

COUNTRY REPORT AUSTRIA

Extended confiscation in scope of the fundamental rights
and general principles of EU

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Introductory question: How is extended confiscation understood in the legal order of your EU Member State?

Extended confiscation in this project is understood not only in the meaning of art 5 of the Directive 2014/42/EU¹ (in the following “the Directive”) but also as confiscation from third persons, non-conviction-based confiscation, confiscation of legal assets from natural and legal persons and instruments not described as confiscation but with similar effects, including also confiscation orders in the meaning of EU-Regulation 2018/1805.²

The term “**extended confiscation**” – translated into German as “erweiterte Konfiskation” – does not exist in the Austrian criminal law. Sec 20b of the Austrian Criminal Code (“ACC” in the following; “Strafgesetzbuch [StGB]” in the original) calls the equivalent sanction “erweiterter Verfall” which translates to “extended forfeiture” in English. However, there is an accessory penalty called “confiscation” as well (sec 19a ACC) – added to the principal penalty which consists of imprisonment or a fine.

Austria has a conviction-based asset recovery system in place. There are some elements of non-conviction-based confiscation, but apart from one type of confiscation there must always be a link to criminal proceedings. There is no civil or administrative confiscation in the Austrian legal system. The Austrian legislators have anchored the whole confiscation regime in criminal law and criminal procedure, and consider therefore that it is of criminal law character. All investigations on coercive measures provided under the Austrian Code of Criminal Procedure (“ACCP” in the following; “Strafprozessordnung [StPO]” in the original) can also be applied to legal entities if they were not specifically intended for natural persons.

Generally, the Austrian criminal law system distinguishes between confiscation (sec 19a ACC), forfeiture (sec 20 ACC), extended forfeiture (sec 20b ACC) and seizure (sec 26 ACC).

¹ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

² Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders

1. Confiscation and seizure

(sec 19a and 26, “Konfiskation” and “Einziehung” in the original)

Austria – as all EU Member States - has enabled, subject to a final conviction, the confiscation of instrumentalities (*instrumenta sceleris*) and proceeds of crime (*producta sceleris*). Pursuant to **sec 19a ACC**, an item used or intended to be used in the commission of an intentional offence and any item yielded from such an offence is to be confiscated if it belongs to the perpetrator at the time of the judgement at first instance. The confiscation also extends to the replacement value of these items if it belongs to the perpetrator at the time of the conviction at first instance. Confiscation shall not occur if it is disproportionate relative to the significance of the offence or to the responsibility of the perpetrator. Confiscation in the meaning of sec 19a ACC is a penalty which explains the requirement of sole possession of the item by the accused. It is therefore not permissible to confiscate instrumentalities and proceeds of crime which belong to a third person.

However, instrumentalities and proceeds of crime can be seized under **sec 26 ACC** independent of ownership if they were criminally dangerous items, that is if the specific nature of the item deems the seizure necessary in order to combat the future commission of offences. An object may not be seized if an authorized person removes or renders useless the specific properties or nature which facilitate the commission of offences. Any items that are subject to legal claims by persons not involved in the offence may only be seized if the person concerned cannot ensure that the item will not be used for the commission of offences. If the requirements for seizure are given, instruments or proceeds may be seized even if no particular person is prosecuted or convicted of the offence.

2. Forfeiture (sec 20-20a, “Verfall” in the original)

In Austria, forfeiture is a conviction- and asset-based form of confiscation. Austria targets the illicit origin of an item and enables its forfeiture irrespective of whether it belongs to the suspect or accused person or to a third party. Forfeited assets do not necessarily have to be owned by the convicted person because forfeiture is not seen as a penalty but a sanction sui generis. If the assets are property of an innocent/uninvolved person, forfeiture will be possible except under certain conditions (see sec 20a ACC).

Any assets required for or through an offence are to be forfeited to the court. Forfeiture also extends to any benefits and replacement value of assets that are to be forfeited. Unless the assets to be forfeited are secured or seized (para 110 (1) 3, 115 (1) 3 ACCP), the court has to forfeit the monetary equivalent of these assets. The court has discretion to determine the extent of asset forfeiture if the determination of the true extent of the assets that are to be forfeited is either impossible or involves excessive effort (**sec 20 ACC**).

Sec 20a ACC states a few exemptions from forfeiture. Any forfeiture of benefits and replacement value of assets to person other than the suspect is not permissible to the extent that the other person acquired these assets whilst unaware of the offence (para 1). Any forfeiture is also not permissible of assets belonging to another if the other person purchased these assets whilst unaware of the offence, to the extent that the person concerned satisfies civil claims resulting from the offence or provides security for these claims or insofar as the effects of the forfeiture are achieved through other legal mechanisms (para 2). Forfeiture shall not occur insofar as the process and efforts required to realize the forfeiture are excessive relative to the value of the assets that are to be forfeited, or to the prospect of achieving the forfeiture (para 3).

3. Extended forfeiture (sec 20b ACC; “erweiterter Verfall” in the original)

3.1. Criminal organizations, terrorist associations, terrorist financing (para 1)

Extended forfeiture consists of three types in Austria. Since 1997 the courts have had to confiscate any assets belonging to a criminal organization in the sense of sec 278a ACC, since 2002 they have had to apply this sanction to terrorist associations within the meaning of sec 278b ACC and to funds for terrorist financing (sec 278d ACC). The only prerequisite is that the assets are in the possession of the criminal organization or the terrorist association or that the assets have been provided or collected for the financing of terrorism. But firstly, the existence of such an organization or association – as defined in sec 278a and 278b ACC, respectively – or the (intended) use of the assets for terrorist financing has to be proven. But then, it is not required that a specific offence has been committed or can be proven. In fact, if these assets were legally acquired, they have to be forfeited as well.³ Extended forfeiture under sec 20b (1) ACC is not permissible if the assets are the subject of legal claims by persons who are not associated with criminal organizations, terrorist associations, or the financing of terrorism (sec 20c (1) ACC).

3.2. Temporal connection to a criminal offence (para 2)

In 2011, by the so-called Criminal Law Competence Package 2010,⁴ major changes were made to the asset recovery system with the intention of increasing the use of confiscation. Therefore, inter alia, a second form of extended confiscation, which could be seen as the typical one and the one set out in art 5 of the Directive, was brought into force: If an unlawful act – not necessarily culpably – pursuant to sec 278 (founding of or participation in a criminal association) or 278c ACC (terrorist conduct) or an intentional offence punishable with more than three years imprisonment was committed and if assets were acquired for or through these

³ *Fuchs/Tipold* in Wiener Kommentar zum Strafgesetzbuch (2nd edition) § 20b Rz 11.

⁴ Strafrechtliches Kompetenzpaket (sKp), BGBl I 2010/108.

acts, the court has to forfeit any assets obtained in a temporal connection with the offence if there is reason to assume that they were acquired through an offence and if the lawful acquisition of the assets cannot be substantiated.

In Austria, extended confiscation is only allowed if it is reasonable to assume that the property is derived from unlawful conduct. Austria did not set up time limits within which the acquired assets may be considered as originating from criminal offences – it simply states “in a temporal context”. This is interpreted as having to be argued in every single case.⁵ In contrast to sec 20b (1) and (2a) ACC, the person affected by extended forfeiture pursuant to sec 20b (2) ACC is known (as the offender of the predicate crime).

Austria has drawn up a short list of offences for which extended confiscation is enabled (sec 278 and 278c ACC). In addition to that, extended confiscation is permissible for all criminal felonies punishable with a sentence of imprisonment of at least three years. The assets do not have to belong to the person convicted of the criminal offence. Establishing a direct or indirect link to a predicate offence is not necessary. Pursuant to sec 20b (3) ACC, not only the original assets obtained from the crime are to be confiscated but benefits, replacement value and monetary equivalents as well.

3.3. Extended confiscation in rem (para 2a)

The **Anti-Terrorism Act 2021**⁶ which went into force on 1st Sept 2021 enlarged the scope of extended forfeiture. A new paragraph 2a was added to sec 20b ACC that should help to fight money laundering and the financing of terrorism more efficiently. The government explicitly referred to sec 76a (4) of the German Criminal Code. Assets originating from a criminal offence which were secured or seized during criminal proceedings for particular offences have to be forfeited if it is not possible to prosecute or convict someone for the crime. This list encompasses slavery (sec 104 ACC), trafficking in persons (sec 104a ACC), money laundering (sec 165 ACC), pornographic images of a minor (sec 207a ACC), procuring engagement in prostitution and pornographic performances by a minor (sec 215a (1) or (2) ACC), pimping (sec 216 ACC), transnational prostitution trade (sec 217 ACC), subversive associations (sec 246 ACC), organized crime and terrorism (sec 277-280 ACC), misuse of official authority (sec 302 ACC), corruption (sec 304-309 ACC), genocide, crimes against humanity and war crimes (sec 321-321k ACC), drug trafficking (sec 28a NSA),⁷ taxation fraud (sec 39 FCL),⁸ transnational VAT fraud (sec 40 FCL) and trafficking in human beings (sec 114 APL).⁹ The court can base the forfeiture of the assets on the disparity between the asset the

⁵ Stricker in *Leukauf/Steininger*, Kommentar zum Strafgesetzbuch (4th edition) § 20b Rz 7.

⁶ Terror-Bekämpfungsgesetz (TeBG), BGBl I 2021/159.

⁷ Narcotic Substances Act, BGBl I 1997/112.

⁸ Financial Crime Law, BGBl 1958/129.

⁹ Aliens Police Act, BGBl I 2005/100.

person has acquired and the legal income of that person (unexplained wealth model). In particular, consideration can be given to the conditions of the asset's discovery, personal and economic circumstances of the person affected by the forfeiture and investigation results regarding the offence that was the reason for the criminal procedure.

Sec 20a ACC applies accordingly to all types of extended confiscation (sec 20c (2) ACC).

RT 1: How was the adoption of extended confiscation explained in the process of its introduction into the internal legal system of your EU Member State (e.g. by legal amendments):

- **before the transposition of the Directive 2014/42/EU (if confiscation regulation existed)?**

In Austria, extended forfeiture has existed since the Criminal Law Amendment Act 1996. The forfeiture of assets belonging to a criminal organization was introduced with the intention to further the fight against (organized) serious crime, in particular money laundering. By depriving criminal organizations of their financial resources, crime should be prevented efficiently.¹⁰ The confiscation of their operating and investment capital was deemed more efficient than the conviction and sentencing of members of the criminal organization who can often be replaced fairly easily. At the same time, the adoption of extended confiscation was necessary to comply with international obligations, namely art 8 (2) of the United Nations' International Convention for the Suppression of the Financing of Terrorism and art 20 (2) of the Directive 2017/541/EU on Combating Terrorism.¹¹

The second type of extended confiscation was also brought into force by the Criminal Law Amendment Act 1996, at the time pursuant to sec 20 (2) ACC which was transferred to sec 20b (2) ACC by the Criminal Law Competence Package 2010. The sanction was intended to combat average and serious crime. The completely new and essential lowering of evidence standards was originally instituted to fight drug and organized crime. The government therefore referred to art 5 (7) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Crime should not pay.

- **in the transposition procedure into the internal domestic law?**

As the Directives of the EU are not directly applicable, every Member State shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 4th October 2015 according to art 12 (1) of the Directive. However, there was no

¹⁰ *Tischler* in Salzburger Kommentar zum Strafgesetzbuch Vor §§ 20 bis 20c und 6 StGB Rz 9 ff.

¹¹ ABI L 88/6 (31.3.2017).

transposition procedure in Austria, as, according to the government, the obligations had been met by the current legislation at that time so that no changes were deemed necessary.

In 2021, as described above, 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.

Meanwhile, sec 20c ACC enumerates certain causes under which assets cannot be confiscated – exemptions the Directive does not provide. So, the court has to refrain from forfeiture insofar as the process and efforts required to realize the forfeiture are excessive relative to the value of the assets that are to be forfeited, or to the prospect of achieving the forfeiture. This means that the Austrian transposition of the Directive has certain shortcomings.

Was (extended) confiscation seen as unacceptable / acceptable under certain (which?) conditions before the transposition of the Directive 2014/42/EU?

Confiscation per se as a criminal sanction has been widely accepted although some doubt their preventive value as it results or should result in a more lenient principal penalty. The big debate concerning forfeiture in Austria focused on its range – well-known as the question of net- vs gross-principle – and as a consequence of this its legal nature. Whereas a previous law subtracted the convicted person's expenses from the confiscated sum, that does not happen anymore and the court orders confiscation of the assets without considering the convict's costs. Extended confiscation was criticized in various aspects concerning its compliance with fundamental principles (see below).

RT 2: Is there any case law in your EU Member State relating to confiscation (e.g. of constitutional court, court of appeals), which referred to (extended) confiscation, applied to (extended) confiscation, rejected the (extended) confiscation, formulate any additional criteria / conditions for the admissibility of (extended) confiscation? What are those criteria? Are those criteria are met in the current extended confiscation regimes?

There are few judgements referring explicitly to extended confiscation. A very controversial topic is the confiscation of real estate. The confiscation of a holiday home where the owner

was accused of paedophile conduct was one ground of appeal in recent criminal proceedings. The Supreme Court decided that immovable property can be confiscated.¹²

The Constitutional Court decided that forfeiture is neither punishment nor preventive measure but a proprietary sanction primarily focused on prevention.¹³ Furthermore, the Supreme Court ruled that the monetary equivalent of the assets had to be calculated without any subtractions due to the suspect's costs (gross-principle).¹⁴

Forfeiture can not only be imposed on the perpetrator, but also on third parties who did not participate in the crime. Sec 20 ACC simply ties forfeiture to an asset – regardless of its current owner except for the reasons enumerated in sec 20a ACC.¹⁵

RT 3: Is there any specific experience by practitioners in your EU Member State which created a special attitude to (extended) confiscation (e.g. organised crime, terrorism, drug crime, money laundering)? How did it influence the legislation (formulation of legal provisions of) (extended) confiscation?

Extended confiscation was originally introduced to combat organized and drug crime, as well as money laundering. However, as it is permissible to apply sec 20b (2) ACC in the case of the commission of any intentional offence punishable with more than three years imprisonment its scope is considerably larger and encompasses more than solely serious offences.

The newest data concerning the practice of confiscation are two years old. In 2019, there was not – despite its large scope – issued any extended confiscation order pursuant to sec 20b ACC (2018: 2; 2017: 7, 2016: 3, 2015: 5). It has to be concluded that extended confiscation does not have great importance in Austria. Therefore, experience by practitioners is nearly impossible to describe and an influence on the legislation is not discernible.

RT 4: What is the legal nature of extended confiscation in your EU Member State? Is extended confiscation in your EU Member State: A criminal sanction (accessory or principal criminal penalty)? A preventive measure without the nature of criminal sanction (security measure in a broad sense, administrative measure adopted within or outside criminal proceedings)? A precautionary measure on a suspect's assets (civil measure in rem or a kind of ante delictum criminal prevention measure)? A civil consequence of committing an offense, provided for by criminal law? An

¹² OGH 29.6.2021, 14 Os 29/21b.

¹³ VfGH vom 8. 10. 2015, G 154/2015.

¹⁴ OGH 14 Os 63/21b.

¹⁵ OGH 14 Os 54/17y.

autonomous (*sui generis*) instrument of another kind (e.g. a measure aiming at neutralisation of criminal profit and at the removal of illegal proceeds)?

Extended forfeiture is an autonomous (*sui generis*) instrument of criminal nature¹⁶ aiming on the one side at the neutralisation of criminal profits and at the removal of illegal proceed. On the other side, extended confiscation should prevent further crime because the lacking of financial resources does not allow the committing of future offences. Some see extended forfeiture according to sec 20b (2) ACC as a penalty.¹⁷ However, the preventive effect of extended confiscation is assumed although there does not (yet) exist any empirical evidence. Its preventive impact is explained with a *homo oeconomicus*-concept: If an offender plots another crime, he has to consider the possibility that he will get caught and furthermore, that all his proceeds of previous offences will be objects of extended confiscation. So, the potential recidivist has to evaluate if the planned criminal act will be worth the risk of losing his previously obtained property (and not just the assets achieved through the new crime).

Extended confiscation related to assets of criminal organizations, of terrorist associations and for terrorist financing is characterized as a penal sanction.¹⁸ In my opinion extended confiscation is rather a preventive measure of criminal nature. The main reason to confiscate the assets is to discourage potential offenders of future crimes. The property is classified as criminally dangerous. Extended confiscation aims – through the withdrawing of their financial means – to obtain the incapacity of the offender or the organization to commit further criminal acts. Hence, extended confiscation can be seen as a preventive measure in a broad sense. Nevertheless, it is clearly a criminal sanction in Austria.

Is there only one type of extended confiscation or are there in fact several different instruments with a common name?

In Austria, extended forfeiture (sec 20b ACC) means that there need not be explicit evidence of the specific offence that the assets are acquired from or through. There are three different types of extended confiscation in Austria (see above). In the understanding of extended confiscation in this project, there exist third-person confiscation and non-conviction-based confiscation in Austria, as well.

Does a non-conviction-based confiscation exist in your EU Member State?

Yes. If sufficient grounds exist to suggest that the conditions for forfeiture, extended forfeiture or seizure of assets are met, and if no decision about either of these can be made in criminal

¹⁶ *Maleczky*, Allgemeiner Teil II (21st edition) 83; *Jesionek/Birklbauer*, Allgemeiner Teil II (9th edition) 57; *Hinterhofer*, Verfall statt Abschöpfung der Bereicherung im österreichischen Strafrecht, *ecolex* 2011, 317 (319).

¹⁷ *Seiler*, AT II⁷ Rz 565; *Fuchs/Tipold* in *Wiener Kommentar zum Strafgesetzbuch* (2nd edition) § 20b Rz 33 und 40.

¹⁸ *Fuchs/Tipold* in *Wiener Kommentar zum Strafgesetzbuch* (2nd edition) § 20b Rz 1.

proceedings or in proceedings concerning the detention in a facility for dangerous perpetrators, the plaintiff may file a stand-alone motion that such a proprietary direction be made (sec 445 ACCP). These motions are decided in separate proceedings following a public oral hearing by way of judgement by the court. In regard to (extended) forfeiture these independent motions are permissible without the need of a special reason that would explain the impossibility of a decision in criminal proceedings. The simple fact, that imposing these asset recovery sanctions in criminal proceedings is not possible, is enough. It could be that the suspect cannot be punished but (extended) forfeiture or seizure is possible. The ruling about these sanctions could have been reserved for a separate decision (sec 443 (2) ACCP). Another possible reason for a stand-alone motion is the situation that the accused is not the person affected of the (extended) forfeiture or seizure (sanctions against third persons).

Since the Criminal Law Amendment Act 2015 non-conviction-based confiscation has been permissible in Austria.¹⁹ According to sec 445 (2a) ACC confiscation is imposed in a stand-alone motion if it could not be decided in criminal proceedings concerning criminal offences committed with the intention to gain an illegitimate material benefit or to obtain an advantage, as they were aborted due to illness or absconding. Because of sufficiently ascertained facts it can nevertheless be assumed that confiscation would be ordered in case of a conviction. The defendant must have been questioned regarding the indictment and the conditions of the direction concerning confiscation.

Is the proof of guilt of the offender required to apply extended confiscation?

No. Extended confiscation is no penalty in Austrian Criminal Law. Therefore, no proof of guilt is necessary. As a matter of fact, there need not be a specific offender. This is in compliance with the principle of guilt because extended confiscation is seen as a sanction sui generis which solely aims to deprive criminals of their financial resources to prevent future criminal offences or intends to take away unlawful enrichment. It does not accuse anybody of committing a crime but wants to end the illegal allocation of assets.

Is a reversed burden of proof applied by extended confiscation?

Extended confiscation is possible without full evidence of the crimes. A lower standard of evidence which could be understood as partially reversed burden of proof or statutory easing of the burden of proof is possible. In reverse, the licit origin of the assets has to be probable.²⁰ So the accused has to contradict the legal presumption of the assets' criminal origin. He does not have to prove the lawful origin of the assets but merely has to credibly claim their lawful

¹⁹ Non-conviction-based confiscation in this context is understood in the meaning of Model 1 of the CARIN-classification.

²⁰ *Fuchs/Tipold* in Wiener Kommentar zum Strafgesetzbuch (2nd edition) § 20b Rz 40.

acquisition. This may be shown by evidence of a lottery win, an inheritance, sales proceeds or a higher income than known to the authorities.

In cases of organised crime and terrorism a shifting of the burden of proof would kick in for the assets of unclear origin. The suspect/accused person would have to prove the licit origin of the assets; otherwise the assets can be confiscated without a criminal conviction.

Are there any other evidence rules / lowered standards of evidence relating to extended confiscation?

A lower standard of evidence applies to extended confiscation pursuant to sec 20b (1) ACC. If assets belonging to a criminal organization are confiscated it is enough to prove its authority to dispose of them. This authority must not be understood in legal/formal terms, crucial is the economic/factual attribution of the assets. The latter can be assumed if the organization can exercise any kind of influence on the use of the assets. It is not required that the court establishes the criminal provenance of the assets that is a specific offence from which the economic benefits derived. Indeed, the illegal origin of assets belonging to criminal organizations is presumed.

The court has discretion to determine the extent of asset forfeiture if the determination of the true extent of the assets that are to be forfeited is either impossible or involves excessive effort (sec 20 (4) and 20b (3) ACC).

RT 5: What are the legal instruments for the protection of individual rights in your EU Member State at each stage of the confiscation procedure? In the substantive legal basis for adjudication? Are they considered as sufficient to protect individual rights and freedoms?

The first steps of confiscation proceedings are the securing and seizure of the assets (sec 109-115e ACCP). Securing is, inter alia, permissible if it appears necessary to secure extended confiscation. A confirmation that something was secured has to be issued to or served on the person affected immediately or within no more than 24 hours and the person has to be informed about the right to raise objection (sec 106 ACCP) and to request a decision by the court to lift or continue the securing (sec 111 (4) ACCP).

Seizure is, inter alia, permissible if it is expected that the secured items will serve to secure a decision by the court concerning extended confiscation. The accused, as well as any other person, may lodge a complaint against the seizure order insofar as his interests are directly affected (sec 87 ACCP).

Proceedings concerning confiscation, forfeiture, extended forfeiture and seizure of assets can be found in sec 443-446 ACCP. Generally, directions concerning extended forfeiture are

decided in the judgement convicting the defendant. Except in cases under sec 445a ACCP, decisions concerning proprietary directions have the same status as sentencing. The decisions may be appealed in favour of or to the disadvantage of the sentenced person or the parties to liabilities by way of appeal. By way of appeal the person concerned is able to contest the sentencing that is the exercise of discretionary powers by the court. As the conditions for asset recovery instruments are defined mostly without any margin of discretion, prevailing opinion is that appeal for nullity is permissible, too.²¹ This allows the person concerned to contest the conviction and its grounds.

Art 8 (9) of the Directive requires third parties to be entitled to claim title of ownership or other property rights. In the system of the ACCP, any person affected in their rights by confiscation has the same rights as the suspect. A party to liabilities is even able to contest whether the crime the defendant is accused of establishes an offence within the jurisdiction of the courts and therefore qualifies as predicate offence to (extended) confiscation and has consequences for the party's property rights.

RT 6: Does – in your opinion based on the answer of the above mentioned questions / the literature in your EU Member States – extended confiscation comply with the principles of:

- **legality?**

Extended confiscation can only be imposed if certain conditions are met. Despite the large scope in some aspects, it is no arbitrary decision. Thus, the principle of legality is respected.

- **legal specificity of a statute?**

It is unclear which the decisive point in time is to determine the criminal organization's or the terrorist association's possession of the assets. Whereas it is usually the time of the judgement at first instance (see for example sec 19a (1) ACC), it is also argued that – for the sake of efficient law enforcement – the moment in which the authorities secured the asset is pivotal.²² There is no legal definition of the „temporal connection“ in the meaning of sec 20b (2) ACC. Neither the explanatory notes to the Criminal Law Competence Package 2010 nor jurisdiction has provided any specificities.²³ As the temporal link to the predicate offence is the essential condition for extended forfeiture in the sense of sec 20b (2) ACC, this statute does not comply with the principle of legal specificity.

²¹ OGH 14 Os 111/20k; *Fuchs/Tipold* in Wiener Kommentar zur Strafprozessordnung § 443 Rz 60; *Schmidhuber*, Konfiskation, Verfall und Einziehung 230.

²² *Fuchs/Tipold* in Wiener Kommentar zum Strafgesetzbuch (2nd edition) § 20b Rz 13.

²³ *Schumann*, (Non-)conviction based and extended confiscation in Österreich. Überlegungen zu Rechtsnatur, Systematik und Problemen vermögensrechtlicher Anordnungen, NZWiSt 2018, 449.

- **proportionality?**

Sec 5 ACCP states in general that authorities may only interfere with the rights of persons as expressly provided by law and as necessary to fulfil their duties. Any infringement of legally protected interests thus caused has to be reasonably proportionate to the gravity of the criminal offence, to the degree of suspicion, and to the intended effect.

The wide range and the lower standard of evidence in some aspects cause some concern about the compliance of extended forfeiture with the principle of proportionality. So, the inculpable but unlawful commission of money laundering is a permissible predicate offence for extended forfeiture pursuant to sec 20b (2) ACC which is quite a severe sanction. But according to sec 20b (1) ACC, it has also to be noted that Austria has a fairly strict definition of a criminal organization which as a consequence limits the scope of this type of extended forfeiture.²⁴

Another considerable concern is the absence of any hardship clause which would allow to take into account individual (extraordinary) circumstances, especially in regard to the wide range of extended forfeiture which is not limited to serious/organized crime.

- **non-retroactivity of the (more severe) statute?**

The principle of non-retroactivity of the (more severe) statute is to be found at the very beginning of the Austrian Criminal Code, in sec 1 ACC. Explicitly, it only refers to punishment and preventive measures. But literature agrees completely – and rightly so – that this principle has to be applied to any criminal sanction.²⁵ Therefore, although it is disputed if forfeiture qualifies as a preventive measure, punishment or a sanction of another kind, it is clear that the principle of non-retroactivity is valid for all sanctions of asset recovery. A new statute has to be applied to offences committed before it went into force if it is more favourable to the accused in its overall impact (sec 61 ACC). The asset recovering instruments in force before the Criminal Law Competence Package 2010 are considered more favourable to the party concerned than the new legal situation. Hence, the new asset recovering sanctions must not be applied to acts committed prior to 1st January 2011.²⁶ Extended confiscation complies with the principle of non-retroactivity in Austria.

²⁴ *Fuchs/Tipold* in Wiener Kommentar zum Strafgesetzbuch (second edition) § 20b Rz 49

²⁵ *Höpfel* in Wiener Kommentar zum Strafgesetzbuch (second edition) § 1 Rz 5, 12; *Fuchs/Tipold* in Wiener Kommentar zum Strafgesetzbuch (second edition) Vor §§ 19a-20c Rz 8 ff.

²⁶ *Fuchs/Tipold* in Wiener Kommentar zum Strafgesetzbuch (2nd edition) Vor §§ 19a-20c Rz 10 with further references.

- **protection of the citizen's trust in the state and law?**

Although there are a few shortcomings, the compliance with this principle can be affirmed in the provisions - thanks to the timely publication of the regulations, their comprehensibility and the fact that they have not been revised too often in recent years.

- **the right to private property?**

Extended forfeiture is a restriction of the use of property in the sense of art 1 (2) First Additional Protocol to the ECHR. To justify an infringement of fundamental rights, the provision has to be of public interest and proportionate. The public interest in extended confiscation lies in its preventive effect. It is suitable as well as necessary to obtain this goal. But extended forfeiture foregoes the strict standard of evidence and allows reasonable assumptions. Therefore, it is permissible to forfeit assumed assets of an assumed offence. This weak link can only justify an infringement in the right to private property in the most severe cases.

- **the right to defence?**

According to sec 7 (1) ACCP the accused has the right of defence and to engage the support of defence counsel at any stage during the proceedings. The right to defence in legal proceedings is guaranteed in sec 49 and 57-63 ACCP. This is the case in extended confiscation proceedings, as well, so that the right to defence is obeyed.

- **the rights to a fair trial?**

The compliance of extended forfeiture with the right to a fair trial (art 6 ECHR) is doubted by some parts of the literature.²⁷ It will be safeguarded if the law is unambiguous, effective rights of defence are in place and the sanction is imposed in a public hearing by a court. In Austria, extended confiscation is imposed in an official and public hearing by an independent and impartial criminal court so that these criteria are met.

- **the presumption of innocence?**

Every person is presumed to be innocent until they have been convicted in a judgement that is final and legally binding (sec 8 ACCP). Confiscation is permissible in an independent procedure without a formal conviction of the suspect (sec 445 (2a) ACCP). This violates the presumption of innocence as it imposes a punishment without the suspect's guilt being proven in a conviction – concerning confiscation (sec 19a ACC) and forfeiture (sec 20 ACC). Extended forfeiture is no penalty so that the presumption of innocence does not apply. There is no conviction regarding the assumed crimes.

²⁷ Maleczky, Allgemeiner Teil II (21st edition) 85 f; Jesionek/Birklbauer, Allgemeiner Teil II (9th edition) 59.

- **the right to privacy?**

There has not been any discussion about the compliance of extended confiscation with the right to privacy in Austria. As the procedural laws relating to securing and seizure of assets are quite strict, there are no concerns about an unjustified violation of the right to privacy.

- **and other relevant rights – what sort of?**

- 1. Nulla poena sine culpa**

Rightly, forfeiture has to be qualified as punishment because it is possible that there are more assets declared forfeited than the person concerned obtained. However, this view is not shared by legislation and jurisdiction which classify forfeiture as sanction sui generis. Therefore, it can occur that a person is affected by forfeiture without being guilty of the offences from which the assets derived. This is a violation of the principle of guilt because a penal sanction must not be imposed on innocent persons.

- 2. Nemo tenetur se ipsum accusare**

Pursuant to sec 7 (2) ACCP the accused must not be forced to incriminate himself (*nemo tenetur se ipsum accusare*). The accused is free to give or refuse testimony at any time. This is in contrast to the need to substantiate the lawful acquisition of the assets. The infringement can only be justified for the most severe crimes and in cases of overwhelming evidence.

- 3. Principle of indictment**

The principle of indictment (sec 4 ACCP) is undermined when further offences are assumed as the origins of assets which are the objects of extended confiscation. These alleged criminal acts do neither have been included in the indictment nor have been added later. This is to the severe disadvantage of the suspect's defence.

- 4. In dubio pro reo**

In regard to the assets acquired for or through temporarily connected criminal acts, a reasonable assumption is sufficient to forfeit them. This violates the in dubio pro reo-principle which demands proof. In the case of sec 20b (2) ACC, there always remains some doubt about the illegal origin of the assets so that the court would have to decide against confiscating them. Again, this can only be justified if the severity of the crime(s) outweighs the value of this principle.