

“Confiscation models covered by the Regulation 2018/1805: National report for Spain”

RECOVER

Mutual recognition of freezing and confiscation orders between efficiency and the rule of law



FISCALÍA GENERAL DEL ESTADO

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I.- RENEWED CRIMINAL PRIORITY

- Serious and OC crimes remains a major security threat globally and at EU level
- **How tackle effectively OC?** Financial gain is the main motivation and revenues generated by OC are substantial: **Focus on the proceeds of crime.**

Speaking in military terms, we have to attack directly the “*enemy logistics*” cutting off their supplies, instead of concentrating efforts on “*individual casualties*”.

CRIME DOES NOT PAY

A FULL SIZE 52 PAGE MAG—NO SKIMPING!

DEC.,
NO. 82
10¢

CRIME

1949

AUTHORIZED
A. C. M. P.

DOES NOT PAY

CONFORMS
to the
COMICS
CODE

LEV GLEASON, PUBLISHER · CHARLES BIRO AND BOB WOOD, EDITORS

**ALL
TRUE**
CRIME
ILLUSTORIES

IT'S A
FIGHT TO
THE FINISH,
MEN! GIVE 'EM
ALL YOU'VE
GOT!

THE
ORIGINAL
NOW BETTER
THAN
EVER!

DON'T
LET THEM
TAKE COVER,
BOYS! KEEP
THEM OUT
IN THE OPEN!

BANG!



CHARLES
BIRO

NYC
I.B.R.
45



CHESAPEAKE
&
RAVEN R.R. Co.

LEV GLEASON
PUBLICATIONS

in this
issue:

"DEATH IN
THE HOBO
JUNGLE!"

"THE CASE OF
THE THURSDAY
BURGLARS!"

"THE SAVAGE
HOUSEBOAT
MOB!"

"WHO DUNNIT?"
CAN YOU SOLVE
THE LANGLEY
MURDER CASE?

and many
other
features!

EU STRATEGY

Proceeds of
Organised
Crime:
Ensuring that
*"crime does
not pay"*.

/*

COM/2008/0
766 final */

III. - EU legal framework

E-V-T-Z-A-T-S-B-C-S

Directive 2014

F-A-C-D-S-M-O-O-T-P

Regulation 2018

C-Z-A-G-R-O

Decision 2007

Two-fold EU harmonization approach:

1st .- Substantive law level

- Directive 2014/42/EU covers both freezing and confiscation of instrumentalities and proceeds of crime in the EU.
- It replaced the 1998 Joint Action 98/699/JHA and, in part, FD 2001/500/JHA and FD 2005/212/JHA (extended confiscation in relation to 6 EU offences when committed in the framework of a CO and terrorism-related,...)

2nd.- Cross-border procedural law level: Mutual Recognition

- ✓ *Programme of measures to implement the principle of mutual recognition in criminal matters – [15.01.2001]*
- ✓ FD 2003/577/JHA on the execution of freezing property/evidence orders.
- ✓ FD 2006/783/JHA on confiscation orders
- ✓ Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders

III.- SPANISH IMPLEMENTATION: *THE LONG AND WINDING LEGAL AVENUE*

- ✓ FD 2003/577/JHA on freezing was transposed by Law 18/2006, de 5 junio,
- ✓ FD 2006/783/JHA on confiscation was implemented by Law 4/2010, 10th March.
 - ✓ Both legal instruments were compiled in Law 23/2014 on mutual recognition
- ✓ FDs 2001/500/JHA and FD 2005/212/JHA were implemented in Organic Laws 15/2003 and 5/2010

Finally Directive 2014/42 was implemented in the SCC by the Organic Law 1/2015

➤ *Starting the house from the roof...*

ASSETS RECOVERY'S SPANISH LEGAL SYSTEM

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ORGA

Spanish Criminal Code

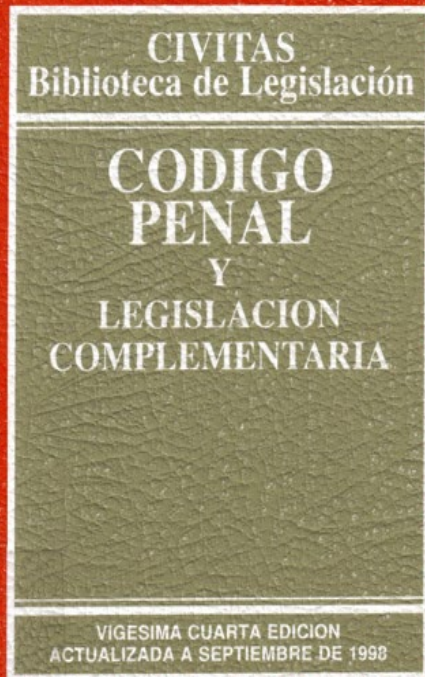
confiscation Art. 127 SCC

Organic Law 15/2003, of 25 November

- **Value-based confiscation.**
- **Limited NCBC as an accessory consequence in exention and extinction of criminal liability cases.**

Organic Law 5/2010, de 22 de junio:

- **Extended confiscation**



EDITORIAL CIVITAS



Renewed Spanish legal framework

Spain implemented Directive 2014/42/EU by mean of the **Organic Law n° 1/2015** amending the Spanish Criminal Code (SCC) introducing relevant changes as regards to

- NCBC;
- extended confiscation's scope of application;
- third-party confiscation;
- procedural safeguards, etc.

Spanish legal framework on confiscation

- Substantive legal framework:
 - Articles 127 to 127 octies in Title VI of Book I (General Part) SCC: "*accessory consequences*".
 - Special Part of the SCC (Book III):
 - Offences concerning organization of the territory and urban planning (art. 319 SCC)
 - Offences against public health set forth in Article 362 sexies SCC.
 - Drug trafficking (Article 374 SCC)
 - Crimes against Road Safety (Article 385 bis SCC)
 - Hate crimes (Article 510 (6) SCC)
 - Smuggling offences (Art. 5 of Special Law n° 12/1995)

Spanish Criminal

Procedure Code

LEY DE
ENJUICIAMIENTO
CRIMINAL
Y LEGISLACIÓN ESPECIAL

8ª EDICIÓN 2009

Actualización en www.colex.es



**REAL
DECRETO 14
DE
SEPTIEMBRE
DE 1882**

Mutual Recognition Spanish Law

TEXTOS LEGALES BÁSICOS

LEY DE ENJUICIAMIENTO CRIMINAL Y LEGISLACIÓN ESPECIAL

8ª EDICIÓN 2009

Actualización en www.colex.es



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SCPC

Ley 23/2014

Reconocimiento mutuo de resoluciones penales en la Unión Europea

Ley 23/2014, de 20 de noviembre,
y Ley Orgánica 6/2014, de 29 de octubre

CON LA LEY ORGÁNICA 7/2014, DE 12 DE NOVIEMBRE,
SOBRE INTERCAMBIO DE INFORMACIÓN DE ANTECEDENTES
PENALES Y CONSIDERACIÓN DE RESOLUCIONES JUDICIALES
PENALES EN LA UNIÓN EUROPEA



Spanish legal framework

- Spanish Criminal Procedure Code (SCPC):
 - Title III ter: “On the intervention of third parties affected by the confiscation and the procedure of autonomous confiscation” (Chapters I -Articles 803 ter a to 803 ter d- and Chapter II -Articles 803 ter e to 803 ter u-, respectively)
 - Interlocutory selling and provisional using of seized items (Articles 367 bis to 367 septies of the SCCP).

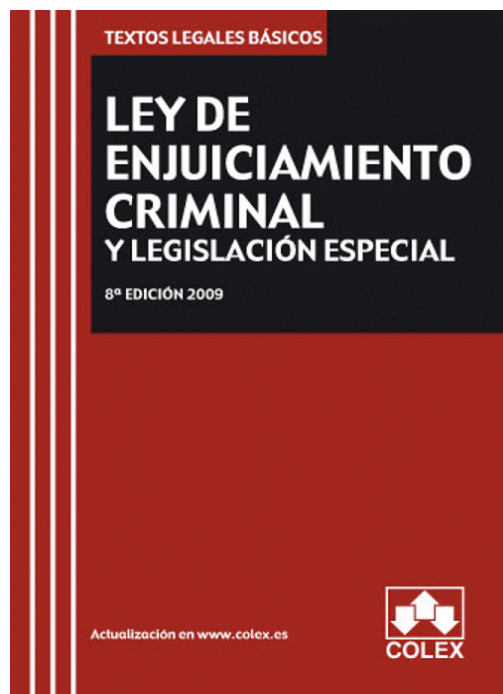
ORGA

Art, 367 septies, LO
15/2010_1/2015

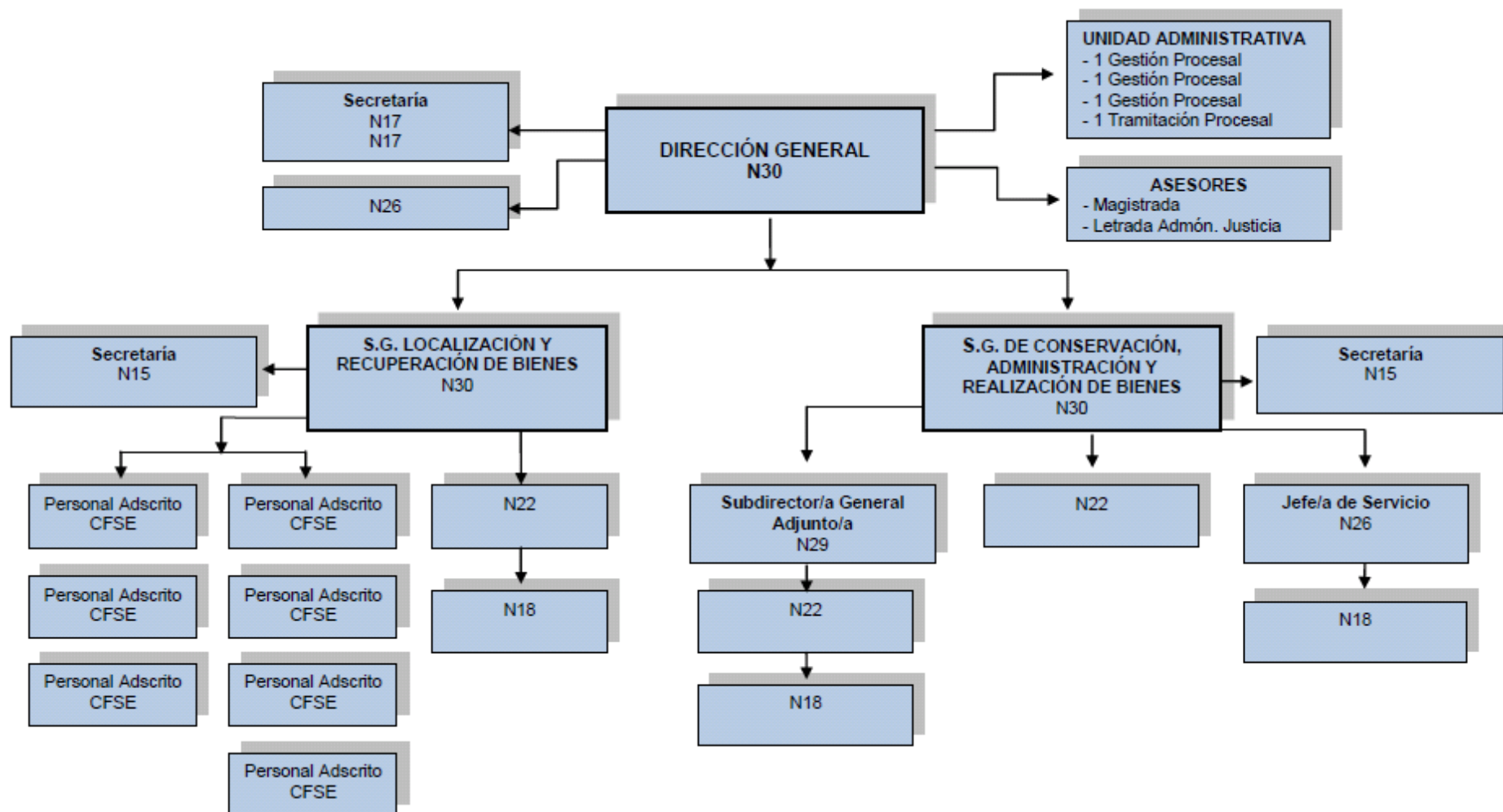
*“INSTITUTIONAL
BRICK”*

Real Decreto 948/2015,
de 23 de octubre

ORGA, reformado por
RD 1044/2018, 24 de agosto



ORGA structure



Spanish confiscation system

- Since 2015 we have implemented a **fully-fledged catalogue** of confiscation measures:
 - ✓ **Freezing.**
 - ✓ **Ordinary confiscation.**
 - ✓ **Value-based confiscation.**
 - ✓ **Extended confiscation.**
 - ✓ **Third-party confiscation.**
 - ✓ **Non-conviction based confiscation (NCBC)**

Ordinary confiscation (Art. 127 SCC)

- Confiscation measure targeting assets the direct proceeds or instrumentalities of a crime, following a criminal conviction for that crime (pure CBC approach).
 - *All-crimes approach* (art. 127.1 SCC),
 - Even reckless offences punishable with a more than one year custodial sentence (Art. 127.2)
 - Proportionality test (Art. 128 SCC)

Value-based confiscation (Art. 127.3 SCC)

- ❑ targeting any property of equivalent value to the proceeds or instrumentality of a crime
- ❑ Art. 127 septies SCC also allows this measure during the *execution phase* whenever it had not been possible to carry it out before,
- ❑ This measure is also applicable to a third-party (art. 127 quater 1 SCC) and to extended confiscation (art. 127 septies SCC) cases

NCBC (Article 127 ter SCC)

- ❑ confiscation measure taken in the absence of a conviction and directed against assets of illicit origin.
- ❑ It covers cases where criminal conviction is not possible because *suspect has become ill; *has fled the jurisdiction; *has died; *lacks legal capacity or *has immunity from prosecution, etc.,
- ❑ *in rem* proceedings?

Extended confiscation (Art. 127 bis)

- CBC that goes beyond the direct proceeds of the crime for which a person was convicted, where the property seized is derived from criminal conduct.
- A direct link between the property and the profitable offence is not necessary if the court concludes that part of the person's property was obtained through other unlawful conduct,

Extended confiscation (Art. 127 bis)

- Since 2015 its scope was enlarged from OCGs and terrorism to 18 *euro-crimes*,
- Under SCC, the court have to decide, “*based on well-founded objective evidence*” that the property derives from illegal activities.

Extended confiscation (Art. 127 bis)

- Aspects to be assessed:
 - **disproportion** between the given goods/assets and lawful incomes of the convicted person,
 - **concealment** of ownership or any power of disposal over the goods/effects by using natural or legal persons or tax havens/off-shore territories that would hinder the identification of real ownership
 - **transfer** of goods/assets via transactions that hinder or prevent ascertaining their location or destination without any legal or economic coverage

Extended confiscation modalities

- Ordinary extended confiscation: mandatory as long as the legally provided circumstances concur and there are “reasonable evidence” of its criminal source and the defence “does not prove their lawful origin”
- Extended confiscation by criminal reiteration (Arts 127 quinquies and 127 sexies SCC) may target all goods acquired & expenses incurred in a certain period of time, provided that the legal presumptions are met.

Third-party confiscation (Art. 127 quárter)

- confiscation measure depriving someone other than the offender a property, where that third party possesses it received from the fist.
- “*intellectual requirement*”: the third person ‘knew or ought to have known [...] that the purpose of the transfer or acquisition was to avoid confiscation’.

Third-party confiscation (Art. 127 quárter)

- Optional modality of confiscation
- Applicable in relation to:
 - **items/effects and profits** acquired with knowledge (or at least reasons for it by a “diligent person”) of its illegal origin.
 - **other assets** acquired with knowledge (or at least reasons for it by a “diligent person”) that confiscation is being circumvented/hindered.
- *Bona fide third-party* excludes confiscation, on a reversal of the burden of proof basis.

Remaining flaws

- ❑ limited use of confiscation mechanisms (Most MS predominantly use standard confiscation).
- ❑ narrow material scope for value-based, third-party, extended confiscation and NCBC,
- ❑ absence of a strategic approach (e.g. lack of shared objectives/comprehensive statistics)

EU REMAINING CHALLENGES

1. More coherent and clear legal framework.
 - NCBC systems are more effective in recovering criminal assets: need of consistency,
2. Effectiveness of assets recovery process initial stages: 1/3 frozen assets are finally confiscated
 - Need of new and more efficient tools (IT) for identification and tracing of assets,
 - Need to measure the rate of confiscation
3. Improve relationships with 3rd States and territories.



Upcoming legal initiatives

- in May 2022 the European Commission launched a proposal to amend the 2014 directive with a view to strengthening the EU's asset recovery and confiscation rules and reinforcing the powers of AROs



Many thanks for your attention!

Molte grazie per la sua
attenzione!