal Matters, that confiscation orders basing on the Act of Regulatory Offences could be object to the mutual recognition in compliance with the Regulation 1805/2018

Section 96e IRG

Outgoing requests

(2) Where an administrative authority competent as regards the prosecution of regulatory offences within the meaning of Article 2 (8) (a) (ii) of the Freezing and Confiscation Regulation has submitted a request for recognition and enforcement of a freezing order in the context of proceedings on a regulatory offence, then, before being transmitted to the requested Member State, the request is to be submitted to the competent public prosecution office for validation.

Section 29a OWiG

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.

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

III. Procedural Aspect

The German legislators makes a difference between the incoming and outgoing freezing requests. For the incoming requests sec. 96b § 1 of the Act of International Mutual Assistance in Criminal Matters (IRG) states as follows:

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It is for the local court with jurisdiction under section 67 (3) to give a decision on the recognition and enforcement of incoming freezing orders; section 51 (2) sentence 3 applies accordingly. Where a freezing order is transmitted simultaneously with a confiscation order, it is for the regional court with jurisdiction under section 50 sentence 1 and section 51 to give the decision.

For outgoing requests the relevant provision is located in sec. 96e IRG:

(1) It is for the public prosecution office to issue and transmit requests for recognition and enforcement of freezing orders or confiscation orders to another Member State.

This applies subject to Article 2 (8) (a) (ii) sentence 3 of the Freezing and Confiscation Regulation.

IV. Statistic Remarks

**Thank you very much for your
attendance!**