

RECOVER – GA 101091375

I RESEARCH QUESTIONNAIRE - II WORKPACKAGE

“ESTABLISHING THE SUBJECT MATTER OF THE REGULATION”:

NATIONAL CONFISCATION MODELS COVERED BY THE REGULATION no. 1805/2018. TYPES, FEATURES AND SAFEGUARDS.

The application of the Regulation no. 1805/2018 – Draft questions for the interview

1. Can you provide us with a **short list of the forms of forfeiture and seizure (as well as the related legislative provisions)** which fall under the scope of the Regulation and within the **concept of proceeding in criminal matter (Art. 1 REG)?**

- **Confiscation** (*“Konfiskation”*, sec 19a Austrian Criminal Code [*“Strafgesetzbuch”*])

An item used or intended to be used in the commission of an intentional offence and any item produced from such an offence is to be confiscated if it belongs to the perpetrator at the time of the judgement at first instance. The legal nature as penalty (secondary penalty to imprisonment or a fine) explains the requirement of sole possession of the item by the accused. The confiscation also extends to the replacement values of these objects owned by the offender at the time of the decision of the first instance. Confiscation shall be refrained from if it is disproportionate to the significance of the offence or to the accusation against the offender.

- **Forfeiture** (*“Verfall”*, sec 20 ACC)

The court declares assets that were obtained for or through the commission of an offence to be forfeited. The forfeiture also extends to benefits and replacement values of the assets to be declared forfeited. The court must declare an amount of money forfeited that corresponds to the assets obtained insofar as the assets subject to forfeiture are not seized or confiscated. If the extent of the assets to be declared forfeited cannot be determined or can only be determined with disproportionate effort, the court shall determine it in its judgement.

Section 20a ACC enumerates a few grounds that exclude the forfeiture of assets. Forfeiture of benefits and replacement values to a third party is excluded if the third party acquired the assets in ignorance of the offence punishable by law. Furthermore, forfeiture is excluded: vis-à-vis a third party if the third party acquired the assets in return for payment in ignorance of the offence punishable by law; if the person concerned has satisfied civil law claims arising from the offence or provided security for them, or if its effect is achieved by other legal measures. Forfeiture is to be waived if the asset to be declared forfeited or the prospect of its recovery is disproportionate to the expense of the proceedings that the forfeiture or recovery would require.

- **Extended forfeiture** (*“erweiterter Verfall”*, sec 20b ACC)

Assets that are subject to the power of disposal of a criminal organisation (sec 278a ACC) or a terrorist group (sec 278b ACC) or were provided or collected as a means of financing terrorism (sec 278d ACC) must be declared forfeited (sec 20b para 1 ACC).

If an unlawful offence pursuant to sections 278 or 278c acc, for the commission of which or through which assets were obtained, or such a crime has been committed, those assets that were obtained in a temporal connection with this offence are also be declared forfeited if there is reason to assume that they originate from an unlawful offence and their lawful origin cannot be substantiated (sec 20b para 2 ACC).

In addition, assets that originate from an offence punishable by law and are involved in proceedings for an offence under Sections 104, 104a, 165, 207a, 215a para. 1 or 2, 216, 217, 246, 277 to 280, 302, 304 to 309 ACC or under the twenty-fifth section of the ACC, under Section 28a of the Narcotic Substances Act, pursuant to Sections 39 or 40 of the Financial Crimes Act, or pursuant to Section 114 of the Foreign Police Act, are to be declared forfeited if the person concerned cannot be prosecuted or convicted for this offence. When deciding on forfeiture, the court may base its conviction that the asset originates from an offence punishable by law in particular on a striking contradiction between the asset and the lawful income of the person concerned, whereby in particular the circumstances of the discovery of the asset, the other personal and economic circumstances of the person concerned and the results of the investigation into the offence that gave rise to the proceedings may also be taken into account (sec 20b para 3 ACC).

Extended forfeiture also extends to benefits and replacement values of the assets to be declared forfeited. The court must declare an amount of money forfeited that corresponds to the assets obtained insofar as the assets subject to forfeiture are not seized or confiscated. If the extent of the assets to be declared forfeited cannot be determined or can only be determined with disproportionate effort, the court shall determine it in its judgement (sec 20b para 2 ACC).

Extended forfeiture pursuant to Section 20b para 1 ACC is excluded if there are legal claims to the assets concerned by persons who are not involved in the criminal organisation or terrorist group or terrorist financing (sec 20c para 1 ACC). Moreover, reference is made to the forfeiture with regard to the reasons for exclusion (sec 20c para 2 ACC).

o **Seizure** („Einzichung“, sec 26 ACC)

Objects which the offender has used to commit the offence punishable by law, which were intended by him to be used in the commission of that offence or which were produced by that offence are to be confiscated if this appears necessary in view of the special nature of the objects in order to counteract the commission of offences punishable by law.

Confiscation shall not be carried out if the person entitled removes the special nature of the objects, in particular by removing or rendering unusable devices or markings that facilitate the commission of punishable offences. Objects to which a person not involved in the criminal offence has a legal claim may only be confiscated if the person concerned offers no guarantee that the objects will not be used to commit criminal offences.

If the conditions for confiscation are met, the objects are to be confiscated even if no specific person can be prosecuted or convicted for the offence punishable by law.

2. Can you give some **statistical data** about the application of the Regulation (e.g.: how many cases, which models of confiscation)?

Unfortunately, there are no publicly available data and the Federal Ministry of Justice has not yet responded to my enquiries in this regard. I hope to get some data (soon) and will submit them as soon as I receive them.

3. Which are the **problems** encountered in applying the Regulation (both in executing requests from foreign authorities in your country and in obtaining the execution of your requests abroad)? And which are the **grounds for refusal** applied in the praxis?

There are no publications concerning the application of the regulation in Austria. Therefore, it is difficult to identify any problems or make valid statements about the grounds for refusal. Unfortunately, enquiries to the Federal Ministry of Justice in this regard have so far remained unanswered.

4. Within your national legal system, is there any need to reform the confiscation models to comply with the guarantees required by the Reg. 1805/2018?

In my opinion, there is room for improvement in several aspects of the confiscation regulation in Austria. However, the guarantees of the regulation have been granted.

5. Do you believe the guarantees provided for in the Reg. 1805/2018 to be sufficient? If not, why?

Yes, I believe them to be sufficient.

7. How was the Directive 2014/42/EU transposed in your national legal order and how did this affect national law?

In Austria, there was no transposition process into national law because the obligations arising from the Directive were already fulfilled by the legal situation applicable at the time, according to the government. So, the Directive did not affect national law.

However, in 2021, extended forfeiture was enlarged by an unexplained wealth type of confiscation. This type does not focus on an individual person but targets unlawful asset allocation to ensure that crime does not pay. According to the government this is no punishment but a preventive measure pro futuro. The extension was necessary because Austria had not brought the Directive into full force. Extended confiscation was solely possible if the court was able to establish a **temporal connection** between the alleged criminal act and the obtaining of the assets. Art 5 of the Directive does not know of such temporal conditions.

8. Do you have **any proposals of harmonization of MS legislation, also in consideration of the new proposal of a directive (May 2022) on freezing and confiscation orders?**

I am not aware of the reasons why confiscation may be waived in detail in the criminal law systems of all member states, but I could imagine that there might be a need for harmonisation there.

In Austria, confiscation shall be refrained from if it is disproportionate to the significance of the offence or to the accusation against the offender. I assume that this clause of proportionality can be found in some way in most of the criminal law systems but that there are differences – if not in the text of the law, then at least in the interpretation.

Section 20a ACC enumerates a few grounds that exclude the forfeiture of assets – exemptions the Directive does not provide.

9. Could you give your inputs about **possible guidelines** on the practical implementation of the Regulation?

As I have no insight into the practical implementation of the Regulation in Austria, it is hard to speak about guidelines. It would be more rewarding to ask a practitioner in this field.

10. Do you have any further **reform proposals**, at a national or international level? Do you have any further **policy recommendations**, at a national or international level?

According to the unanimous opinion in literature and case law, confiscation (sec 19a ACC) is to be qualified as a penalty. Therefore, it must always be pronounced in the judgement after the determination of the guilt of the accused. This changed with the Criminal Law Amendment Act 2015 for certain cases. Since then, it is possible to impose a sentence without a judgement and guilty verdict. This is probably incompatible with the requirements of the presumption of innocence, the principle of guilt and the fair trial under Art 6 of the ECHR.

Another policy recommendation also concerns the confiscation (sec 19a ACC): In Austria, only objects, i.e. physical items, can be confiscated. This gap must be closed by applying confiscation to tangible and intangible property, i.e. rights, in accordance with the provisions of Directive 2014/42/EU. This can be done either by changing the interpretation of the term "object" or by using a new term. I would favour the latter solution by also using the term "assets" for Section 19a ACC.

In order to honor the principle of guilt, Section 20 ACC must be teleologically reduced to the effect that in the case of offenders who are not culpable, only the profit from the criminal activities, i.e. after deduction of their expenses, is declared forfeited. In this way, Section 20 ACC has the effect of purely skimming off profits with regard to this group, while it has the character of a penalty-like sanction in the case of a fully-fledged criminal offence.

11. Which models of confiscation can be applied against legal persons and which are their constituent elements?

It should be noted in advance that a legal person is responsible for an offence under the following conditions (sec 3 Association Responsibility Act [*„Verbandsverantwortlichkeitsgesetz“*]): A legal person is responsible for a criminal offence if the offence was committed for its benefit or if the offence violated obligations that apply to the legal person. The association is responsible for offences committed by a decision-maker if the decision-maker as such has committed the offence unlawfully and culpably. The legal person is responsible for criminal offences committed by employees if employees have unlawfully committed the facts corresponding to the statutory offence; the legal person is only responsible for a criminal offence that requires intentional action if an employee has acted intentionally; for a criminal offence that requires negligent action, only if employees have failed to exercise the due care required in the circumstances; and the commission of the offence was made possible or significantly facilitated by the fact that decision-makers disregarded the due and reasonable care required in the circumstances, in particular by failing to take essential technical, organisational or personnel measures to prevent such offences.

Forfeiture (sec 20 ACC) is possible both for legal persons not responsible for the offence and for legal persons responsible for the offence. In those cases in which the association is responsible for the offence (sec 3 Association Responsibility Act), which is therefore not only in bad faith (i.e. not unaware of the punishable offence), but to which the offence itself is attributed, forfeiture is directly applicable to the legal person without the restrictions against third parties provided for in Section 20a ACC. Section 20a ACC remains applicable to cases in which an uninvolved association has acquired assets.

The **confiscation** (sec 19a ACC) of association-owned objects from the responsible association is also permissible, as well as the **seizure** of dangerous objects (sec 26 ACC). All the general elements apply.

○ Could you give your inputs about **possible guidelines** on the implementation of the Regulation against **legal persons**? Do you have any **reform proposals** for your country in this regard?

First of all, it is important to apply confiscation orders to legal persons as well as natural persons. Secondly, the confiscation rules relating to legal persons should fit into the general confiscation regime and be congruent with the criminal liability of legal persons. In my opinion, these requirements were quite well observed by the Austrian legislator so that I do not see any reform need in this regard at the moment. As for the implementation of the regulation I would advise to stick as much as possible to the existing system. In Austria at least, it can be observed that the implementation of international guidelines often leads to systemic breaks in the national criminal law system.