Country Report Germany

Extended Confiscation in Scope of the Fundamental Rights and General Principles of EU

Michael Kilchling

1. Introduction: The emergence and concept (understanding) of extended confiscation in the legal order of Germany

1.1. History

Confiscation has been a traditional part of the penal acquis in Germany since long. In principle, it is a subject-matter that belongs to a bunch of scattered pre-constitutional[1] remains in contemporary criminal law. Some basic provisions on confiscation can already be found in the Penal Code of the German Reich as introduced in 1871 (sec. 40-42). Even apparently modern elements such as a non-conviction-based variant of confiscation could already be imposed some 150 years ago. Originally, these instruments were designed as property-related penalties *in personam* which carried the legal character of an accessory punishment.[2] However, it could only be imposed in case of a very small number of explicitly listed offences. One of these reference crimes was corruption;[3] from a historical perspective, one might therefore argue that confiscation in its modern shape emerged in the 19th century as an instrument for targeting corruption in public administration.

Since then, confiscation law underwent three major reforms: 1969/73, 1992, and 2017; in addition, some important procedural amendments were adopted in 1998.[4] The directive 2014/42/EU[5] was the first European piece of legislation on penal confiscation that led to an explicit transposition act in Germany. Prior to this most recent reform of

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1 The term "pre-constitutional" refers to legal provisions that were already in existence prior to the Federal constitution (Basic Law – *Grundgesetz*) of 1949. Some prominent examples of pre-constitutional pieces of law which are still in force include the Civil Code of 1900 (*Bürgerliches Gesetzbuch*) and the Juvenile Justice Act of 1923 (*Jugendgerichtsgesetz*).

2 For more details, see Eser 1969.

3 The basic design of the current set of penal corruption provisions in Germany is also very similar still to the shape they've had in the first Penal Code of the German Reich of 1871; for more details, see Kilchling 2021.

4 Further minor legislative amendments have to be neglected here for obvious reasons. For a more detailed analysis of the major confiscation reform packages that were passed in the 1990s and the early 2000s, see Kilchling 2004.

5 Directive 2014/42/EU of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, O.J. L 127/39.

2017,[6] the federal governments and legislature always proclaimed Germany to be ahead of the related developments on EU level. It is indeed true that, all basic elements of the conceptual approach of confiscation addressed by earlier EC and EU legal acts[7] which include, *inter alia*, its availability as a generally applicable instrument of crime control, as well as its major extensions such as value confiscation, extended confiscation, non-conviction-based confiscation in rem, and the possibilities for issuing freezing orders at the earliest possible moment had been introduced in some form or another on the basis of genuine national reform bills before these issues were promoted and stipulated by the European legislature since the late 1990s.

The current system was introduced as part of the so-called principal reform of German criminal law (*"Große Strafrechtsreform"*) of 1969 which brought forth a completely new General Part of the Penal Code that entered into force on 1 October 1973.[8] One of the central innovations was the newly designed two-track system of forfeiture and confiscation which introduced two separate formal paths[9] of how to deal with objects involved in, or deriving from, crime. While the instrument of forfeiture[10] targets profits obtained from or for committing a crime (sec. 73 et seq.), confiscation[11] relates to *producta* and *instrumenta sceleris* (sec. 74 et seq.).[12]

With the Organized Crime Act of 1992,[13] two major amendments were introduced with the purpose to make the system fit for tackling organized crime which is characterized by its extreme greed for profit. In this particular context the traditional instrument of confiscation has gained increased attention; it was even considered to be a new, "third dimension of crime control".[14] One of the novelties of this reform act was the launch of

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6 Penal Confiscation Reform Act (*Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung*) of 13 April 2017, BGBl. I (Federal Law Gazette, part I), pp. 872.

7 Joint Action on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation on Instrumentalities and the Proceeds from Crime (98/699/JHA); Framework Decision on Money Laundering, the Identification, Freezing, Seizing and Confisction of Instrumentalities and the Proceeds of Crime (2001/500/JHA); Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (2005/212/JHA); Framework Decision on the Execution in the European Union of Orders Freezing Property or Evidence (2003/577/JHA); Framework Decision on the Application of the Principle of Mutual Recognition to Confiscation Orders (2006/783/JHA). The same is true with regard to the related Council of Europe conventions.

8 Second Criminal Law Reform Act (*Zweites Gesetz zur Reform des Strafrechts – 2. StrRG*) of 4 July 1969, BGBl. I (Federal Law Gazette, part I), pp. 717.

9 Either path consists of a cascade of specific provisions, i.e., sec. 73-73e, and 74-74f; an additional set of general provisisons (sec. 75-76b) apply in all cases; all provisions are shown in the appendix.

10 *"Verfall".*

11 *"Einziehung".*

12 Unless indicated otherwise, all legal provisions quoted refer to the Penal Code (*Strafgesetzbuch – StGB*).

13 Act to Combat Illegal Drug Trafficking and Other Forms of Organized Crime (*Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität – OrgKG*) of 15 July 1992, BGBl. I (Federal Law Gazette, part I), pp. 1302.

14 Kaiser 1999, 145.

extended confiscation as a new variant to be applied in organized crime cases exclusively. From today's perspective this has been the initial variant, or nucleus, of extended confiscation. In addition, a general system change in relation to the scope of confiscation was adopted. Whereas in the past the concrete amount liable for confiscation was determined according to the net principle, the so-called **gross principle** should now apply. According to the prior concept offenders had the chance to have all costs and expenses subtracted before confiscation. In legal terms, the original definition of the object of confiscation – "pecuniary advantage" – was slightly changed and replaced by the wording "anything obtained" from or for committing an unlawful act. No matter whether the offender had expenses while preparing and committing the offence or whether he or she lost parts of it or everything later on, all influx related to the crime commission shall be liable for confiscation, thus excluding any set-off. The offender should bear the risk of the full return of everything that was illegally obtained. This rigorous concept was subject of intensive and controversial political and academic discussion (see below, 2.1 and 2.4.). It has also been described as "full"[15] or *extensive confiscation*.[16]

In principle, the system as introduced in 1969/75 still applies today. However, the 2017 reform act has abolished the clear terminological distinction between the two basic instruments, in absence of any specific conceptual or technical need to do so: anyway, the traditional and widely acknowledged generic term forfeiture was eliminated and replaced by *confiscation of proceeds*, while the original confiscation now labels as *confiscation of objects*.[17]

In the following, the focus will be on confiscation of proceeds mainly, unless indicated otherwise. In the context of the current research project, confiscation of objects is of minor interest only; it is of relevance in two particular areas of crime: corruption and money laundering. In a corruptive relation, the donator is liable for confiscation of objects as bribes constitute the object of the offence whereas on the side of the receiving party, the same bribes are gains and, as such, subject to confiscation of proceeds. Accordingly, laundered moneys are usually the object, not the proceeds of such crime. Depending on the concrete modus operandi in a money laundering case either of the two instruments may apply; quite often even both of them have to be employed parallel.

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[15] Rönnau & Bögemeier 2021, 707: *"Vollabschöpfung".*

[16] The term "extensive confiscation" is used here in specification of the gross principle; it should not be mixed up with extended confiscation as defined in article 5 of EU Directive 2014/42/EU.

[17] Strange enough, the name change was explained with difficulties in translating the two distinct instruments into English; see explanatory to the draft bill, BT-Drucks. 18/9525, p. 2.

The new, amended confiscation rules apply generally, immediately and exclusively, also in cases in which the related crime(s) – i.e., the reference crime(s) as well as the acquisition crime(s) – were committed prior to the coming into force of the amendment act (i.e., before 1 July 2017).[18]

Finally, it is important to mention that in daily court practice, judges sometimes try to avoid engaging with the rather sophisticated confiscation provisions. *In lieu* of issuing a formal confiscation order, an informal variant of *de facto* confiscation was created in court practice that is quite prevalent at least in simple cases. Upon query by the presiding judge put forward before the final pleadings begin, defendants have the option to waive their rights on seized property. This "short track" way of confiscation, once documented in the protocol, is irrevocable and replaces a formal confiscation decision.[19] However, this confiscation *extra legem*[20] would rarely be practicable in regard to extended confiscation. Unfortunately, it is not registered in the confiscation statistics; reliable estimates on numbers do not exist. A second escape road has been introduced by the 2017 reform act. A new provision in the criminal procedure code allows abstention from pursuing confiscation for reasons of procedural economy.[21] This confiscation-related variant of diversion can be applied either by the court or even earlier by the prosecutor. Examples provided in the law include, e.g., insignificant extent of the profit, or unreasonable investigatory or legal difficulties that would require "disproportional effort". Prosecutors and courts have wide discrepancy; however, the court needs approval by the prosecutor.[22]

1.2. The current system

1.2.1. Basic principles

Germany's **two track system of confiscation** is regulated in the General Part of the Penal Code; this ensures general applicability for all kinds of offences, unless provided otherwise (special restrictions for extended confiscation will be addressed later). The concepts and basic components are visualized in *Graph 1*, below. **Confiscation of proceeds** (sec. 73 et seq.) applies if anything was obtained from or for committing an unlawful act; according to the rule it is a compulsory additional consequence of the

[18] As provided by art. 316h of the Introductory Law to the Penal Code (*"Einführungsgesetz zum Strafgesetzbuch – EGStGB"*). This clause blocks applying the *lex mitior* rules.

[19] The judicial interest in that practice can be explained by the fact that the protocol note makes any written reasoning unnecessary; in addition it also helps to avoid the risk of overruling/correction by a higher court instance. Despite such academic critique, this practice has always been accepted by the Federal Court of Appeals (*Bundesgerichtshof – BGH*), most recently also after the 2017 reform; *BGH*, rulings of 10.04.2018 – 5 StR 611/17, and 11.12.2018 – 5 StR 198/18.

[20] For a critical comments, see Thode 2000.

[21] Sec. 421 of the Code of Criminal Procedure.

[22] For more details, see Reitemeier 2017, pp. 360 et seq.

conviction and should be ordered automatically. With the 2017 reform act, the former priority rule for victims' claims over state confiscation[23] was abolished. In light of its *de facto* barrier effect[24] that former rule was considered to provide the most impactful impediment to effective confiscation.[25] As a substitute, victims now have the right to file a replacement claim against the state.[26] The second track deals with any objects or instruments that were produced by an offence or used or designated to commit or to prepare an offence (**confiscation of objects**, sec. 74 et seq.). The rationale behind the latter instrument is to withdraw dangerous objects; the best examples are weapons or drugs. There is wide consensus about its legal nature of a preventive security measure.[27] Application is in the discretion of the court.

German law still follows, at least in its basic concept, the natural principle of confiscation, primarily targeting the original assets or objects. The legal term "anything" covers any profit, tangible and non-tangible, which includes saved (or avoided) expenditures[28] and all kinds of non-financial advantage such as, e.g., price reductions or gratis personal services such as craftsmen services, construction work, or "pleasure packages" in luxury establishments of the red-light industry.[29] Liability for confiscation also includes **benefits** taken out of the original gain, e.g., returns on interest, or, if the original was transferred further, any **surrogate values or objects** acquired such as, e.g., Rolex watch, Ferrari car, motor yacht, or *Côte d'Azur* villa bought with drug money.[30] If, however, the original illegally obtained asset can, for any reason whatsoever, not be located or identified, confiscation of an equivalent value is possible. This variant of **value confiscation**[31] which substitutes the object(s) of confiscation has three significant advantages:

- it allows seizure and confiscation of any legal property,

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[23] In its former versions, sec. 73 para 1.2 had stipulatd that "forfeiture shall not apply to the extent that a claim of the injured party has arisen out of the unlawful act [...]". Courts had interpreted this clause widely to the effect that the abstract possibility that such victim claims may exist, prohibited confiscation, even if victims remained unkown. For more details, see Kilchling 2000 (with further references).

[24] The potential existence of a victim automatically blocked confiscation. The only option for intervention was provisional seizure in favour of the victim. However, if a concete victim could not be identified or if a victim could not realize his/her claim the seized property had to be released – a worst case scenario for police.

[25] See also Kaiser 1999, 147 et seq.

[26] Sec. 459g et seq. of the Code of Criminal Procedure. For more details, see Köhler 2017, pp. 679 et seq.

[27] For the controversies on the legal nature of confiscation of proceeds (formerly: forfeiture), see below, 2.4.

[28] For example, fees for legal disposal of toxic waste that were avoided through illegal dumping.

[29] For more examples of advantages delivered in the context of corruption, see Kilchling 2021.

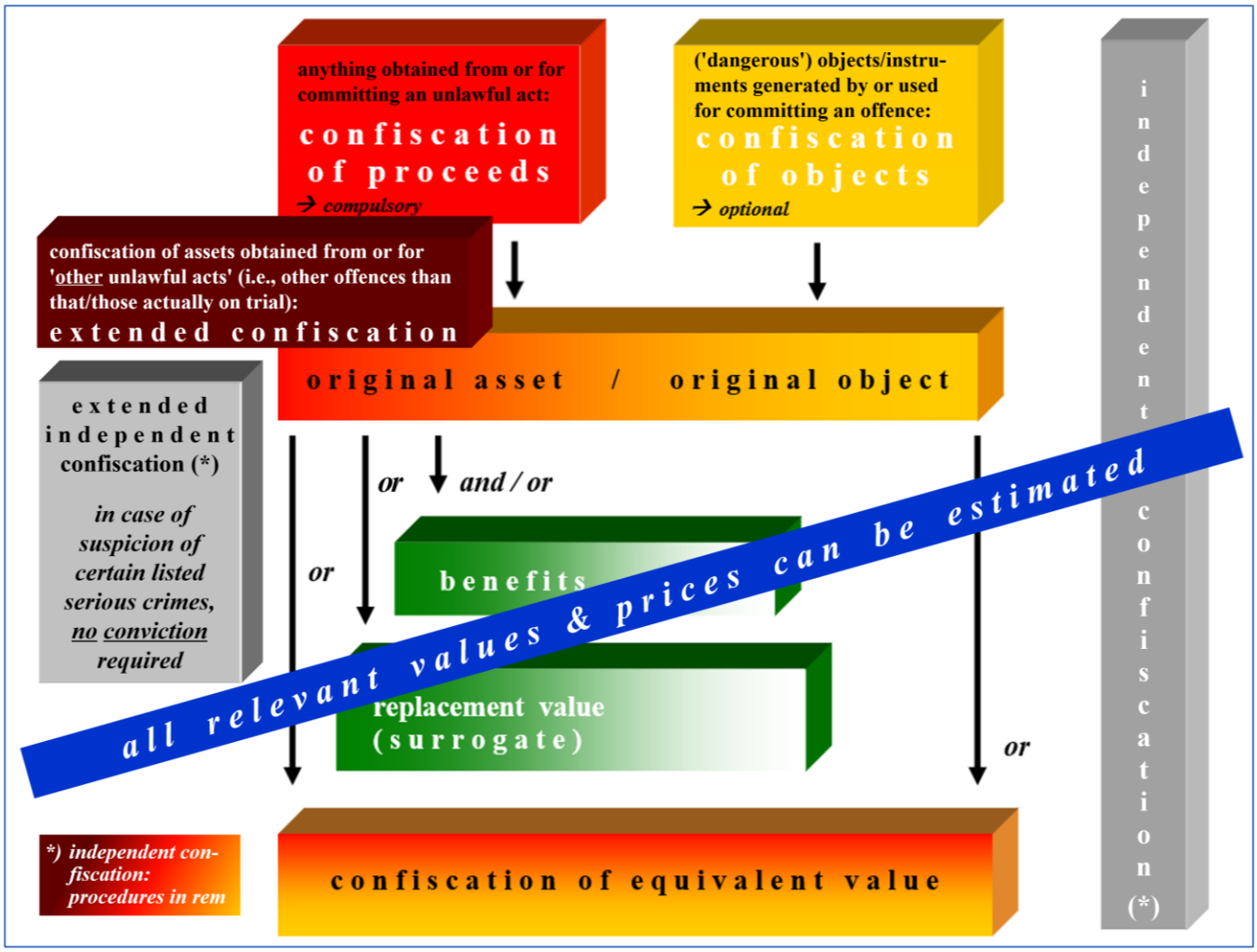
[30] Section 73 paras 1-3.

[31] Sec. 73a.

- any form of concealment or dislocation of assets or their transfer to third parties is *de facto* irrelevant, and
- it is easier and faster, and thus helps sparing investigative resources.

Value confiscation can even be ordered retrospectively, thus replacing a 'natural'[32] confiscation order that has already become final. In case that such order cannot be realized – fully or in part – the original order **can be transformed *ex post* into a value confiscation order**. The same possibility applies when, based on subsequently obtained information on the real extent of the illicit gain, the original confiscation order proved to be insufficient.[33] However, this option can only be activated once a confiscation order had been issued in the main trial.

*Graph 1: The Penal Confiscation System of Germany***



**) All related provisions documented in full text in the appendix.

[32] Targeting the original asset(s) or object(s), according to sections 73 or 74.
[33] Sec. 76.

Once introduced as a kind of "fallback option", value confiscation developed to become a standard procedure under the advanced asset recovery powers of police which regularly put the focus of their financial investigations on the wider financial background of suspects in order to identify any seizable[34] properties – bank accounts, real estate, stocks, company shares, etc., domestic and abroad – that are officially registered under the name of a suspected person.[35] Police are free to choose whatever property is easiest to catch. This clear preference of practitioners toward value confiscation may explain why third-party issues which often dominate the political discussion in the European Union and many member states, are not in the focus of attention in Germany – just due to the fact that the possibility to easily grab on the legal assets of defendants makes the transfer of the original illicit assets irrelevant to a large degree.

This *de facto* dominance of value confiscation is often not sufficiently reflected in the legal discourse, neither in the most recent reform process nor in the criminal law text books. In the last 10 or 15 years, not surprisingly, up to 90 to 95 percent of all seizures which regular precede final confiscation have been carried out as value confiscation.[36] Conceptionally speaking, value confiscation is more than just a practical tool to facilitate recovery in cases in which the original unlawful assets have been concealed. It can be seen as a consequent manifestation of the principle of "full" or extensive confiscation as it puts the risk of subsequent minimization or even full loss of illegally obtained assets on the perpetrator. In principle, one logical second of possession is sufficient to establish principal liability for (value) confiscation, unless the hardship clause[37] applies. From such a perspective, the concept of value confiscation also means a shift away from the traditional naturalistic understanding of confiscation. In addition, it can be seen as a rather efficient functional equivalent for modified evidence rules.

An additional provision on **confiscation from third parties** widens the scope of liability on persons who were not involved in the related crime(s) (third-party beneficiaries).[38] These include so-called "stand-in" scenarios in which the offender has acted on behalf or in the interest of the third party, so-called "transfer/removal" cases, and "succession"

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[34] The rules for (provisional) seizure are explained below, 1.2.4.

[35] This is particluarly true in case investigations from crime into the assets; the situation may be different in case of investigations from suspicious assets into the related crimes (which is one of the reasons why money laundering investigations based on suspicious transactions reports are often not successful).

[36] For more details, see Kilchling 2000.

[37] See sec. 73e.

[38] Sec. 73b.

cases. This provision is of further high practical relevance because it allows – as an exemption from the still prevailing strict principle of guilt in German criminal law – confiscation also from legal persons that have taken profit of the crime. Confiscation from legal persons as immediate perpetrators, on the other hand, is possible under the Regulary Offences Act solely.[39]

In court practice, one of the most relevant case scenarios involving legal persons as third-party beneficiaries involve corruptive practices carried out by employees. The handling of such cases led to a ***de facto* suspension of the principle of extensive confiscation**. In the past the two senates at the Federal Court of Appeals which are in charge of cases of economic crime and corruption regularly refused to apply extensive confiscation against established businesses. They repeatedly argued that the concept of the "gross" principle when applied in cases of corruption should *not* mean that the entire income earned on the basis of a corruptively achieved contract should be liable for confiscation. Instead, they established a new "abstract" method of determination of the immediate advantage taken out of the crime which would be solely *the contract as such, not the value of that contract*.[40] Accordingly, the completion of the contracted services and the realization of the revenue taken out of it has been classified *legal*. Not even the profit before tax should be the determinant basis of calculation: all the taxes[41] and other expenditures further reduce the amount that is finally liable for confiscation.

This divergent *ad hoc* interpretation was in obvious contrast of what the legislator originally had in mind: offenders should bear the risk of arithmetical (factual) over-confiscation following from non-deductible costs incurred through the preparation and commission of a crime, damage, devaluation or even loss of the gain. In addition, it neglects the fact that the law does not at all limit confiscation to immediate proceeds; to the contrary, the law explicitly includes follow-up advantages taken out of the immediate profit as well as any surrogate assets into the catalogue of liable enrichments.[42]

As mentioned, this narrow interpretation was developed for cases of business corruption exclusively. Quite obviously, legal enterprises – even when involved in corruptive activities – should not be treated in the same way as criminal organizations for which the concept was developed.[43] Despite the fact that the other divisions at the

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[39] See sec. 29a of the Regulary Offences Act (*Ordnungswidrigkeitengesetz – OWiG*). However, the net principle applies in such a case. Additionally, legal persons can be fined up to an amount of € 10 million (sec. 30 *OwiG*); such regulatory fines can also pursue implicit confiscatory aims.

[40] *BGH*, rulings of 02.12.2005 – 5 StR 119/05, 27.01.2010 – 5 StR 224/09 (5th senate), 19.01.2012 − 3 StR 343/11 (3rd senate).

[41] *BGH*, ruling of 21.03.2002 – 5 StR 138/01 (5th senate).

[42] See above, ad sec. 73 para 2.

[43] For more details, based on concrete exemplary case scenarios, see Köhler 2017, pp. 506 et seq.

appeals court were much less reluctant and followed the original purpose of the law by applying extensive confiscation according to the gross principle more strictly,[44] the legislator finally retreated and changed the law into the direction as claimed by the *BGH*'s influential business crime division. In the course of the 2017 reform, the gross principle was replaced by a new additional section which explicitly provides that "when calculating the value of [illicit proceeds], any expenditure on the part of the offender, participant or [third party liable to confiscation] is to be deducted."[45] Such deduction is mandatory. Ironically, this amendment has been advertised as a strengthening of the gross principle. Others have explained it as a "specification",[46] or a modification into a "normative gross principle".[47] Realistically speaking, it is a *de facto* revision of the principle of extensive confiscation because it applies in all cases of value confiscation, thus exceeding the category of cases involving legitimate businesses for which it was originally developed as an exclusive exception by the *BGH*'s business crime division.

A further statutory option makes confiscation easier: the exact value(s) which have to be concretized in the final confiscation order can be estimated by the court in the course of the proceedings.[48] **Estimation power** mainly includes two components, i.e., the extent or volume of what was obtained, and its value. This can be calculated, for example, on the basis of estimates on, first, the quantity of drugs trafficked and, second, their retail market price at the time and place in question. Likewise, the amount of the expenses to be deducted can be estimated as well.

In addition to all afore-mentioned instruments *in personam*, a confiscation procedure *in rem* has been part of the catalogue of instruments since long. Isolated confiscation proceedings can be conducted "if it is impossible to prosecute or convict a specific person for a criminal offence".[49] Initial purpose of this variant of **independent confiscation** is to enable confiscation of illegal assets from foreign or fugitive offenders or owners. Over the years, the scope of this patrimonial confiscation procedure was broadened by the courts, allowing *in rem* confiscation of illegal assets also when the person concerned cannot be prosecuted or convicted because of legal grounds such as, in particular, *ne bis in idem*, case dismissal, lack of culpability, statute of limitations, immunity, lack of evidence on individual liability, etc.[50] With the 2017 reform act, these variants were explicitly added to the related statute which further clarifies that *in rem*

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[44] *BGH*, rulings of 30.05.2008 – 1 StR 166/07 (1st senate), 19.11.1993 – 2 StR 468/93 (2nd senate).

[45] Sec. 73d para 1. The law also defines some exeptions regarding expenses directly used for crime commission; these include, e.g., the bribe. For more details, see Reitemeier 2017, pp. 356 et seq.

[46] Trüg 2017, p. 1914.

[47] Reitemeier 2017, p. 358.

[48] See sec. 73d para 2.

[49] See sec. 76a para 1.

[50] For more details on the strategic advantages of *in rem* confiscation procedures, see Meyer 2015, pp. 256 et seq.

procedures can be conducted to accomplish confiscation, value confiscation, or third-party confiscation.[51] In any case, however, full evidence on the criminal origin of the actual proceeds must be established.

1.2.2. Extended confiscation

As mentioned earlier, the German has introduced **extended confiscation** as an extra tool rather early with the Organized Crime Act of 1992.[52] This origin implies its original purpose and scope. As an extraordinary confiscatory instrument aimed to tackle organized crime explicitly it could only be applied in case of listed offences which typically represent organized crime;[53] in technical terms, access to this instrument was cleared through an explicit normative link provided in the relevant offence statutes such as, e.g., drug trafficking, human trafficking, money laundering,[54] various types of professional or large-scale fraud or other profit crimes, etc.[55]

Extended confiscation has been particularly designed for cases in which suspicious assets cannot be assigned to a specific offence from which it might derive. To reach this aim, the strict accessory offence connection (nexus) was lowered. Application requires one concrete crime, i.e., the reference crime,[56] which opens the door for confiscating further assets *suspected to derive* from *other, unspecified crimes*. With this approach the legislature explicitly rejected introducing a reversal of the burden of proof.[57] Although the concepts of accessory offence connection on the one hand and burden of proof on the other have different function, they can have similar effects, in particular in our context.

Originally, application of this rigid instrument was limited to cases involving organized crime and terrorism.[58] With the reform act of 2017, this specified – and limited – scope of application of extended confiscation disappeared. Now, *any type of offence can qualify as reference crime*; a simple theft or minor shoplifting is sufficient, or even a

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51 Sec. 76 paras 2 and 3.

52 See above, 1.1.

53 In absence of an explicit legal definition of organized crime, the cataloge of crimes in case of which extended confiscation was possible in those days could even be seen as an indicator of what the German legislature considered to be a crime of that type. For more details, see Kilchling 2004.

54 Prior to its conversion into an all crime offence, money laundering, more or less parallel to the original variant of extended confiscation, was likewise designed as an instrument aimed at targeting organized crime and terrorism exclusively. Similar to the catalogue crimes allowing extended consfiscation, the catalogue of eligible predicate offences to money laundering was seen as a quasi list indicating what the legislator perceived to be typical organized crimes. With the reconstruction of extended confiscation and money laundering – both once introduced as prototype instruments for tackling organized crime – into "ordinary" instruments this "mnemonic" no longer works.

55 The list consisted of some 34 statutory offences; for more details, see Kilchling 2004.

56 *"Anknüpfungstat"*.

57 Cf. explanatory to the Organized Crime Act of 1992 (see footnote 13), BT-Drucks. 12/989, p. 23.

58 After the events of 9/11 the scope of application had been extended to terrorism-related crimes.

traffic offence (drunk driving or criminally relevant speeding[59]). This means that, for example, an unexplained private storage of goods, e.g., dozens or hundreds of brandnew high price smartphones or tablets or what have you, can be removed via extended confiscation as soon as one single reference crime can be prosecuted; an accessory connection between the reference crime on trial and the additional (alleged) acquisition crime(s)[60] from which the suspected proceeds have probably derived is not needed. The latter do not have to be proven beyond reasonable doubt; the preponderant likelihood of illegal origin is sufficient.[61] A typical example from the textbooks refers to the situation of a retail drug dealer whose private home is to be searched after arrest in the act on the street. When police find, in addition to the drugs and cash in the offender's pocket, a suitcase full of money bills, used and in small denomination, the entire amount can be confiscated as alleged drug money in the course of the prosecution of that one single deal for which he or she was arrested. Potential acquisition crimes in such a case would be a series of further – unspecified – drug sales; neither their concrete number nor any other details as to their commission (date, place, price, quantities, clients, etc.) have to be determined. It therefore may happen that a defendant will be tried and convicted for one small scale deal involving 25 Euros, and an additional 10,000 Euros or whatever amount be confiscated. Proportionality between the reference crime and the value of confiscated proceeds must not be met;[62] solely for confiscation of objects a statutory proportionality clause applies.[63]

In any such case, extended confiscation in its current[64] basic variant presupposes prosecution *in personam* for at least one criminal offence, no matter of which type. This is the starting point of the second core element of the recent reform through which the basic variant was amended by the *in rem* variant of extended confiscation that is, *extended independent confiscation* which represents the German variant of **non-conviction-based confiscation** as required by directive 2014/42/EU. Technically

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59 By way of broad interpretation of the statutory element "situationally unreasonable speeding" the courts have introduced the new category of a so-called "one-man-race", to be punishable as illegal motor race under sec. 315d of the Penal Code; see Federal Court of Appeals (*BGH*), ruling of 17.02.2021 – 4 StR 225/20. In case of conviction the motor vehicle involved can also be confiscated; sec. 315f of the Penal Code (which refers to sec. 74 et seq.). This regulation, introduced in October 2017 parallel to, but formally independent of, the general confiscation reform of the same year, has clearly been inspired by Switzerland's general practice of confiscating cars involved in serious traffic offences.

60 *"Erwerbstat(en)"*.

61 The Federal Court of Appeals established a constitutional interpretation requiring that the courts have to explain that "concrete circumstances justify the assumption [of illicit origin]." See, e.g., BGH, ruling of 22.04.1994 – 4 StR 516/94.

62 The former forfeiture-related hardship clause (cf. former section 73c of the Penal Code) was abolished by the 2017 reform as well.

63 Sec. 74f of the Penal Code.

64 I.e., without the prior offence-related restrictions.

speaking, the concepts of extended confiscation and independent confiscation were combined.[65] A new additional paragraph, integrated into the provision on independent confiscation, now allows conducting such an *in rem* procedure according to the rules of extended forfeiture.[66]

Distinct from the basic variant of independent confiscation,[67] an initial ('simple') degree of suspicion of a reference crime – i.e., the threshold that allows provisional seizure[68] – is sufficient. Just like in the basic variant of extended confiscation, an accessory connection between the reference crime and the (allegedly criminal) assets is not required. Not enough, not even the (alleged) reference crime has to be proven. The crime suspicion alone functions as the gateway to this patrimonial confiscation procedure (without prosecution of a person). Accordingly, seized assets can be confiscated if a defendant cannot be charged or prosecuted in lack of evidence for the commission of a reference crime. In regard to the (alleged) acquisition crime(s) the court must be convinced of the criminal origin of the assets upon preponderance. In principle, the same rules as for basic extended confiscation apply, i.e., those acquisition crimes do not have to be specified, neither in regard to their type nor to any other details. In addition, in this independent variant of extended confiscation the anglo-saxon "inappropriate lifestyle" test, as provided by the directive 2014/42/EU[69], applies for justifying the illicit origin and, therefore, seizure and confiscation.[70] This is, or comes at least close to, a *de facto* shift of the burden of proof. In fact, it changes the focus and scope of the court inquiry: While in a regular penal trial the evidence is collected and weighted in order to *determine the guilt* of a defendant, the testing of the facts during *in rem* procedures is centered around the *rebuttal of the – implicit – presumption of the illicit origin*. In such a situation, those affected cannot rely anymore on the right to silence. Instead, they have the *de facto* burden of presenting facts that are sufficient to convince to court of – either their innocence or, at least, the licit origin of their property what means in that particular legal context the non-involvement of the property in prior criminal conduct, no matter of which kind.[71]

In view of the rigid character and the wide scope of this instrument which goes beyond the limits that had so far been respected, application has been limited, at least for the time being, to specified serious reference crimes.[72] These are provided in a detailed

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65 For more details, see Marstaller & Zimmermann 2018, pp. 37 et seq.
66 Sec. 76a para 4.
67 See above, 1.2.1.
68 See below, 1.2.4.
69 See article 5 of the Directive 2014/42/EU.
70 This particluar detail has been concealed in a side provison, i.e., sec. 437 no. 3 of the Code of Criminal Procedure.
71 For similar considerations, see Trüg 2017, p. 1916.
72 The catalugue is broader than what is required under art. 5 para 2 of the Directive 2014/42/EU.

catalogue which includes, e.g., terrorism, financing of terrorism, human trafficking, forced prostitution, child pornography, serious tax crimes, and a considerable number of crimes regulated in side laws such as the Narcotics Act, Asylum Act, Foreign Trade and Payments Act,[73] War Weapons Controls Act, etc.[74] While this catalogue looks quite limited at first glance, it has to be noted that the catalogue includes money laundering as eligible reference crime. However, the recent system change of money laundering will have significant impact on non-conviction-based confiscation.[75] The implementation of the all crime principle[76] has made this variant of confiscation now available for all cases which involve any money or other assets of suspicious origin.[77] The seemingly nondescript reference to money laundering[78] appears like a trojan horse[79] that seriously affects the legislator's initial reference to the narrow list of catalogue crimes that would restrict the scope of sec. 76 para. 4 to serious organized and terrorist crimes solely.[80] By now there is no general legal barrier in place anymore that would effectively block non-conviction-based confiscation. Past research has shown that the (alleged) suspicion of money laundering can be instrumentalized in the course of criminal investigations as a kind of "amplifier tool" that opens the door for applying the entire set of investigation and prosecution powers – including seizure – that formally apply in organized and other serious crime cases exclusively, in any case involving a crime that generated proceeds. When the suspicion cannot be confirmed in the further course of such investigations, it is easy to downgrade the legal assessment later on and to substantiate the indictment with reference to less serious offence(s).[81] In light of the fact that extended independent confiscation requires initial suspicion only,[82] it can be expected that such practices can be attractive for police and prosecution also in cases that are not explicitly listed in the law.

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[73] The Foreign Trade and Payments Act gained additional significance in the context of the enforcement of the EU's economic sanctions against Russia; see below, footnotes 83 & 84.

[74] See sec. 76a para 4 no. 1 to 8.

[75] For similar conclusion, see also Böhme & Busch 2021, p. 173.

[76] The radical system change replacing the catalogue principle by the all crime principle was introduced with the Act to Enhance the Penal Combat of Money Laundering [*Gesetz zur Verbesserung der strafrechtlichen Bekämpfung der Geldwäsche*] of 03.03.2021, BGBl. I, p. 32, which brought a complete re-design of sec. 261 of the Penal Code. For more detals, see Vogel 2020.

[77] Besides any kind of suspicious monetary transaction, the mere possession of such assets can already raise initial suspicion of money laundering which allows for immediate seizure (see also below, 1.2.4.).

[78] Cf. no. 1f) of sec. 76 para. 4.

[79] The statutory crime of money laundering has to be seen as a kind of a "materialized" prosecution strategy rather than a crime with real doctrinal substance; it's primary aim is to facilitate asset recovery. For more details, see also Kilchling 2000, 2014a/b.

[80] Government proposal (see footnote 17), p. 73.

[81] For the particularities of confiscation in the context of money laundering, see also Vogel 2020.

[82] See below, 1.2.4.

An *additional sector-related widening of the scope of confiscation* has been introduced in May 2022. Through an amendment of the Foreign Trade and Payments Act, non-conviction-based confiscation has been made applicable also in the context of the – non-penal – economic restrictions imposed by the European Union. This new option applies in regard to non-declared assets of individuals who are subject to one of the EU's (political) freezing regimes.[83] A first case targeting property held by Russian nationals listed has been initiated by the public prosecution authorities in Munich.[84]

1.2.3. Statute of limitation

The instrument of non-conviction-based confiscation was further strengthened with new regulations on the statute of limitations. After the recent reform the individual statutes of limitations of the (alleged) crimes in question no longer apply. Instead, a new **general statute of limitation of 30 years** has been introduced for both, extended and independent confiscation.[85] This is the maximum limitation period in German penal law which only applies for the most serious crimes for which a life sentence can be imposed.[86] The effect of this amendment in a non-conviction-based confiscation procedure is that the courts only have to determine that the suspicious asset(s) have their origin in any (alleged) acquisition crime that had been completed no longer than 30 years ago.[87]

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[83] A new provision in the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz – AWG*) targeting persons listed in the EU's regulations on economic restrictions in view of Russia's invasion of Ukraine was introduced: The failure to immediately declare all their properties to the competent authorities has been criminalized under the new sec. 18 para 5b of the AWG, as introduced by the First Act for More Effective Enforcement of EU Sanctions (Sanctions Enforcement Act I – *Sanktionsdurchsetzungsgesetz I*) of 23 May 2022, BGBl. I, p. 754; for more details, see the explanatory to the draft bill, BT-Drucks. 20/7014. Due to the fact that sec. 18 of the AWG has already been part of the catalogue of reference crimes for non-conviction-based confiscation, this amendment opens the door for seizing and confiscating such properties. Sec. 20 para 1 of the AWG further provides that any objects related to AWG crimes are subject to confiscation. As a result of this sector-related widening of the scope of confiscation, the character of the undeclared property becomes irrelevant – *be it of licit or illicit origin*. In such a context, the term "undeclared property" earns a totally new, highly problematic meaning.

[84] This domestic regulation goes far beyond the original purpose and quality of the EU's restrictive measures which are implied under the joint foreign and security policy (CFSP). The freezing of property according to article 2 of EU regulation 269/2014 of 17.03.2014 (with its regularly amended annexes in which the targeted persons are being listed) is meant to be a political sanction in form of a – temporary – constriction of the possibility to enjoy their (often luxurious) properties located in the European Union; however, ownership remains with the sanctioned persons, and the restrictions will automatically lapse when the actual sanction regime comes to an end. For more details on the concept of the EU's sanctions regimes in general and the latest developments in Germany in particular, see Kilchling 2022.

[85] Sec. 76b para 1; sec. 76b para 2 further provides that there is no limitation at all for international (war) crimes according to sec. 78 para 2 of the Penal Code and sec. 5 of the Code of Crimes against International Law.

[86] See sec. 78; as an exception, murder is imprescriptible. For the prosecution of any other statutory crimes, significantly shorter periods (20, 10, 5 or 3 years) apply.

[87] See also Köhler 2017, p. 671. See also below, 2.1.

Together with all the other amendments introduced by the reform act of 2017, this new statute of limitation also applies retroactively – a novelty which was approved by the Federal Constitutional Court (FCC) in February 2021 (for more details, see below, 2.6.3.). While investigators and lower instance courts were hesitant towards applying extended confiscation in (formerly) time-barred cases prior to this somewhat surprising FCC ruling, some experts now expect a wave of such retroactive confiscation proceedings. Such procedure is even possible in cases that were already adjudicated in the past as the *ne bis in idem rule*, too, does not apply in independent proceedings.[88] When taking into consideration the various rules on interruption or suspension of the limitation period,[89] cases can be re-opened and assets confiscated for a past period of up to 65 years.[90] In the variant of an *in rem* procedure this can also relate to assets that have long been in the possession of legal successors, e.g. the widow who inherited such assets from a former suspect or defendant.

This amendment may be seen as a missile whose explosive power has not yet been fully explored. It is an inherent component of the current concept of extended confiscation of Germany.

1.2.4. Seizure

Effective confiscation needs provisional seizure of assets that are potentially liable for confiscation at the earliest possible moment of time. Extended independent confiscation even requires seizure as a formal prerequisite. In order to prepare such seizures, different kinds of financial investigations, to be conducted by specialized police units with the aim to clear up the financial situation of suspects as comprehensively as possible, have been developed since the late 1990s.[91]

With the 2017 reform the formal preconditions for seizure were lowered. In particular, the former temporal limitation of, and phased preconditions for, provisional seizure were abolished. This measure can be initiated and enforced rather quickly upon *initial suspicion*. In the past seizure orders had lapsed automatically after 6 months (or, under extraordinary circumstances, after 12 months at the latest); for further extension demonstration of strong suspicion was required.[92] Today seizure upon initial suspicion is, in principle,[93] *temporarily unlimited*. Distinct degrees of suspicion now have a different function, or consequence: In case of initial ('simple') suspicion, the prosecutor

[88] See above, 1.2.2.
[89] Sec. 78b and 78c
[90] For more details, see Maciejewski 2020, 444.
[91] See above, 1.2.1. For more details on the practices of embedded versus independent financial investigations, see Kilchling 2014, pp. 658 et seq.
[92] Cf. earlier version of sec. 111b para. 3 of the Code of Criminal Procedure (prior to 1 July 2017).
[93] Release can be claimed on grounds/with plea of disproportionality only.

has discretion whether or not to make a seizure, whereas in case of a strong suspicion, seizure must be ordered.[94]

1.2.5. Selected procedural features

With the 2017 reform act, an additional procedural mechanism was introduced that aims to further facilitate the handling of confiscation orders *in personam*. In cases in which the assessment of the accessory connection between crime and alleged proceeds would unreasonably frustrate or delay the course of the trial, the court now has the possibility to **split the proceedings** at any time,[95] in order to give priority to the hearing on the criminal responsibility of the defendant(s) while postponing the confiscation-related aspects of the case. Once the (main) judgement has become non-appealable, the related confiscation issues are to be addressed in a **subsequent – separate – procedure**[96] during which the accessory connection of suspicious proceeds to the related crime(s) is to be explored.[97] All facts as pre-determined in the main judgement are binding during the second part. Not enough, this subsequent confiscation-related part of the process can be conducted in written. In this case, the decision will be issued by written court order[98] against which only reduced remedy is possible.[99] (Only) upon request by the prosecutor or those affected by the confiscation action an oral hearing has to be scheduled;[100] in this case, the regular legal remedies are available. This splitting option can be described as a kind of *quasi-independent decision in rem – embedded in an in personam procedure.*

Besides this latter option of issuing a separate (written) confiscation order, all confiscation provisions can also be applied in the context of **full written proceedings**. In principle, any criminal case resulting in a conviction of no more than one year of imprisonment can be tried in such a way, i.e., without a public court hearing. The general rules allow that a confiscation order can be issued, together with the main decision, by means of a so-called **penal order**[101] – either *in personam*, or in the context of an independent *in rem* procedure.

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94 Sec. 111b para. 1 of the Code of Criminal Procedure.

95 Sec. 422 of the Code of Criminal Procedure.

96 Sec. 423 of the Code of Criminal Procedure. According to para 2 the separate confiscation order shall be issued no later than 6 months after the main verdict has become final.

97 Depending on the confiscation variant in question these final facts can qualify either as reference crime or as acquisition crime.

98 Sec. 423 para 3 of the Code of Criminal Procedure.

99 Written court orders can only be challenged by means of an immediate complaint (*"sofortige Beschwerde"*), see also sec. 423 para 3 of the Code of Criminal Procedure. Regular appeal is precluded.

100 Sec. 423 para 4 of the Code of Criminal Procedure.

101 Sec. 407 para 2 no. 1 of the Code of Criminal Procedure. Any non-custodial penalties and additional measures (such as, confiscation) as well as conditional prison sentences up to one year can be issued in such simplified written procedure which is very popular in practice. In 2020, nearly 554,000 penal orders were issued in Germany which exceeds the number of formal charges

The Code of Criminal Procedure also provides detailed rules on **third party rights**. Anyone who is not accused but potentially concerned by a confiscation order has, in principle, the same procedural rights like a defendant.[102] His or her position as a so-called **party to confiscation proceedings**[103] shall be determined *ex officio*, as soon as induced,[104] unless such person has officially declared waiver of objections.[105] Under certain circumstances a subsequent review procedure can be initiated by a third party concerned even when confiscation decision has become non-appealable.[106] Parties to confiscation proceedings have the right of legal representation at any stage from investigations on; if necessary, a lawyer has to be assigned *ex officio*.[107] In case that such a party was neither present nor represented when the related judgement was pronounced, the verdict has to be delivered to him or her.[108] For further details on the procedure, see below (2.5.).

Finally, all variants of confiscation can, in principle, also be applied in **proceedings against juveniles**. There is no general exemption foreseen in the youth justice laws.[109] However, in light of the explicit educational rationale of the youth justice system the catalogue of corrections to be imposed on juvenile offenders does not include financial penalties such as, in particular, fines or transaction fines. Other financial consequences, direct or indirect, such as, e.g., victim restitution ordered as a condition for a diversionary termination (closing) of the case, or restorative payments arising from an agreement concluded in a victim-offender mediation procedure, are of course possible. In light of its non-penal character, the same applies, in principle, to confiscation.[110] However, if in an individual case the youth prosecutor or youth judge do consider the effects of a confiscation order inappropriate or even counter-effective in regard to the educational needs of an individual young offender they can apply the specific confiscation-related diversion clause of sec. 421 of the Code of Criminal

followed by a full trial (Federal Statistical Office, Conviction Statistics of 2020). The extent to which confiscation was ordered by means of a penal order is not known.

[102] Sec. 424 para 1 and sec. 427 of the Code of Criminal Procedure.

[103] *Einziehungsbeteiligter*.

[104] This can already be the case during the investigation phase, see sec. 426 of the Code of Criminal Procedure.

[105] Sec. 424 para 2 of the Code of Criminal Procedure. For exceptions, see sec. 425.

[106] Sec. 433 of the Code of Criminal Procedure. This option applies whithin a period of two years after the decision has became final, as long as the enforcement of the confiscatioon order has not been concluded.

[107] Sec. 428 of the Code of Criminal Procedure.

[108] Sec. 430 para 4 of the Code of Criminal Procedure.

[109] Cf. sec. 2 para 2 of the Juvenile Justice Act (*JGG*; see above, footnote 1). Confiscation may even be applied in simplified youth proceedings (sec. 76 *JGG*); however, penal orders are not allowed (sec. 79 *JGG*).

[110] Notwithstanding its character of a (quasi-penal) monetary claim, the Federal Court of Appeals also allows value confiscation against juveniles, even in cases in which the original enrichment got lost; *BGH*, ruling of 17.06.2010 – 4 StR 126/10.

Procedure referred-to above[111] based on which they can renounce confiscating proceeds which, according to the general rules, would be mandatory.

2. Specific issues related to extended confiscation and its role in the general context of confiscation legislation

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

The draft bill to the recent reform act of 2017 gives rather general explanations as to the purpose of the amendments which have significant parallels to the arguments which are quite common in the area of such legislative acts: the general aim is to "improve the existing regulations" on confiscation; to this end, "application should be made easier" and "non-justifiable gaps" should be closed. Last but not least, the draft bill also mentions that the reform is a necessary step to fully implement the Directive 2014/42/EU.[112] Besides the usual array of technical details, the main focus of the explanatory is dedicated to the principal system changes related to the abolition of the former priority of victims' claims over the state's interest in confiscation, to the de facto suspension of extensive (gross) confiscation, and the new statute of limitation. It is presumably due to the fact that both, extended confiscation as well as independent confiscation, had – in principle – already been in existence before, that their significant broadening did not receive much emphasis in the document.

Inter alia, the transformation of extended confiscation from a special instrument originally available in cases of organized crime and terrorism solely into a universal tool, has now been promoted as a "consequent" next step;[113] the need for it has been justified rather formally with the obligation arising from article 5 of the EU Directive.[114] The extension of the non-con-conviction based variant of confiscation was further explained as an attempt to close the *de facto* confiscation gap in cases involving suspicious assets of unclear origin; the document quite vaguely refers to the Italian and some "Anglo-American" systems as good role models, however, without going into any kind of detail.[115] Only one meager reference has been made to a paper by

[111] See above, 1.1. For more details regarding confiscation in juvenile justice cases, see Reitemeier 2017, pp. 360 et seq.
[112] BT-Drucks. 18/9525, p. 2.
[113] BT-Drucks. 18/9525, p. 65.
[114] BT-Drucks. 18/9525, p. 57. Contrary to what the explanatory, at least implicitly, suggests, article 5 *does not require* such universal applicability; see also Trüg 2017, p. 1915.
[115] BT-Drucks. 18/9525, p. 58. In addition, Eurojust's 2013 report on non-conviction based confiscation has been mentioned, also without providing any specific quotes.

Meyer,[116] claiming that that author considers such an instrument needed. A further quite poor justification has been given for the extreme extension of the statute of limitation.[117] Superficially, the new general time limit of 30 years[118] has been explained quite technically as act of harmonization with the general statute of limitation of civil enrichment law which is also 30 years.[119] No discussion whatsoever on the different functions of limitation rules in private and in penal law. From a pure conceptual perspective this means, without doubt, a logical expansion of the predominant interpretation of penal confiscation as penal variant of a civil *condictio* (see below 2.4.). From a penal perspective, however, it means a significant aggravation – advertised in the explanatory as a (pretended) act of precaution to guarantee a "clear temporal limitation of confiscation"; at the same time, the document gives praise to its particularly advantageous effect for non-conviction-based procedures arising from the fact that the only aspect that remains to be ascertained by the courts now is that the (alleged) acquisition crime dates back no more than 30 years.[120]

Traditionally, in-depth legal discussions are not an integral part of draft bills in Germany. Some issues of relevance have been subject of discussions in the course of the parliamentary proceedings which included statements by invited experts before the parliamentary committee on justice matters. Interestingly, comments primarily express some doubts about the potential efficiency of the amended provisions rather than principal concerns about their compliance or non-compliance with constitutional principles. However, at least some critical considerations in regard to the new variants of extended confiscation have also been documented.[121] This remarkable absence of fundamental critique towards the recent amendments and their purpose may be explained by the fact that the basic elements of the confiscation system had all been approved by the Federal Constitutional Court (FCC)[122] already in the past, as will be explained in more detail in the following sub-chapter.

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[116] Meyer 2015.

[117] See above, 1.2.3.

[118] For exceptions for imprescriptible crimes, see above footnotes 85 & 86.

[119] See sections 197 and 852 of the Civil Code (see above, footnote 1).

[120] BT-Drucks. 18/9525, p. 83: "[With this legislatory change] a significant factual obstacle to the confiscation of unexplained (illicit/unlawful) assets will be eliminated; from a criminal policy perspective, this is so essential" (non-literal translation by author; round brackets taken from the original). This sentence, at least implicitly, suggests an equation of unexplained property with property of illicit/unlawful origin.

[121] Seven experts had been invited for hearing; for more details, see BT-Drucks. 18/11640, pp. 74 et seq.

[122] *Bundesverfassungsgericht (BVerfG)*.

2.2. Is there any case-law in your EU Member State relating to confiscation (e.g. of constitutional court, court of appeals)

In the past, the FCC always confirmed the (domestic) penal confiscation regime in relation to both, the general concept and its various instruments. Point of reference for all of the Court's case law in this matter is the principal ruling of 1967[123] according to which property derived from crime does not enjoy constitutional protection from the outset. On the contrary, it is the penal confiscation rules that (pre-) define the scope of the basic right to property,[124] and its limits.[125] After the implementation of the Organized Crime Act of 1992,[126] all amendments that have tightened the confiscation rules were brought before the Court. Notwithstanding some strong academic critique,[127] the FCC issued a key ruling in which all the major innovations were fully approved – this includes, *inter alia*, the general system change through which the 'net' principle was replaced by the 'gross' principle (extensive confiscation), value confiscation, and extended confiscation (in its original, basic form).[128] In its decision, formally a ruling on extended forfeiture solely, the Court declared the constitutionality of all three elements mentioned. It explicitly held that neither the principle of extensive confiscation nor the instrument of extended forfeiture do have a punitive character and, therefore, cannot violate the constitutional principle of guilt. Above all, the Court also rejected any violation of property rights, thus approving once again its prior ruling of 1967 on the general exclusion of illegally obtained property from constitutional protection. It further confirmed the concept of the lowering of the accessory crime connection in the case of extended confiscation – as concretized by the Federal Court of Appeals[129] – to be in accordance with the principle of legality. In an *obiter dictum* the Court added further principal considerations on extensive confiscation and value confiscation. According to the opinion of the Court, the gross approach which entails the principal responsibility of perpetrators for the return or refund of illegally obtained assets out of their legal assets. This responsibility follows the traditional principles of *civil mala fide liability*, accordingly it is not an issue of criminal responsibility or even guilt at all.

This recourse in the reasoning on the civil *mala fide* concept finds its doctrinal roots in the general classification of the legal character of penal confiscation which, according

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[123] BVerfG, ruling of 12.12.1967 – 2 BvL 14/62, 2 BvL 3/64, 2 BvL 11/65, 2 BvL 15/66, 2 BvR 15/67, BVerfGE 22, pp. 387.

[124] An infringement of this basic right can therefore not be claimed.

[125] See also Köhler, p. 498 (with further references). According to the FCC, the penal confiscation regime is part of the "traditional limits" of the constitutional property protection; BVerfG, ruling of 12.12.1967 (footnote 123), p. 422.

[126] See above, 1.1.

[127] Some of these critical arguments have gained new attention in relation to the most recent reform, namely the non-conviction-based variant of extended confiscation; see below, 2.6.

[128] BVerfG, ruling of 14.01.2004 – 2 BvR 564/95, BVerfGE 110, pp. 1 = NJW 2004, pp. 2073.

[129] See above, 1.2.2., footnote 61.

to the FCC's constant opinion, is **a civil concept in essence** (which will be explained in more detail below[130]). Its purpose is, in simplified terms, to terminate the wrongful allocation of property, caused by the criminal conduct in question.[131] Seen from such a perspective, the property-related intervention lacks any punitive character. The fact that confiscation is being carried out by prosecution agencies (including the penal courts) on the basis of provisions codified in the penal code shall not be decisive for determining the legal character of confiscation.

Two recent decisions further imply that the FCC is determined to stick with its prior constitutional assessments of the German confiscation system, independent of the latest amendments.[132] The formal focus of these two new rulings is on the retroactive implementation of the amended regulations. In its 2021 ruling the Court emphasized in the first head note,[133] that it will pursue with the major reasonings of the 2004 ruling, namely in regard to the non-penal character of confiscation in general and extended confiscation in particular, as determined in its prior decisions. In regard to the merits of the new case, i.e., the retroactive implementation, the Court has pointed out that the 2017 reform act had not altered the entire confiscation regime to such a degree that would require a re-assessment of the core substance of the prior case law. Going even further, the Court now held that the purpose and the intended effect of confiscation – i.e., recovery of the proper allocation of property – is *future-oriented* and therefore, in clear contrast to all punitive concepts, not focusing on (allegedly) past illicit conduct.[134] The problem of retroactivity will be discussed in more detail below.[135] First comments on the 2021 ruling have come to the conclusion that this decision strongly implies that the FCC, once an individual complaint explicitly challenging non-conviction-based confiscation would come up, is likely to approve the non-penal character of the new variant of non-conviction-based confiscation as well.[136]

This short overview confirms that – with the exception of the nullification of an earlier attempt by the legislator to establish a so-called asset penalty in form of an additional, repressive variant of confiscation[137] – the FCC has always approved, at least in the

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130 See below, 2.4.

131 The Court speaks of an intervention aiming to re-establish the proper allocation of property (*"vermögensordnender Zugriff"*); BVerfG, ruling of 14.01.2004 (footnote 128), p. 2075.

132 BVerfG, rulings of 10.02.2021 – 2 BvL 8/19, and 07.04.2022 – 2 BvR 2194/21.

133 *Erster Leitsatz*. The 2004 ruling is explicitly cross-refenced in that key statement – quite a rare, but expressive technique that usually can be seen only in key rulings aimed at sending a clear message.

134 BVerfG, ruling of 10.02.2021 – 2 BvL 8/19, annot. 111, 113.

135 See below, 2.6.

136 Lenk 2021, p. 1232.

137 Former sec. 43a of the Penal Code (1992-2002) which had been designed as an option for confiscating the entire assets of a convict *in lieu of* a prison sentence. Role model for that type of asset penalty was the *"confiscation générale"* under French law; for more details, see Kilchling 2000, 2004. The FCC emphasized the concept of exclusivity between – repressive, guilt-related –

past, the general, non-penal variants of confiscation in all its various forms under Germany legislation. One critical academic comment on the recent ruling that has confirmed the retroactive implementation of the new rules even suggests confiscation having developed to become a kind of "sacred cow" which the Court wouldn't dare to touch upon.[138] However, the future development can hardly be predicted, *inter alia* also in light of the fact that the subject-matter – at least the EU-driven elements of the 2017 reform act such as, in particular, the non-conviction-based variant – is no longer subject of the exclusive national constitutional jurisdiction.

2.3. 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)

When extended confiscation was first introduced through the Organized Crime Act of 1992, applicability of this variant was, as explained above, limited to crime types that are typically linked to organized crime, in particular drug crime and money laundering and, after the 2001 attacks, also to terrorism and the financing of terrorism. Therefore, the development of confiscation practices was closely connected with the development of money laundering control.[139]

Parallel to the statutory advancements, the investigation skills were significantly strengthened through the setting-up of specialized units for financial investigations at the Federal Police Office and the central State Police Offices in all 16 Federal States which have their focus on both, the investigation into money laundering activities as well as the investigation into the entire financial situation of suspects, in order to prepare confiscation and value confiscation.[140] The *de facto* dominance of value confiscation is one of the most significant results of the work of these specialized units. Practitioners' guides to confiscation always emphasized the importance of value confiscation as a tool of utmost importance for a successful combat of organized crime.[141] Besides frequent remarks emphasizing the importance of close cooperation of police and the judiciary, practitioners sometimes also put forward critical comments on what they consider to be a kind of principal reluctance within some branches of the

punishment on the one hand, and the preventive orientation of security-related or other utilitarian instruments on the other hand. The Court therefore held that the objectives of punishment and confiscation are distinct and cannot be combined in one and the same instrument; accordingly, confiscation can never be the objective or aim of punishment, neither directly nor indirectly. Federal Constitutional Court, ruling of 20.03.2002 – 2 BvR 794/95, BVerfGE 105, pp. 135, or NJW 2002, pp. 1779.

[138] Lenk 2021, p. 1231.

[139] For mor details, see Vogel 2020.

[140] See above, 1.2.1. and 1.2.4.

[141] Podolsky & Brenner 2003; Podolsky et al. 2019.

judiciary towards straight confiscatory practices, sometimes even towards the concept of confiscation in general.[142]

Distinct from the conceptual approach of the FCC, police put more emphasis on the criminal preventive impact of confiscation and extended confiscation in its function as an economic strategy of crime control, and the concrete criminalistic value of financial investigations. The tracing of financial transactions can help to also reveal potentially relevant connections between actors involved in (organized) crime, thus enabling their identification through the forensic analysis of the finance data.[143] This is also considered to be very useful for the investigation into, and prosecution of, large scale corruption and economic crime.[144]

2.4. What is the legal nature of extensive confiscation in your EU Member State

In light of the strict principle of guilt that governs the penal sentencing system in Germany, confiscation cannot be imposed on a correctional basis.[145] Accordingly, the dominant interpretation of the legal character of confiscation denies any punitive objective. In the course of the preparation of the 1992 Organized Crime Act, when extensive and extended confiscation were introduced, a strong minor opinion had argued that any confiscation exceeding the real net profit should be classified to be of a penal character, because under such circumstance the owner would lose more than his or her actual economic advantage.[146] Those who took that view further suggested that in such cases the main sentence should be reduced in order to balance out the penal surplus arising from extensive confiscation which, according to that opinion, would otherwise constitute a penal over-reaction.[147] Alternatively, a restriction of

[142] See, e.g., Tröndle 1997, § 73 annot. 1c, once blaming the legislature of putting the axe on the principles of substantive criminal law by passing the Organized Crime Act of 1992 (see above, footnote 13) through which "the end should justify the means". With a similar notion, Fischer 2021, Vor §§ 73-76a annot. 2, considers the concept of confiscation to be "overhyped": criminal law practice should not pursue concepts determined by police rationales. (These authors have both been working as magistrates; in their role as editors of the most influential commentary in everyday use by the criminal courts they can be considered as representatives of the major attitude within the judiciary.)

[143] See, e.g., Bundeskriminalamt (Federal Police Office), Zweiter Periodischer Sicherheitsbericht (Second Periodic Security Report) 2006, pp. 584 et seq; Kilchling 2000, 2004, 2014a.

[144] For more details, see Kilchling 2021, with particular reference on the so-called Leuna case.

[145] See above, footnote 140.

[146] See, e.g., Eser 1993, pp. 833 et seq.; Jescheck & Weigend 1996, p. 793, have called it an additional penalty.

[147] Eser 2014, Vorbem. § 73 annot. 19, and § 73 annot. 74.

confiscation of the penal surplus to cases of conviction upon culpability[148] was proposed. Neither of these comments gained any relevance in practice.

Recent critical comments on the new non-conviction-based variant have argued that *in rem* confiscation may produce – and is in fact intended to produce – a "confiscatory surplus".[149] that exceeds the extent of what could be attained through regular *in personam* variants of confiscation. They further argue that, in light of the potential breadth of non-conviction-based confiscation, the FCC's generalized adherence to the assigned civil character of the confiscation regime as a whole is not appropriate anymore as it fails to sufficiently take the impact of that confiscatory surplus into consideration. It is indeed that surplus that represents the added value of non-conviction-based confiscation as intended by the legislature. From such a point of view this variant of confiscation might appear as a – punitive or quasi-punitive – *aliud* to the other variants, thus not sharing their non-punitive character.[150]

The majority of experts, however, support the traditional approach as constantly pursued by the FCC – even in regard to extended and extended independent confiscation.[151] According to this predominant interpretation, the German system is characterized by strong doctrinal links to **civil enrichment law**,[152] which stipulates, as a general principle, the civil obligation to return, or restitute, any unjust enrichment to the legal owner. To make comprehensive legal arguments short: The FCC considers penal confiscation to be a (penal) variant of the civil *condictio sine causa* or *ex iniusta causa* action. The core element of the civil concept, that is, the dissolution of unjust ownership, was adopted for penal confiscation.[153] Confiscation is therefore considered to be a penal – *"quasi-condictious"*[154] – counter measure *sui generis*.[155] Quite distinct from its civil counterpart, the focus of penal condiction is on the removal rather than on the restitutional aspects of such an operation. The mere absence of a legal justification for the possession of illicit gain entitles the state to step in and take it.[156] The definite

[148] (*Schuldhafte Taten*), thus excluding cases of mere unlawfulness (*rechtswidrige Taten*); see also Fischer 2009, § 73 annot. 4.

[149] *"Abschöpfungsüberhang"*.

[150] For more details, see Rönnau & Begemeier 2021. For similar conclusion, see also Heuer 2021, pp.182 et seq.

[151] See above, 2.2.

[152] *"Bereicherungsrecht"*; *condictio sine causa* or *ex iniusta causa* action, as provided in sections 812 et seq. of the Civil Code (*Bürgerliches Gesetzbuch*).

[153] For a comparative synopsis of the penal confiscation provisions and their civil 'reference' norms of the Civil Code, see Podolsky et al. 2019, p. 25.

[154] *"Quasi-konditionelle Ausgleichsmaßnahme"*, see also Jescheck & Weigend 1996, p. 792. For definitions and terminologies, see also Black's Law Dictionary (11th ed. 2019), "condictio".

[155] See also Köhler 2017, p. 498.

[156] See also sec. 75 of the Penal Code which defines the legal effect of confiscation: ownership devolves to the state once the order becomes final.

frame of reference of confiscation is – civil – liability, not – penal – culpability (guilt).

In light if the straight position held by the FCC, the characterization of both, confiscation and extended confiscation, as civil measures, it has been argued that this can meanwhile be seen as an immutable fact.[157] Here and there the reasonings as formulated by the Court may even suggest an understanding that, in light of the responsibility for the strengthening of the citizens' trust in justice and the legal order, the state would not only have discretion but even the duty to actively take action against illicit enrichment: *"Confiscation aims to reaffirm the validity of the legal order by demonstrating to both, perpetrators and society, that profits derived from crime will not be accepted and cannot continue to exist."*[158] From such a perspective, confiscation is an act to re-establish (recover) justice.[159] I am not quite sure whether the general-preventative line of argumentation as expressed by the FCC is really compatible with a truly civil-law-based concept of confiscation. There is one significant difference: While a *civil condictio* is always a matter between two private parties, to be initiated upon explicit and autonomous initiative of at least one of these private actors exclusively, penal confiscation is a state intervention carried out with coercive power. Others suggest, however, that neither the coercive nature of an intervention nor its general-preventative rationale would necessarily imply its punitiveness or quasi-punitiveness.[160]

2.5. What are the legal instruments for the protection of individual rights in your EU Member State

In all proceedings involving confiscation *in personam* the general procedural rules apply. From a procedural perspective, effective defence is guaranteed. For limitations arising from substantive penal provisions, see below (2.6.). Third parties concerned by a confiscation order enjoy – in their role as party to confiscation proceedings[161] – more or less the same rights as an accused party.[162] Under certain circumstances they can challenge a confiscation order even after such an order has become non-appealable.[163] However, their options for legal remedy are limited: As an exception to

[157] Lenk 2021, p. 1232.
[158] (Non-literal) translation by author; see BVerfG, ruling of 10.02.2021 – 2 BvL 8/19, annot. 151.
[159] *"Ein Akt ordnender Gerechtigkeit"*, Maciejewski 2020, 448.
[160] For more details, see Marstaller & Zimmermann 2018, p. 79.
[161] See above, 1.2.5.
[162] See BT-Drucks. 18/9525, p. 89: Those concerned shall have the position of a subject to the proceedings, with the full set of procedural rights – e.g., filing of procedural motions, interrogation, submission of and request for evidence, etc. – that are necessary to defend the imposition of a confiscation order against their (legitimate) property.
[163] See sec. 433 para. 2 of the Code of Criminal Procedure.

the regular double-step recourse in standard criminal matters – appeal on facts and law[164] that can be further challenged by an appeal on law[165] – appellants must choose either of these two options.[166] The right to legal representation from early stage on which is strengthened by the possibility to have a lawyer assigned *ex officio* are further instruments aiming at safeguarding effective legal protection of anyone concerned by a confiscation order.

In regard to *in rem* procedures a couple of specific procedural rules apply. In principle, the same provisions as those for proceedings *in personam* apply here as well; this is particularly relevant at the investigation stage when the necessary evidence for justifying confiscation is collected. However, investigatory powers are significantly constricted here: Any covert measures such as, e.g., telephone tapping, capture of telecommunication traffic data, remote search in computer systems, acoustic surveillance, etc., are not allowed.[167] The standard instruments required for conducting effective financial investigations remain untouched of these limitations. As a consequence of the fact that no individuals are accused in independent confiscation proceedings, the legal position of those concerned is the same as that of any other party to confiscation as explained above.[168] The related provisions apply accordingly; this includes the option for an *ex post* revision.

This latter possibility means nothing less than an extraordinary *breach of res judicata*[169] what underlines the legislature's concern for a strong procedural protection of the citizens' property rights – as long as these are considered legitimate. The legal position of other persons has weakened by the continuous narrowing down of the concept of legitimate property by the substantive law amendments which have been portrayed in detail in this report. The extension of non-conviction-based confiscation is only one but clearly the most far-reaching instrument in this regard. In practical terms it can happen that an *in personam* trial resulting in a final acquittal, e.g. for lack of evidence for the commission of an alleged acquisition crime – an outcome which formally confirms penal innocence –, is not the end of the matter anymore for the (former) defendant. Although not explicitly provided so in the criminal procedure code, such trial can be followed, if the substantive and procedural preconditions are met, by an independent confiscation procedure. Courts have even allowed an immediate *transition of an in personam into an in rem procedure*, and vice-versa, without a formal interruption.[170]

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[164] *Berufung*.
[165] *Revision*.
[166] Sec. 434 para 3 of the Code of Criminal Procedure.
[167] Sec. 435 para 4 of the Code of Criminal Procedure.
[168] Sec. 424 para 1 & 435 para 3 of the Code of Criminal Procedure.
[169] *Durchbrechung der Rechtskraft*.
[170] This can also happen, e.g., in the course of an appellate trial; for more details, see Meyer-Goßner & Schmidt 2022, § 435 annot. 19.

Hence, **escape from prosecution and conviction does no longer entail escape from confiscation**.

The picture would not be complete, though, without mentioning that the position of both, defendants and other parties to confiscation proceedings is further weakened to some extent by the fact that the courts have more options for *in camera decisions* on confiscation than in regular penal matters. This is particularly true in separate confiscation proceedings as well as in subsequent review proceedings – to the effect that regular remedies against written decisions are automatically precluded.[171] In both cases, however, a regular trial including oral hearing and oral judgement have to be conducted upon request by those concerned, or by the prosecutor – which then is appealable according to the general rules.[172] Last but not least, confiscation orders issued by way of a penalty order in written summary proceedings come into force after a very short objection period of two weeks only. This period also applies to (third) parties to confiscation proceedings; this is why the related penalty order has to be notified to them as well.[173] Once an objection has been launched, a regular trial with full legal remedy options gets started.

2.6. Does – in your opinion based on the answer of the above-mentioned questions / the literature in your EU Member State – extended confiscation comply with the following principles

As a consequence of the FCC's constant interpretation of penal confiscation as a *"quasi-condictious" counter measure sui generis* with its focus on civil liability (strictly distinguished from penal culpability), some of the basic rights issues which have been addressed in the project-related questionnaire have not been subject of serious academic discussion. In particular, potential infringements of the **principle of legality**, the **presumption of innocence**, and the **protection of property**, are mostly denied.[174] As mentioned earlier, the FCC has been holding this opinion for extended and, quite recently, also for extended independent confiscation.[175] The same is true for questions related to the **principle of equal treatment (non-discrimination)**. The (former) statutory limitation of extended confiscation which could be imposed in case of specific catalogue crimes exclusively[176] had been approved by the FCC as a

[171] Sec. 423 para 3 & 434 para 2 of the Code of Criminal Procedure; for more details, see above, 1.2.5.
[172] Sec. 423 para 4 & 434 para 3 of the Code of Criminal Procedure.
[173] See sec. 432 of the Code of Criminal Procedure.
[174] See above, 2.2.
[175] See above, 2.4.
[176] See above, 1.2.2.

reasonable, non-arbitrary legislative method of distinction. A more rigid confiscatory treatment of offenders involved in specific types of listed crimes (mainly terrorism, organized crime and serious economic crime) does therefore not discriminate such persons in an inappropriate way.[177] There is no reason to expect that the main considerations of this ruling that was released in relation to a complaint against an extended confiscation order issued in an *in personam* procedure would lead to a different result in regard to the catalogue of crimes which are currently stipulated for extended independent confiscation (*in rem*). Accordingly, the abstract definition of specified crime types as a precondition of applicability does not involve any specific person-related criteria, neither explicitly nor implicitly.[178]

Some other issues, however, are still discussed more controversially.

2.6.1. The rights to fair trial and effective defence

Since it was introduced first in 1992, the lowered standards of proof in relation to extended confiscation (*in personam*) received some critical comments. Namely, the fact that only the reference crime has to be proven beyond reasonable doubt while for the (alleged) acquisition crime(s) conviction upon preponderance is sufficient has been seen as impediment of the **right of fair trial**.[179] In particular in situations of extended independent confiscation (*in rem*), the related presumption of illicit origin[180] might be considered to be an additional burden on the owner of suspicious assets which implies a *de facto* requirement to cooperate. More concretely speaking, those affected have to actively provide facts based on which a rebuttal of the presumption of illicit origin can be set out. This may be seen as an infringement of the **right to silence** and the ***nemo tenetur* principle**, both important components of the right to fair trial and the right to effective defence.[181]

2.6.2. The right to privacy

An interesting further basic-rights-related aspect addressed by the outline to the current research project is the right to privacy. In practice the above-mentioned ***de facto* cooperation requirement** – Meyer even speaks of "pressure"[182] – means that certain facts and circumstances have to be presented by those affected which would, in principle, enjoy privacy protection.[183] However, as far as we can see, this aspect has

[177] BVerfG, ruling of 14.01.2004 (footnote 128).
[178] For similar conclusion, see Heuer 2021, pp. 237 et seq.
[179] Trüg 2017, p. 1916. See above, 1.2.2.
[180] Sec. 437 no. 3 of the Code of Criminal Procedure. See above, 1.2.2.
[181] Pro: Eser & Schuster 2018, § 76a annot. 14 – contra: Marstaller & Zimmermann 2018, p. 125.
[182] Meyer 2015, p. 267.
[183] According to the standards set forth by the FCC, only matters that belong to the core area of private life such as, e.g., intimate entries in a diary, enjoy priority protection in criminal proceedings; see, e.g., BVerfG, ruling of 26.06.20228 – 2 BvR 219/08.

not yet been subject of in-depth exploration in the German literature. This may be explained by the fact that in the context of criminal proceedings, the public interest in effective prosecution is commonly considered to overrule the private interest in keeping any relevant case-related facts undisclosed.

One might of course argue that non-conviction-based confiscation which has been characterized namely by the FCC as an intervention of non-penal nature should – consequently – not enjoy the same principal priority over privacy as the prosecution of crimes. This should stimulate more discussion on this issue in the future.

2.6.3. Principle of non-retroactivity of the /more severe/ statute

As mentioned earlier, the extended variant of non-conviction-based confiscation, together with the other basic elements of the 2017 reform act such as, in particular, the general statute of limitation of 30 years for all variants of confiscation, were introduced with retro-active effect.[184] It can be applied even in cases in which both, prosecution and confiscation, had already been time-barred when the new rules entered into force. This aspect of the reform immediately gained serious criticism[185] and led to several constitutional complaints rather quickly. In light of the constant interpretation of all kinds of confiscation as non-penal measures one could not be too surprised about the fact that the FCC also held this aspect of the reform. In concrete terms, an infringement of the constitutional prohibition of retroactive punishment[186] was denied in two recent rulings.[187] In line with its general position the FCC once again highlighted the non-penal character of Germany's confiscation regime and held that **the prohibition of retroactive punishment can therefore not apply**. The fact alone that confiscation is meant to target illicit acquisition of property is not sufficient for the prohibition of retroactivity. This would only be the case if *the measure itself* were guilt-based – which is not the case with confiscation.[188]

Curiously enough, the Court's reasoning has been underpinned by a couple of genuine crime-related arguments such as:

- *"Asset confiscation is intended to demonstrate to both the offender and the legal community in a norm-affirming manner that the acquisition of assets in violation of criminal law is not recognized by the legal system and therefore cannot maintain."*[189]

[184] Art. 316j no. 1 of the EGStGB; see above, footnote 18.
[185] See, e.g., Schilling et al. 2021.
[186] Art. 103 para. 2 of the Basic Law (*Grundgesetz – GG*).
[187] BVerfG, ruling of 10.02.2021 – 2 BvL 8/19, and ruling of 07.04.2022 – 2 BvR 2194/21 (the latter is related to confiscatory measures in the context fo the so-called Cum-ex-bonds scandal; see also footnote 197).
[188] BVerfG, ruling of 07.04.2022 – 2 BvR 2194/21, annot. 66.
[189] BVerfG, ruling of 10.02.2021 – 2 BvL 8/19, annot. 151.

- *"A criminal offence once committed does not lose its unlawful character by the fact that it is not prosecuted or cannot (any longer) be prosecuted for factual or legal reasons; criminal liability does not cease with prosecutability."*[190]
- *"[Irrespective of a potential] statute of limitations for prosecution, related] property continues to be tainted with the stain of tortious origin."*[191]

One might argue that such explicit reference to criminal liability as well as the argument that such liability continues to exist even when prosecutability has ended, is not fully convincing.

2.6.4. Principle of protection of the citizens' trust in the state and law

In the same rulings the FCC further denied the legal relevance of trust in the prior statute of limitation of prosecution of the related crimes in the context of confiscation. The Court clearly held that **citizens' trust in the continuity of legal positions that were acquired dishonestly is in principle not worthy of protection**. It argues that, while the constitutional prohibition of retroactive application finds its justification in the concept of trust protection, this prohibition finds, at the same time, its limits in situations of unworthiness of protection.[192] In cases in which overriding interests of the legal community take precedence over the principle of legal certainty, retroactive intervention can even be *imperative*.[193] This was explicitly decided so in case of the so called Cum-ex bonds tax fraud with its huge fiscal damage.[194] In this case, retroactive application of the new confiscation rules has been recognized as a paramount public interest.[195] With its ruling the FCC annulled a prior decision by the Federal Court of Appeals of 2019 which had blocked retroactive confiscation of time-barred tax debts.[196]

Going even further the FCC also ruled that not only the trust of those directly involved in the illegal acquisition of assets be legally irrelevant but also that of third parties.[197]

These rulings, and the extension on third parties in particular, received strong academic critique. One the one hand, the selectivity of the Court's concrete balancing exercise according to which the removal of fiscal benefits that were acquired through tax crime should enjoy general precedence, has been qualified to be one-sided and over-simplified.[198] Others have pointed out that the rulings actually appear as being

[190] BVerfG, ruling of 10.02.2021 – 2 BvL 8/19, annot. 159.
[191] BVerfG, ruling of 10.02.2021 – 2 BvL 8/19, annot. 160; all quotes translated by author.
[192] BVerfG, ruling of 10.02.2021 – 2 BvL 8/19, annot. 161.
[193] BVerfG, ruling of 07.04.2022 – 2 BvR 2194/21, annot. 82-84.
[194] See https://en.wikipedia.org/wiki/CumEx-Files [09/2022].
[195] BVerfG, ruling of 07.04.2022 – 2 BvR 2194/21, annot. 77.
[196] BGH, ruling of 24.10.2019 – 1 StR 173/19, NStZ-RR 2020, p. 46. For more details, see also Maciejewski 2021.
[197] BVerfG, ruling of 10.02.2021 – 2 BvL 8/19, annot. 162.
[198] See, e.g., Reichling et al. 2021, p. 418; Maciejewski 2020, p. 448.

based on a quasi-penal "socio-ethical condemnation" which comes very close to a genuine attribution of guilt;[199] the critique culminates in a statement implying that the Court's verdicts represent "enemy-law-like"[200] tendencies.

On the other hand, the FCC's rulings received a couple of supporting comments as well. One argument was that in case of time-barred crimes, non-retroactivity would have the consequence that those responsible would not only evade punishment; in addition, they could also enjoy the material benefits.[201] With a purely systematic argument, finally, it has been argued that the principal secession of confiscation from the penal statutes of limitation should be considered to be not only a symbol of its independent, non-penal character – but even as a coherent consequence of their doctrinal distinction from criminal law.[202]

2.6.5. Principle of proportionality

Under the premise of the non-penal character of confiscation, the principle of proportionality becomes a bigger weight than in a genuinely penal context with its inherent principle of effective prosecution.[203] From such a perspective, any State intervention has to meet the general standards pf proportionality – i.e., necessity, adequacy, and proportionality *stricto sensu*. From such a perspective it has been argued that non-conviction-based confiscation regularly fail to meet such standards, just because none of the facts or circumstances that actually justify confiscation have to be demonstrated, at least not as formal evidence.[204] This opinion is, however, in contradiction to the constant rulings by FCC.

When looking on the confiscation system as a whole (either *in personam* or *in rem*) the principle of proportionality can of course function as a protection against so-called excessive confiscation.[205] In situations of provisional seizure in particular, courts carefully defined the scope and limits of such measures. In 2006, the FCC prohibited the unlimited – "haphazard" – freezing of assets without a sufficient factual basis. In that case in which the total assets of a defendant (about € 28 million) had been seized with the purpose to secure a maximum amount of money for future value confiscation, the Court held that the principle of proportionality had been violated although – what is rather typical following the rule that seizure should be initiated as quickly as possible once investigations have been started – it was not yet clear whether the person would

[199] Bülte 2022, p. 204.
[200] Ibid., p. 205.
[201] Weinbrenner 2022, p. 71.
[202] Meyer 2015, p. 281-282.
[203] See also Meyer 2015, p. 279.
[204] Heuer 2021, 222
[205] See also Meyer 2015, p. 282.

be charged or if confiscation would be ordered (and if so, to what extent).[206] In a further case, the entire assets on a person's bank accounts, amounting to € 2.17 million, were seized before investigators had a clear picture about the criminal background. In the further course of the proceedings, the case was dismissed by the prosecutor in return of payment of a transaction fine of € 500. not surprisingly, this seizure was declared unconstitutional, too.[207] However, in relation to the latter case it has to be taken into consideration that the rulings date back to the period prior to the 2017 reform when the procedural conditions for seizure were stricter than nowadays.[208]

These examples demonstarte that the principle of proportionality can indeed be applied for limiting confiscation. So far, however, this has happened on a case-related basis solely. It has never been applied yet for challenging constitutional conformity of confiscation as a whole or of specified variants of confiscation.

3. Statistical snapshot

*Table 1: Number of confiscation orders**

	2016	2017	2018	2019	2020
Persons tried	900,615	875,194	869,105	891,795	852,527
Persons convicted	737,873	716,044	712,338	728,868	699,269
Total confiscation orders	42,743	56,584	96,222	107,158	107,920
- Confiscation of proceeds (incl. value confiscation)	2,102	8,741	44,602	50,117	50,780
- Extended confiscation of proceeds	unknown	unknown	1,178	1,312	1,322
- Independent extended confiscation of proceeds	N/A	N/A	5,100	5,770	3,498
- Confiscation of objects	40,205	47,061	45,251	49,877	52,248

*) Source: Federal Statistical Office, Convictions Statistics 2016-2020.

In confiscation practice, the 2017 reform had an immediate booster effect which becomes apparent in the statistics (see *table 1*). When compared to 2016, the total number of confiscation orders has more than doubled, from ca. 42,700 in 2016 to ca. 96,000 in 2018; meanwhile, the annual number is higher than 100,000. The extent of this increase has to be assessed in the context of the (general) long-term decline of

[206] BVerfG, rulig of 29.05.2006 – 2 BvR 820/06.
[207] BVerfG, ruling of 05.05.2004 – 2 BvR 1012/02.
[208] For a comparison of the prior and the current versions of sec. 111b of the Code of Criminal Procedure, see above, 1.2.4.

the total number of individuals tried and convicted. While confiscation of objects has seen only a moderate increase, a significant rise can be identified for confiscation of proceeds which has grown in the same period from ca. 2,000 to ca. 44,600; this is an increase of more than 850 %. Meanwhile, the number exceeded the threshold of 50,000. In addition, a quite stable number of extended confiscation orders, for which separate statistical counts were not available before, can be identified; it slightly varies between 1,200 and 1,300, approximately. At the same time, the newly introduced weapon of independent extended (non-conviction-based) confiscation *in rem* has been quite frequently applied from the very first day on, and to a significantly higher extent than the 'older', more established *in personam* variant of extended confiscation: The statistics show an immediate jump from zero to some 5,100 such orders in the first year. This impressive development may have been fueled also by the immediate exclusive applicability of the new regulations (no *lex mitior*).[209]

At the same time, however, the figures further indicate that the impact of the new regime seems to lose momentum already. In particular the instrument of independent extended confiscation *in rem* was in decline in 2020 (minus 39 %). This may be explained, on the one hand, by assuming that during the first two years a considerable bunch of cases which had been pending for a long time without any realistic prospect for successful prosecution and confiscation *in personam* could now be re-opened and their suspects targeted and blindsided with this new weapon that doesn't require any longer presentation of strict evidence sufficient for a criminal charge. Besides alleged drug dealers, Arab family clans[210] have been major targets of such unexpected action. On the other hand, it is also plausible to assume that defense capacities have quickly improved, making their legal consultants better prepared for the rules and options under the new confiscation provisions.

*Table 2: Total value of accomplished/completed/enforced confiscation orders**

	2017	2018	2019	2020
Estimated value (in million Euros)	198.6	1,870.0	796.2	821.1

*) Estimates, based on the values of prior seizures. Source: Federal Statistical Office, Prosecution Statistics 2017-2020.

[209] See above, 1.1.

[210] In Germany, so-called clan crime (*"Clan-Kriminalität"*) is considered to be an increasingly prevalent variant of organised crime. See *Bundeskriminalamt* [Federal Police Office], Third Periodic Security Report (2021), pp. 88 et seq.; www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PeriodischerSicherheitsbericht/periodischersicherheitsbericht_node.html [03/2022].

Since 2017 the prosecutorial statistics include, for the first time, some official information as to the value of accomplished confiscation orders.[211] Estimated values presented in *table 2* show an impressive increase from some 198.6 million Euros confiscated in 2017 to more than 821 million in 2020. The extraordinary amount registered in 2018 totaling up to 1,87 billion Euros further supports the assumption of the extraordinary situation in that very year and its related effects referred to above: prosecutors targeting some long-term "clients" (suspects) by surprise with a new, aggressive instrument. Several such cases involving non-conviction-based seizure and confiscation of luxury cars, lucrative real estate located in prime city areas of Berlin, and other profitable business investments were intensively portrayed in the media.[212]

[211] Besides their role as head of investigation and indictment, the prosecutor's offices are also in charge of the execution of all penal sanctions.

[212] In one of the most prominent cases 77 buildings owned by members of one family clan were confiscated in summer 2018; for more details, see www.thelocal.de/20180719/police-confiscate-77-berlin-properties-thought-to-belong-to-criminal-family/ [03/2022], www.dw.com/en/berlin-prosecutors-confiscate-lebanese-mafias-properties/a-44742961 [03/2022], www.faz.net/aktuell/gesellschaft/kriminalitaet/landgericht-ordnet-einziehung-von-clan-immobilien-an-16730336.html [03/2022].

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APPENDIX: LEGAL PROVISIONS[213]

1. GERMAN PENAL CODE (Excerpts)

Title 7
Confiscation

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.

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.

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

[213] Excerpts of the relevant provisions. Inofficial English versions based on translations by M. Bohlander (Penal Code) and by B. Duffett, M. Ebinger, K. Müller-Rostin and I. Mahdi (Code of Criminal Procedure), all regularly amended by Ute Reusch, as provided by the Federal Ministry of Justice at www.gesetze-im-internet.de/englisch_stgb/index.html and www.gesetze-im-internet.de/englisch_stpo/index.html [03/2022].

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.

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.

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.

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.

(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.

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).

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.

Section 74b
Confiscation of dangerous objects

(1) If, due to their nature and the circumstances, objects pose a danger to the general public or there is a danger that they will be used for the commission of unlawful acts, they may be confiscated even if

1. the offender or participant acted without guilt or

2. a person other than the offender or participant owns or is entitled to the object.

(2) In the cases under subsection (1) no. 2, the third party is adequately compensated in money from the Treasury, having regard to the fair market value of the confiscated object. The same applies if the confiscated object was encumbered by another's right which was extinguished or prejudiced by the decision.

(3) Compensation is not granted if

1. the person who has a right to compensation under subsection (2)

a) contributed at least recklessly to the object being used as a means of crime or it was the object of crime or

b) acquired the object or the right in the object in a reprehensible manner in the full knowledge of the circumstances which would have allowed for its confiscation, or

2. it would be lawful, under the circumstances which justified the confiscation, to permanently confiscate the object or the right in the object from the person entitled to compensation without granting compensation, on the basis of provisions outside of the criminal law.

Compensation may, however, be granted in derogation from sentence 1 if it would cause undue hardship to deny it.

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.

Section 74d
Confiscation of material and rendering unusable

(1) Material (section 11 (3)) the content of which is such that every intentional dissemination in the knowledge of that content would fulfil the elements of a criminal provision is confiscated if at least one copy was disseminated through an unlawful act or was intended for such dissemination. At the same time, the equipment used for or intended for the production of the material which was used as a template for the reproduction or was intended as such is to be rendered unusable.

(2) The confiscation extends only to those copies which are in the possession of the persons involved in their dissemination or preparation or which have been put on display in a public place or, if they were sent for dissemination, have not yet been distributed to the recipient.

(3) Subsection (1) applies accordingly to material (section 11 (3)) the content of which is such that the intentional dissemination in the knowledge of that content would fulfil the elements of a criminal provision only if additional facts and circumstances apply. However, confiscation and rendering unusable is only ordered if

1. the copies and the equipment indicated in subsection (1) sentence 2 are in the possession of the offender, participant or another on whose behalf the offender or participant acted, or they are intended by these persons for dissemination and

2. the measures are necessary to prevent unlawful dissemination by the persons referred to in no. 1.

(4) Dissemination within the meaning of subsections (1) to (3) also means making material (section 11 (3)) or at least one copy of it available to the public by putting it on display, putting it up to serve as an announcement, through presentation or by other means.

(5) If, at the time of the decision on confiscation or rendering unusable becoming final, a third party other than the offender or participant had ownership of the property or the object was encumbered by a third party's right which was extinguished or prejudiced by the decision, the third party is to be adequately compensated in money from the Treasury, having regard to the fair market value. Section 74b (3) applies accordingly.

Section 74e
Special provision applicable to organs and representatives

Whoever commits an act

1. in the capacity as an organ authorised to represent a legal entity or as a member of such an organ,

2. in the capacity as a director of an association lacking independent legal capacity or as a member of the board of directors of such an association,

3. in the capacity as a partner authorised to represent a partnership with independent legal capacity,

4. in the capacity as a general agent (*Generalbevollmächtigter*) or, in a management position, with general power of representation (*Prokurist*) or with commercial power of attorney (*Handlungsbevollmächtigter*) of a legal entity or of one of the associations referred to in nos. 2 or 3 or

5. as another person acting in a responsible capacity for the management of the business or enterprise of a legal entity or association referred to in no. 2 or 3, including oversight of the management of the business or other exercise of controlling powers in a senior management position,

which in relation to them and under the other conditions of sections 74 to 74c would allow the confiscation of an object or of its equivalent value or justify the denial of compensation, has this act attributed and these provisions applied to the person or entity represented. Section 14 (3) applies accordingly.

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.

Section 75
Effects of confiscation

(1) If confiscation of an object is ordered, ownership of the property or the right devolves to the state once the order becomes final if the object

1. belongs to the person affected by the order at that time or if the person affected is entitled to the object at that time or

2. belongs to some other person or if some other person is entitled to it, and that person has granted it for the offence or for other purposes whilst being aware of the circumstances of the offence.

In all other cases, ownership of the property or the right devolves to the state once six months have elapsed after notice has been given of the order of confiscation having become final, unless the person who owns or is entitled to the object has previously filed this right with the enforcing authority.

(2) In all other respects, the rights of third parties in the object remain. In the cases under section 74b, however, the court orders the expiry of these rights. In the cases under sections 74 and 74a, the court may order the expiry of the right of a third party if that third party

1. has contributed at least recklessly to the object being used as a means of crime or to its being the object of crime or

2. has acquired the right in the object in a reprehensible manner whilst being aware of the circumstances giving rise to the confiscation.

(3) Up until such time as ownership of the property or the right is transferred, the order of confiscation or the order to reserve confiscation has the effect of a prohibition of disposal within the meaning of section 136 of the Civil Code (*Bürgerliches Gesetzbuch*).

(4) In the cases under section 111d (1) sentence 2 of the Code of Criminal Procedure, section 91 of the Insolvency Code (*Insolvenzordnung*) does not apply.

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 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 material or rendering unusable.

(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 derived from an unlawful act which has been seized in proceedings brought on suspicion of one of the offences referred to in sentence 3 having been committed is, as a rule, even to be separately confiscated in those cases in which it is impossible to prosecute or convict the person affected by the confiscation. 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 pornography 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 and concealing unlawfully acquired assets under section 261 (1), (2) and (4);

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).

Section 76b
Limitation on confiscation of proceeds of crime and value of proceeds of crime

(1) The limitation period for the extended and the independent confiscation of the proceeds of crime or the value of the proceeds of crime in accordance with sections 73a and 76a is 30 years. The limitation period commences upon completion of the unlawful act through which the offender or participant has obtained something within the meaning of section 73b. Sections 78b and 78c apply accordingly.

(2) In the cases under section 78 (2) and section 5 of the Code of Crimes against International Law, the extended and the independent confiscation of the proceeds of crime or the value of the proceeds of crime under sections 73a and 76a are not subject to the statute of limitations.

2. GERMAN CODE OF CRIMINAL PROCEDURE (Excerpts)

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 shall be ordered. […]

(2) […]

Section 111e
Asset seizure to secure confiscation of equivalent sum of money

(1) If it is reasonable to assume that the conditions for confiscation of the equivalent sum of money are met, seizure of the person concerned's movable and immovable assets may be ordered to secure enforcement. If there are cogent reasons justifying this assumption, such asset seizure shall be ordered.

(2) Asset seizure may also be ordered to secure enforcement of a fine and the anticipated costs of the criminal proceedings where a judgment or summary penalty order has been made against the accused.

(3) There shall be no seizure to secure the costs of enforcement.

(4) The claim to be secured, including the amount of money, shall be designated in the order. In addition, the order shall indicate a sum of money which the person concerned may deposit in order to avert enforcement of and demand the setting aside of the seizure; section 108 (1) of the Code of Civil Procedure shall apply accordingly.

(5) […]

(6) […]

Section 421
Exemption from confiscation

(1) The court may, with the public prosecution office's consent, dispense with confiscation if

1. the value of that which was obtained is negligible,

2. confiscation is of no consequence given the anticipated penalty or measure of reform and prevention or

3. the confiscation aspect of the proceedings would involve disproportionate effort or the process of obtaining a decision on the other legal consequences of the offence would be unreasonably difficult.

(2) The court may order confiscation at any stage of the proceedings. It shall grant an application made therefor by the public prosecution office. Section 265 shall apply accordingly.

(3) In the preparatory proceedings, the public prosecution office may limit the procedure to the other legal consequences. The limitation shall be recorded in the files.

Section 422
Separation of confiscation proceedings

If the process of obtaining a decision on confiscation pursuant to sections 73 to 73c of the Criminal Code would unreasonably impede or delay the taking of a decision on the other legal consequences of the offence, the court may separate the confiscation proceedings from the other proceedings. The court may order joinder at any stage of the proceedings.

Section 423
Confiscation following separation

(1) If the court separates the proceedings pursuant to section 422, it shall take its decision on the confiscation once the judgment in the main action has become final. The court shall be bound by the decision in the main action and by the finding of facts on which that decision was based.

(2) The decision in respect of confiscation shall be taken no later than six months after the judgment in the main action becomes final.

(3) The court shall give its decision by way of an order. The decision may be challenged by an immediate complaint.

(4) In derogation from subsection (3), the court may order that the decision be given by way of a judgment delivered following an oral hearing. The court must make the order pursuant to sentence 1 if the public prosecution office or the party against whom the confiscation is made applies therefor. […]

Section 424
Parties to confiscation proceedings in criminal proceedings

(1) If the confiscation order is made against a person who is not an accused, the court shall order that said person become a party to the confiscation aspect of the criminal proceedings (party to confiscation proceedings *(Einziehungsbeteiligter)*).

(2) Such an order shall not be made if the person who would be named therein has declared in writing to the court or public prosecution office or has stated for the record or in writing to another authority that he does not wish to raise any objections in respect of the confiscation of the object. […]

(3) Such an order may be made up until pronouncement of the confiscation and, where an admissible appeal on fact and law has been filed, up until conclusion of the closing speeches in the appeal proceedings.

(4) The decision to order participation in the proceedings shall not be contestable. An immediate complaint shall be admissible if participation in the proceedings is refused.

(5) Participation in the proceedings shall not suspend continuation of the proceedings.

Section 425
Exemption from participation in proceedings

(1) In the cases under sections 74a and 74b of the Criminal Code, the court may dispense with ordering that a person become a party to the proceedings if it can be assumed, on the basis of specific facts, that such order cannot be enforced.

(2) Subsection (1) shall apply accordingly if

1. a party, association or institution outside the territorial scope of this statute which is pursuing action directed against the existence or security of the Federal Republic of Germany or against any of the constitutional principles designated in section 92 (2) of the Criminal Code would have to be involved and

2. it is to be assumed, in the light of the circumstances, that such party, association or institution, or one of its intermediaries, made the object available to promote such action.

Before taking the decision as to whether to confiscate the asset, and where feasible, the holder of the object or the person entitled to dispose of the right shall be heard.

Section 426
Hearing of possible parties to confiscation proceedings in preparatory proceedings

(1) If evidence comes to light during the preparatory proceedings which suggests that a person might be considered as a party to confiscation proceedings, he shall be heard. This shall only apply if it appears feasible that the hearing can be held. Section 425 (2) shall apply accordingly.

(2) If the person who might be considered as a party to confiscation proceedings declares that he wishes to object to the confiscation, those provisions governing the examination of the accused shall apply accordingly in the event of his examination if it is considered possible that he might become a party to the proceedings.

Section 427
Powers of parties to confiscation proceedings in main proceedings

(1) Upon the opening of the main proceedings, a party to confiscation proceedings shall have the same rights as a defendant, unless otherwise provided by this statute. In accelerated proceedings, this shall apply from the beginning of the main hearing, in proceedings for a summary penalty order from the issuance of such an order.

(2) The court may order that a party to confiscation proceedings appear in person for the purpose of clarifying the facts. If such a person has been ordered to appear in person and he

fails to appear without sufficient excuse, the court may order that he be brought before it if a summons has been served on him which draws his attention to this possibility.

Section 428
Representation of parties to confiscation proceedings

(1) A party to confiscation proceedings may, at any stage of the proceedings, be represented by a lawyer with a documented power of attorney. The provisions of sections 137 to 139, 145a to 149 and 218 which apply to the defence shall apply accordingly.

(2) The presiding judge shall, upon application or ex officio, appoint a lawyer to a party to confiscation proceedings if the lawyer's involvement is deemed necessary on account of the complexity of the factual or legal situation in respect of the confiscation or if it is apparent that the party to confiscation proceedings cannot exercise his rights himself. Section 140 (2) sentence 2 shall apply accordingly.

(3) Subsection (1) shall apply accordingly in the preparatory proceedings.

Section 429
Notification of date of main hearing

(1) Notification of the date set down for the main hearing shall be served on a party to confiscation proceedings; section 40 shall apply accordingly.

(2) Where a party to confiscation proceedings is a party to the proceedings, in addition to being notified of the date set down for the main hearing he shall also be furnished with the bill of indictment and, in the cases under section 207 (2), with the decision to initiate proceedings.

(3) At the same time, the party to confiscation proceedings shall be advised of the fact that

1. the hearing may also be conducted in his absence,

2. he may be represented by a lawyer with a documented power of attorney and

3. the decision given on the confiscation shall apply to him as well.

Section 430
Status in main hearing

(1) If a party to confiscation proceedings fails to appear at the main hearing despite being properly notified of the date of the hearing, the main hearing may be conducted in his absence; […]. The same shall apply if the party to confiscation proceedings absents himself from the main hearing or does not return once the interrupted main hearing is resumed.

(2) […]

(3) […]

(4) If the party to confiscation proceedings was neither present nor represented when judgment was pronounced, the judgment shall be served on him. The court may order that those parts of the judgment which do not concern the confiscation be struck out.

Section 431
Appellate proceedings

(1) In appellate proceedings, the examination as to whether confiscation from the party to confiscation proceedings is justified shall extend to the conviction in the contested judgment only if such person

1. raises objections in this respect and

2. through no fault of his own was not heard in respect of the conviction at an earlier stage of the proceedings.

If, accordingly, the examination also extends to the conviction, the court shall refer to the findings on which the conviction was based, unless such person's submissions require renewed examination.

(2) Subsection (1) shall not apply to proceedings on an appeal on fact and law if at the same time a decision needs to be given in respect of the conviction upon an appellate remedy being filed by another party.

(3) In proceedings on an appeal on law, objections to the conviction shall be lodged within the time limit set for the submission of the grounds of appeal.

(4) If only the decision on the amount of compensation is contested, a decision may be given on the appellate remedy by way of an order, unless the parties object thereto. The court shall advise them in advance of the possibility of following such procedure and of raising an objection and shall give them the opportunity to make submissions.

Section 432
Confiscation by way of summary penalty order

(1) If confiscation is ordered by way of a summary penalty order, such order shall also be served on the party to confiscation proceedings if he is a party to the proceedings. Section 429 (3) no. 2 shall apply accordingly.

(2) […]

Section 433
Subsequent proceedings

(1) Where the confiscation order has become final and a person substantiates that he was, through no fault of his own, unable to exercise the rights of a party to confiscation proceedings either in the proceedings at first instance or in the appeal on fact and law, he may claim in subsequent proceedings that the confiscation, insofar as it relates to him, was not justified.

(2) The application for subsequent proceedings shall be made within one month after the end of that day on which the applicant learned of the final decision. The application shall be inadmissible where two years have elapsed since the decision became final and enforcement was concluded.

(3) The application for the conduct of subsequent proceedings shall not suspend enforcement of the confiscation order; the court may, however, order suspension and interruption of enforcement. If, in the cases under section 73b of the Criminal Code, also in conjunction with section 73c of the Criminal Code, an application is made under the conditions of subsection (1) for subsequent proceedings to be conducted, no enforcement measures shall be taken against the applicant up until their conclusion.

(4) Section 431 (1) shall apply accordingly to the scope of the examination. If the right asserted by the applicant is not proved, the application shall be unfounded.

(5) Prior to giving its decision, the court may, with the public prosecution office's consent, revoke the confiscation order under the conditions of section 421 (1).

(6) The reopening of proceedings pursuant to section 359 no. 5 for the purpose of lodging objections pursuant to subsection (1) shall be ruled out.

Section 434
Decision in subsequent proceedings

(1) The decision on confiscation in subsequent proceedings shall be given by the court of first instance.

(2) The court shall give its decision by way of an order, against which an immediate complaint shall be admissible.

(3) A decision on an admissible application shall be given by way of a judgment delivered following an oral hearing if the public prosecution office or the applicant applies therefor, or if the court so orders; those provisions governing the main hearing shall apply accordingly. Whoever has filed an admissible appeal on fact and law against the judgment may no longer file an appeal on law against the appellate judgment on fact and law.

(4) Where the court decided by way of a judgment, section 431 (4) shall apply accordingly.

Section 435
Independent confiscation proceedings

(1) The public prosecution office and a private accessory prosecutor may apply for an order for independent confiscation if this is admissible by law and, in the light of the outcome of the investigations, issuance of the order is to be expected. The public prosecution office may, in particular, dispense with filing such application if the value of that which was obtained is only negligible or the procedure would involve disproportionate effort.

(2) The object or the sum of money equal to its value shall be designated in the application. The facts substantiating the admissibility of independent confiscation shall also be cited. […]

(3) […]

(4) The provisions on criminal proceedings shall apply accordingly to investigations that serve exclusively to conduct the independent confiscation proceedings. Investigative measures that are only permissible against an accused person and covert measures within the meaning of section 101 (1) are not permissible.[214]

Section 436
Decision in independent confiscation proceedings

(1) The decision on independent confiscation shall be given by the court which would be competent if a specific person were to face criminal prosecution. The court in whose district the object has been secured shall also have local jurisdiction in respect of the decision on independent confiscation.

(2) […]

Section 437
Special provisions governing independent confiscation proceedings

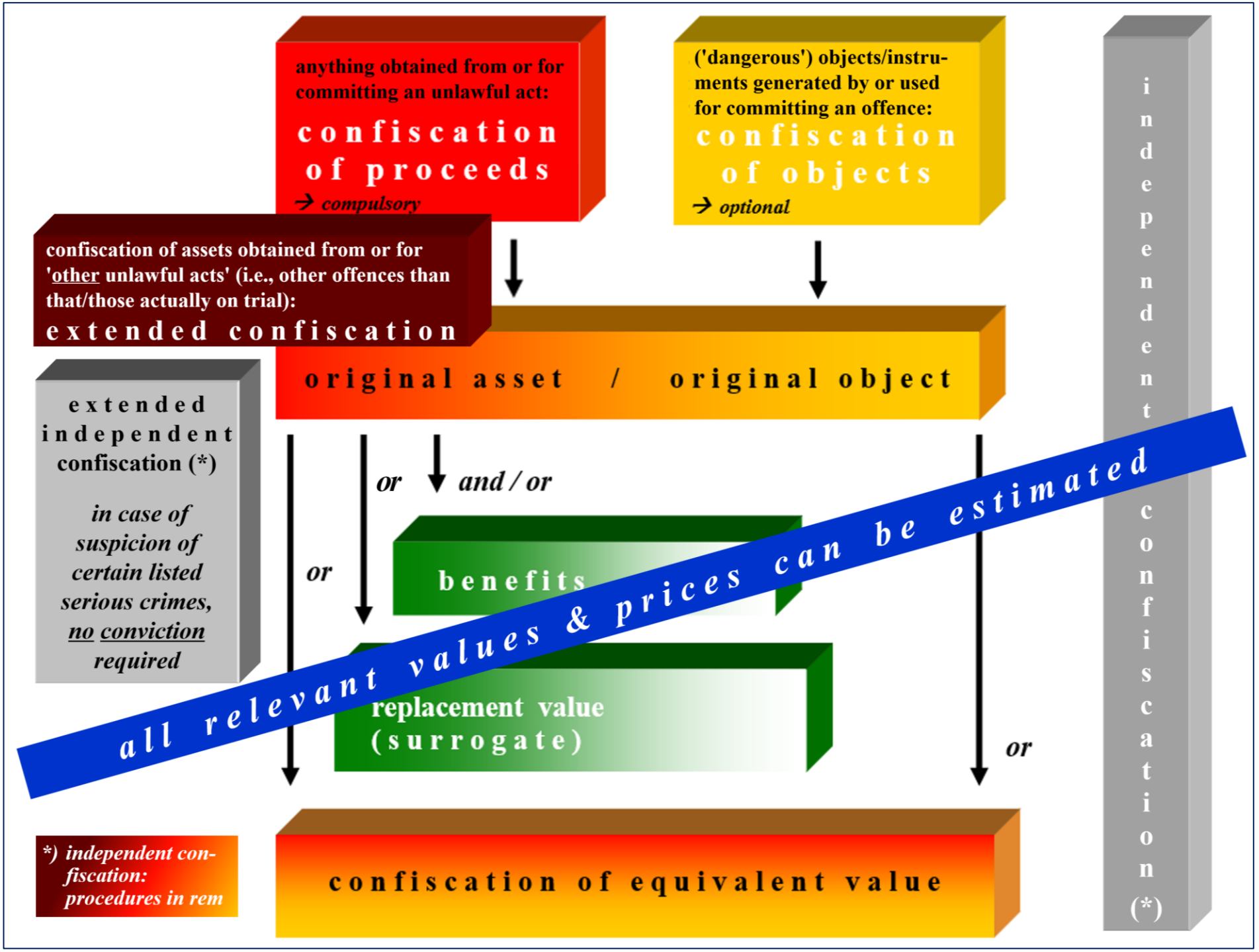
When giving its decision on independent confiscation pursuant to section 76a (4) of the Criminal Code, the court may, in particular, base its conviction as to whether the object was derived from an unlawful act on the gross imbalance between the value of the object and the legitimate income of the person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

[214] In lack of an official translation, sec. 435 para 4 has been translated by author.


anything obtained from or for committing an unlawful act:
confiscation of proceeds
→ compulsory
('dangerous') objects/instruments generated by or used for committing an offence:
confiscation of objects
→ optional
independent confiscation (*)
confiscation of assets obtained from or for 'other unlawful acts' (i.e., other offences than that/those actually on trial):
extended confiscation
original asset / original object
extended independent confiscation (*)
in case of suspicion of certain listed serious crimes, no conviction required
or
and / or
or
benefits
replacement value (surrogate)
all relevant values & prices can be estimated
or
*) independent confiscation: procedures in rem
confiscation of equivalent value