

COUNTRY REPORT LUXEMBOURG
(Extended) Confiscation in Luxembourg Law
Charlotte Quaisser, University of Luxembourg
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The Luxembourg Criminal Code (*Code Pénal*, hereinafter: “LCC”) provides for extended confiscation in Art. 31 (2) 5° LCC that implements Art. 5 of the Directive 2014/42/EU¹. While the term “extended confiscation” (*confiscation élargie*) does not appear in the provision itself, it is used throughout the legislative proceedings.² Accordingly, extended confiscation *stricto sensu* refers to the confiscation of assets that are likely to have been acquired through criminal activity without requiring the prosecuting authority to directly prove that each individual item of property has been generated by an offence.

Beyond this specific provision, there are, however, several other forms of confiscation that can be considered as a form of extended confiscation: Art. 31 (3) LCC provides for non-conviction based confiscation (see below III.1.c.), and Art. 31 regulates the cases where third party confiscation is permitted (see below III.1.a.). Moreover, the confiscation of dangerous objects is carried out by the courts as a security measure *in rem* (see below III.2.).³ Finally, Art. 324-quarter LCC contains the offence of unexplained wealth that is to be read in conjunction with Art. 31 (2) 5° LCC (see below III.1.b.bb.), thus complementing the framework for extended confiscation.

I. Extension of the ambit of confiscation

1. Notion

a. Lack of an all-encompassing definition of confiscation in Luxembourg law

Scholarly writing in Luxembourg defines confiscation as “the State taking control of a particular object as a penalty, in contrast to restitution, which is a civil reparation measure”,⁴ or a “withdrawal, by way of authority, of the ownership of a movable thing”.⁵ Reference is also made to French doctrine that understands confiscation as “the acquisition by the State of all or part of the assets of a convicted person, with a view to disposing of them for its own benefit’, or ‘expropriation usually taking place as an additional penalty in cases specified by law”.⁶

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

² e.g. Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 8 f.

³ Spielmann, D./Spielmann, A., *Droit pénal général luxembourgeois*, 2nd edition, Bruylant Bruxelles 2004, p. 422 f.

⁴ Spielmann, D./Spielmann, A., *Droit pénal général luxembourgeois*, 2nd edition, Bruylant Bruxelles 2004, p. 410: „[L]a mainmise de l’État sur un objet particulier à titre de peine [...] et se distingue ainsi de la restitution [...] qui est une mesure réparatrice de caractèree civil”.

⁵ Spielmann, D., *La confiscation en droit luxembourgeois à l’aube de la réforme du Code pénal*, *Annales de droit de Louvain* 1995, 201 (202): „La confiscation spéciale est généralement conçue comme un retrait, par voie d’autorité, de la propriété d’une chose mobilière”.

⁶ Nies, *La confiscation en droit luxembourgeois: une peine en pleine évolution*, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larquier Luxembourg 2013, 141 (141): “l’acquisition par l’État, aux fins d’aliénation à son profit, de tout ou partie du patrimoine d’une personne condamnée’, comme

Although this general and overarching definition used in Luxembourg doctrine no longer covers all forms of confiscation, it clearly shows that confiscation was initially conceived in Luxembourg criminal law as a criminal penalty affecting the convicted person's property. There are several forms of extended confiscation which are, however, at odds with this original idea. Namely, non-conviction based confiscation, third party confiscation and confiscation as a security measure are all forms of confiscation that either do not require a conviction or do not concern the property of the convict, but that of another person.

Given the the broad scope of confiscation in modern Luxembourg law, it is challenging to establish a comprehensive definition that would apply to all forms of confiscation. Today, confiscation is usually, but not exclusively, imposed as an accessory penalty in Luxembourg for cases defined by law allowing the State to acquire assets of a (usually, but not necessarily in all cases) convicted person with the aim of disposing it for the State's benefit.

b. The development of various confiscation-regimes in Luxembourg law

Luxembourg law differentiates between two confiscation regimes: general confiscation (*confiscation générale*), which targets the entire assets of a person and "*confiscation spéciale*", which affects only certain designated parts of a person's assets. Accordingly, the term *confiscation spéciale* is used in Luxembourg law to describe the ordinary confiscation regime and should not be misunderstood as referring to special rules or regimes for specific offences.

At present, Luxembourg criminal law allows for *confiscation spéciale* only. For a long time, there was even a constitutional ban on general confiscation in Article 17 of the Luxembourg Constitution,⁷ which was recently abolished as of 1 July 2023 by the constitutional reform (see below I.3.e.).⁸

2. The introduction of *confiscation spéciale* to Luxembourg criminal law

The current LCC, and its provisions on confiscation, are derived from the Belgian Penal Code that was enacted by **Law of 18 June 1879**.⁹ Confiscation at the time was regulated in Art. 42 and Art. 43 LCC. The scope was initially very limited and, compared to today, incomplete.¹⁰ Despite their narrow scope, the provisions remained in force unchanged for a long time until the Law of 13 June 1994 on the system of penalties¹¹ amended the LCC (see below 3.b.).

'expropriation intervenant le plus souvent à titre de peine complémentaire dans les cas spécifiés par la loi'; with reference to: Gérard Cornu (dir.), *Vocabulaire juridique* (8th edition 2007) see "confiscation" [currently 14th edition (2022)].

⁷ Former Article 17 of the Constitution: „*La peine de la confiscation des biens ne peut être établie.*” – The penalty of confiscation of property cannot be established.

⁸ Nies, *La confiscation en droit luxembourgeois: une peine en pleine évolution*, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, p. 141 (141).

⁹ Loi du 18 juin 1879, portant révision du Code pénal, Mém. A 58 de 1879, p. 589.

¹⁰ Nies, *La confiscation en droit luxembourgeois: une peine en pleine évolution*, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (142 f.).

¹¹ Loi du 13 juin 1994 relative au régime des peines, Mém. A 59 de 1994, p. 1095, n° doc. parl. 2974.

Confiscation was originally codified as an accessory penalty limited to the direct object of the offence, the instrumentalities, and the proceeds of the offence. Substitutes acquired as a replacement for items resulting directly from the offence were excluded, as well as items acquired with the help of stolen goods.¹²

Moreover, there was no possibility to confiscate from third parties. Even instrumentalities could not be confiscated if they belonged to a person other than the convicted person. This condition was however interpreted broadly by case law and doctrine, deeming it sufficient if the convicted person had been the owner of the property at the time of the offence,¹³ and confiscation was possible even if the convicted person was not the sole owner.¹⁴

Alongside this penal confiscation regime provided for by law, the jurisprudence established confiscation as a precautionary measure to remove dangerous or harmful objects from circulation. In this case, the object is targeted regardless of the fate of the accused, which is why confiscation must be pronounced even in case of an acquittal and without a legal basis, the only condition being that it is linked to criminal proceedings. The courts have applied confiscation as a security measure, based purely on its perceived necessity as a public security measure, to prohibited weapons in particular, confiscating them even in situations where they had been seized illegally or during an irregular search.¹⁵

3. Gradual extension of the scope of *confiscation spéciale*

The Luxembourg criminal law on *confiscation spéciale* has been subject to several subsequent reforms even before the EU legislator decided to approximate provisions on confiscation in the Member States. The reforms adopted prior to Directive 2014/42/EU have already led to a gradual expansion of the scope of *confiscation spéciale* in Luxembourg criminal law, providing for special subcategories of confiscation and establishing confiscation as a principal penalty. More recently, changes of *confiscation spéciale* have increasingly been driven not by internal systematic needs but by international demands.

These amendments have led to a modern and broad scope of confiscation in Luxembourg criminal law that resembles in several respects French criminal law. The tendency of the past 20 years to rely rather on French than Belgian law – irrespective of the Belgian origin of the LCC – created, however, inconsistencies and frictions in the LCC. As the *Conseil d'État* observed, the casuistic French provisions do not fit well into the general regime of *confiscation spéciale*.¹⁶

¹² Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (142).

¹³ Cour d'appel, 12 avril 1984, n° de rôle 117/84 VI with reference to the Belgian jurisprudence: Cour de Cassation belge, 13 juin 1955, Pas. belge 1955, p. 1114; Cour de Cassation belge, 30 juin 1955, Journal des Tribunaux 1955, n° 4079, p. 581.

¹⁴ Cour d'appel, 23 juillet 1981, Pas. lux. 25.185; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (142 f.).

¹⁵ Cour Supérieure de Justice, 10 novembre 1966, Pas. lux. 20.228; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (143, 145); Spielmann, D./Spielmann, A. Droit pénal général luxembourgeois, 2nd edition, Bruylant Bruxelles 2004, p. 422 f.

¹⁶ Projet de loi n° 7220, Avis du Conseil d'État, n° doc. parl. 7220/2, p. 7.

a. Creation of subcategories of *confiscation spéciale*

To compensate for the shortcomings of the regime on *confiscation spéciale*, several special subcategories were introduced.¹⁷

For instance, the **Law of 23 May 1927** on the production, storage, distribution, exhibition, dissemination and trade in obscene publications¹⁸ provided for the confiscation of objects deemed obscene even in the case of acquittal and thus solely on the basis of the nature of the object, without any connection to the prosecution of an accused.¹⁹

The **Law of 19 February 1973** concerning the sale of medicinal substances and the fight against drug addiction²⁰ introduced a particularly strict confiscation regime in this area, as it permitted the confiscation even if the substances and objects referred to were not the property of the convicted person and ordered the confiscation of prohibited substance independently of any conviction.²¹

In the same context, the legislator modified the aforementioned law by introducing the concept of money laundering into Luxembourg law with the **Law of 7 July 1989**,²² inspired by the French Law of 31 December 1987 on the fight against drug trafficking²³ and in the light of the ongoing work of the United Nations and the Council of Europe respectively on drug offences and organised crime, in order to create effective sanctions by affecting the assets of drug traffickers and third parties with whose help they tried to launder the money from crime.²⁴

The same law extended *confiscation spéciale* in the case of drug trafficking to the property of the convicted person that was acquired with the proceeds of the crime, but this special rule did not yet apply to money laundering.²⁵ This gap was filled by the **Law of 17 March 1992** approving the United Nations Convention against Illicit Traffic in Narcotic Drugs and further modifying the Law of 19 February 1973.²⁶

¹⁷ Nies, *La confiscation en droit luxembourgeois: une peine en pleine évolution*, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (143-145).

¹⁸ Loi du 23 mai 1927 concernant la fabrication, la détention, la distribution, l'exposition, la circulation et le trafic des publications obscènes (art. 383 et 384 du Code pénal), *Mém. A* 30 de 1927, p. 433.

¹⁹ Nies, *La confiscation en droit luxembourgeois: une peine en pleine évolution*, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg, 2013, 141 (143).

²⁰ Loi du 19 février 1973 concernant la vente de substances médicamenteuses et la lutte contre la toxicomanie, *Mém. A* 12 de 1973, p. 317, n° doc. parl. 1550.

²¹ Nies, *La confiscation en droit luxembourgeois: une peine en pleine évolution*, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (143 f.).

²² Loi du 7 juillet 1989 portant modification de la loi modifiée du 19 février 1973 concernant la vente de substances médicamenteuses et la lutte contre la toxicomanie, *Mém. A* 50 de 1989, p. 907, n° doc. parl. 3009.

²³ Loi n° 87-1157 du 31 décembre 1987 relative à la lutte contre le trafic des stupéfiants et modifiant certaines dispositions du code pénal, *JORF* n°0003 du 5 janvier 1988, p. 159, NOR: JUSX8700015L.

²⁴ Projet de loi n° 3009, Amendements gouvernementaux, n° doc. parl. 3009/1, p. 2; Nies, *La confiscation en droit luxembourgeois: une peine en pleine évolution*, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (144).

²⁵ Nies, *La confiscation en droit luxembourgeois: une peine en pleine évolution*, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (144).

²⁶ Loi du 17 mars 1992 portant [entre autres] 1. approbation de la Convention des Nations Unies contre le trafic illicite des stupéfiants et de substances psychotropes [...], *Mém. A* 15 de 1992, p. 697, n° doc parl. 3483.

Additionally, the Law of 17 March 1992 stipulated that, in the cases provided for, confiscation would henceforth extend to income from seized and confiscated property. It also introduced a restitution procedure for cases where the public prosecution cannot be continued or is discontinued. In these cases, the public prosecutor is authorised to decide on the restitution of the property in order to avoid having to return the seized property to the offender or their heirs.²⁷

b. Introduction of confiscation as a principal punishment

For the ordinary confiscation regime, the **Law of 13 June 1994** on the system of punishments²⁸ contained changes on essential points regarding confiscation as an accessory punishment. It introduced the possibility of confiscating objects acquired with the proceeds of the offence and provides for a subsidiary fine if the confiscated object can no longer be recovered. The mandatory confiscation in correctional matters was made optional and the articles were re-numbered with Art. 42 and Art. 43 LCC (old) becoming Art. 31 and Art. 32 LCC (new) respectively.²⁹

The major change brought by the law was the introduction of confiscation as a principal punishment alongside confiscation as an accessory punishment (cf. Art. 7 LCC, Art. 14 LCC and Art. 25 LCC which list the principal penalties for criminal, correctional and police matters respectively). In correctional matters and when the offence is punishable by imprisonment, a judge can henceforth pronounce special confiscation as a principal punishment even if confiscation is not provided for by the particular law in question (Art. 19 LCC).³⁰ In this case, and despite the explicit reference to Art. 31 LCC, confiscation may also affect property entirely unrelated to the offence committed.³¹

c. Changes due to international demands

More recent reforms have been largely driven by international commitments and criticisms, rather than by the need to improve the domestic framework.³²

One of those externally driven extensions of the scope of confiscation came with the **Law of 14 June 2001** ratifying the Strasbourg Convention of 8 November 1990 on Laundering, Search,

²⁷ Projet de loi n° 3483, Avis du Conseil d'État, n° doc. parl. 3483/1, pp 5 f.; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (145).

²⁸ Loi du 13 juin 1994 relative au régime des peines, Mém. A 59 de 1994, p. 1095, n° doc. parl. 2974.

²⁹ Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (146).

³⁰ Art. 19 LCC first indent: „Lorsqu'un délit est puni de l'emprisonnement, la confiscation spéciale telle qu'elle est définie par l'article 31 peut être prononcée à titre de peine principale, alors même qu'elle ne serait pas prévue par la loi particulière dont il est fait application.”

³¹ Projet de loi n° 2974, Document de dépôt, n° doc. parl. 2974, p. 12; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (145 f.).

³² Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (147-153).

Seizure and Confiscation of the Proceeds from Crime,³³ which, among other modifications, provided for in the new Art. 32-1 LCC for confiscation in cases of money laundering as defined in Art. 506-1 LCC.

The aim was, first, to align confiscation pursuant to 506-1 LCC with confiscation based on the (modified) Law of 19 February 1973 concerning the sale of medicinal substances and the fight against drug addiction (see above I.3.a.), especially with regard to value confiscation while avoiding the risk of a reversal of the burden of proof, and, second, to establish a restitution procedure that safeguards the rights of a civil or even third party that might have legitimate and justified claims.³⁴

This duality was maintained until the **Law of 1 August 2007** on confiscation,³⁵ which recreated a uniform sanction with an extended scope of application. Art. 31 LCC is thus replaced by the text of Art. 32-1 LCC with a few adaptations: The scope is extended to all offences, the provision of the former Art. 31 LCC that allowed for the confiscation of instrumentalities (which was not possible pursuant to the old Art. 32-1 LCC) is resumed and the term “civil party” (*partie civile*) is replaced by the broader term “person injured by the offence” (*personne lésée par l’infraction*).³⁶

Following these amendments, Luxembourg criminal law now allows for confiscation by equivalent. Namely the former possibility of imposing a subsidiary fine (see above I.3.b.) did not meet the requirements of the international texts for value confiscation.³⁷

In contrast to the here described expansion of the scope of confiscation, the possibility of confiscation in the event of acquittal, exemption from punishment, extinction or prescription of the public prosecution was omitted from provisions related to *confiscation spéciale*. Such non-conviction based confiscation was regulated in the new Art. 32-1 second indent LCC that allowed it only for the offence of money laundering.³⁸

The last reform of confiscation prior to the Directive 2014/42/EU came with the **Law of 27 October 2010** strengthening the legal framework for combating money laundering and the financing of terrorism,³⁹ which aimed to bring Luxembourg law in line with FATF

³³ Loi du 14 juin 2001 portant [entre autres] approbation de la Convention du Conseil de l'Europe relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime [...], Mém. A 81 de 2001, p. 1707, n°doc. parl. 4657.

³⁴ Projet de loi n° 4657, Document de dépôt, n° doc. parl. 4657, pp. 14 f.; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (147 f.).

³⁵ Loi du 1er août 2007 sur la confiscation et portant modification de différentes dispositions du Code pénal, du Code d’instruction criminelle et de différentes lois spéciale, Mém. A 136 de 2007, p. 2429, n° doc. parl. 5019.

³⁶ Projet de loi n° 5019, Document de dépôt, n° doc. parl. 5019, p. 6 f.

³⁷ Projet de loi n° 5019, Avis du Conseil d’État, n° doc. parl. 5019/1, pp. 2-5; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (149 f.).

³⁸ Projet de loi n° 5019, Document de dépôt, n° doc. parl. 5019, p. 7; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (148 f.).

³⁹ Loi du 27 octobre 2010 portant renforcement du cadre légal en matière de lutte contre le blanchiment et contre le financement du terrorisme [...], Mém. A 193 de 2010, p. 3171, n° doc. parl. 6163.

recommendations.⁴⁰ To this end, the scope of application of Art. 32-1 LCC was amended to include, in addition to money laundering, terrorist offences⁴¹. The material scope of application was enlarged so that instrumentalities can now be confiscated regardless of whether they belong to the convicted person or a third party. Both confiscation of substitutes and confiscation by equivalent include instrumentalities, accordingly also in this case irrespective of ownership.⁴²

d. Transposition of Directive 2014/42/EU

The **Law of 1 August 2018**,⁴³ which, *inter alia*, transposes the Directive 2014/42/EU with delay, brought several innovations in the field of extended confiscation: First, the introduction of extended confiscation in the sense of Art. 5 of Directive 2014/42/EU, second, the introduction of a new offence criminalising unexplained wealth in Art. 324quater LCC, and, third, the extension of the possibility to confiscate instrumentalities to the property of a third party.⁴⁴

Even though the legislator assumed that that Luxembourg law was already largely in line with the Directive,⁴⁵ this was notably not the case with regard to extended confiscation.⁴⁶ As the deadline for transposition had already expired on 4 October 2014, the introduction of extended confiscation by Law of 1 August 2018 was belated.⁴⁷

Extended confiscation was described as one of the major innovations of the Directive, which should enable the national authorities to confiscate and recover the profits generated by organised crime more efficiently by setting a common minimum standard⁴⁸ and equipping the country with an adequate legal arsenal to counter economic and financial crime.⁴⁹

It was deemed necessary to target the financial side of crime more effectively because prosecution in this area is difficult, investigations are often cumbersome and lengthy and technical means enable the international transfer of money in a very short time.⁵⁰

To respond to these challenges, the reform eased the burden of proof, thus allowing to tackle the overall assets likely to have been acquired through criminal activity without requiring the prosecuting authority to directly prove that each individual item of property has been

⁴⁰ Projet de loi n° 6163, Document de dépôt, n° doc. parl. 6163, p. 50.

⁴¹ The list of terrorist offences referred to was later adjusted by Law of 26 december 2012: Loi du 26 décembre 2012 portant approbation de la Convention du Conseil de l'Europe sur la prévention du terrorisme, Mém. A 290 de 2012, p. 4531, n° doc. parl. 6388.

⁴² Projet de loi n° 6163, Document de dépôt, n° doc. parl. 6163, p. 31; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (152 f.).

⁴³ Loi du 1er août 2018 portant modification [de plusieurs lois] en vue d'adapter le régime de confiscation, Mém. A 789 de 2018, n° doc. parl. 7220.

⁴⁴ Projet de loi n° 7220, Avis de la Cour supérieure de justice, n° doc. parl. 7220/1, p. 1.

⁴⁵ Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 7.

⁴⁶ Projet de loi n° 7220, Avis de la Cour supérieure de justice, n° doc. parl. 7220/1, pp. 1, 30; Avis du Conseil d'État, n° doc. parl. 7220/2, p. 1.

⁴⁷ Projet de loi n° 7220, Avis du Conseil d'État, n° doc. parl. 7220/2, p. 1.

⁴⁸ Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 8.

⁴⁹ Commission juridique, Procès-verbal n° 37 de la réunion du 13 juin 2018, p. 3.

⁵⁰ Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 6.

generated by an offence.⁵¹ Courts should be enabled to order the confiscation of property belonging to the convicted person on the basis of certain relevant and conclusive circumstances. These circumstances are a disproportion between the value of the assets and the lawful sources of income, as well as failure to justify the origin of the assets (i.e., to provide positive proof on the part of the convicted person).⁵²

In the same context, a special offence copied from French law was introduced in Art. 324quarter LCC, which penalises the circumstance that, in the presence of certain objective circumstances, no means can be proven to enable a lifestyle that is disproportionate to the officially verifiable legal income.⁵³ This offence of “non-justification of resources” has certain similarities with the offences of receiving stolen goods (*receil*) and money laundering.⁵⁴

Regarding third party confiscation, the confiscation of instrumentalities is extended, following the model of the French Art. 131-21 second paragraph *Code Pénal*, to assets which are not formally the property of the convicted person, but which he or she can freely dispose of, i.e., is the only person who has control of or benefits from them. This is done to counteract the mechanisms criminals find to hide their assets.⁵⁵ The confiscation is subject to the rights of an owner acting in good faith.⁵⁶

It was furthermore proposed to generalise the provision on non-conviction based confiscation,⁵⁷ but this was rejected by the *Conseil d’État* and the *Cour supérieure de la Justice* on the grounds that it is an exceptional measure which is only justified in case of specific offences, and which is at odds with the notion of ordinary confiscation as a punishment because it is imposed even if no criminal responsibility was established.⁵⁸ The generalisation was thus ultimately not implemented,⁵⁹ with the consequence that e.g. the proceeds of an offence cannot in all cases be confiscated from the heirs of the perpetrator if the latter dies without being convicted.⁶⁰

In addition to these expansions, the law intended to revise the whole ordinary confiscation regime by clarifying the structure of the current legislation and enlarging the scope of assets that can be seized and confiscated.⁶¹ The reformed confiscation regime was further adjusted

⁵¹ Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 8.

⁵² Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, pp. 6 f.

⁵³ Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 7.

⁵⁴ Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 12; Avis du Conseil d’État, n° doc. parl. 7220/2, p. 1.

⁵⁵ Projet de loi n° 7220, Avis du Conseil d’État, n° doc. parl. 7220/3, p. 7.

⁵⁶ Projet de loi n° 7220, Avis du Parquet général, n° doc. parl. 7220, p. 8.

⁵⁷ Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 9.

⁵⁸ Projet de loi n° 7220, Avis de la Cour supérieure de la justice, n° doc. parl. 7220/01, p. 2; Avis du Conseil d’État, n° doc. parl. 7220/02, p. 3 f.

⁵⁹ Projet de loi n° 7220, Amendements adoptés par la Commission juridique, n° doc. parl. 7220/04, p. 4.

⁶⁰ Commission juridique, Procès-verbal n° 37 de la réunion du 13 juin 2018, p. 3.

⁶¹ Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 7.

by the **Law of 17 December 2021**⁶² and the **Law of 22 June 2022**,⁶³ with the latter introducing a new form of subsequent value confiscation to comply with Art. 9 of Directive 2014/42/EU.⁶⁴

e. Constitutional Reform abolishing Art. 17: The Laws of 17 January 2023

Art. 17 of the former Luxembourg Constitution (which was derived from the identical provision that has featured in Art. 17 of the Belgian Constitution since 1831) disapproved the introduction of a penalty involving confiscation.⁶⁵ This provision has been, however, interpreted to prohibit only the general confiscation (*confiscation générale*) of the entire patrimony, thus affecting the convicted person and their entire family.⁶⁶ In contrast thereto, *confiscation spéciale* did not fall under Art. 17 of the former Luxembourg Constitution because it does not aim at the entire patrimony.⁶⁷ Instead, it seeks to confiscate, in a first step, the means and proceeds of crime and, then, certain profits subsequently generated therefrom, and, ultimately, if the proceeds cannot be seized anymore, their value. Hence, *confiscation spéciale* is only of a limited nature, leaving untouched such assets unrelated to the crime and its proceeds.⁶⁸ Thus, *confiscation spéciale* was deemed to be in accordance with Art. 17 of the Constitution and has, as demonstrated above, long been part of Luxembourg's legislative arsenal.

However, due to the significant extension of the scope of assets that are subject to confiscation through the above mentioned reforms, the *Justice de paix d'Esch-sur-Alzette* raised concerns about the constitutionality of these provisions⁶⁹ which the Government shared.⁷⁰ The *Conseil d'État* thus proposed to omit Art. 17, arguing that property rights are otherwise guaranteed by the constitutional provisions on expropriation and the general principle of the legality of penalties is already set out in another article.⁷¹ This change was implemented with the constitutional reform consisting of four different **Laws of 17 January 2023**⁷² and as of 1

⁶² Loi du 17 décembre 2021 portant modification [de plusieurs lois] aux fins de transposition de la directive (UE) 2018/1673 [...], Mém. A 900 de 2021, n° doc. parl. 7533A.

⁶³ Loi du 22 juin 2022 sur la gestion et le recouvrement des avoirs saisis ou confisqués, Mém. A 323 de 2022, n° doc. parl. 7452.

⁶⁴ Projet de loi n° 7452, Document de dépôt, n° doc. parl. 7452, p. 13-16.

⁶⁵ [Former] Article 17 of the Constitution: „*La peine de la confiscation des biens ne peut être établie.*”

⁶⁶ Cf., e.g., Cour supérieure de Justice, 7 Février 2018 n° 62/18 X, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 212, with further reference to Nicolas Majerus, *Histoire du Droit dans le Grand-Duché de Luxembourg*, Tome 2, Saint-Paul Luxembourg 1949, p. 718; Projet de loi n° 6030, Avis du Conseil d'État, n° doc. parl. 6030/3, p. 26.

⁶⁷ Cour supérieure de Justice, 7 Février 2018 n° 62/18 X, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 212.

⁶⁸ Cf. Cour supérieure de Justice, 7 Février 2018 n° 62/18 X, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 212.

⁶⁹ Projet de loi n° 6030, Avis de la Justice de Paix d'Esch-Alzette, n° doc. parl. 6030/4, p. 18.

⁷⁰ Projet de loi n° 6030, Prise de Position du Gouvernement, n° doc. parl. 6030/5, p. 52.

⁷¹ Projet de loi n° 6030, Avis du Conseil d'État, n° doc. parl. 6030/3, p. 26.

⁷² 1. Loi du 17 janvier 2023 portant révision du chapitre VI. de la Constitution, Mém. A 26 de 2023, n° doc. parl. 7575;

2. Loi du 17 janvier 2023 portant révision des Chapitres Ier, II, III, V, VII, VIII, IX, X, XI et XII de la Constitution, Mém. A 27 de 2023, n° doc. parl. 7700;

3. Loi du 17 janvier 2023 portant révision du chapitre II de la Constitution, Mém. A 28 de 2023, n° doc. parl. 7755;

4. Loi du 17 janvier 2023 portant révision des chapitres IV et Vbis de la Constitution, Mém. A 29 de 2023, n° doc. parl. 7777.

July 2023 the old Art. 17 of the Constitution prohibiting general confiscation has been abolished.

II. The Present System of Confiscation in Luxembourg

The present system of confiscation in Luxembourg has been stipulated by the Law of 1 August 2018 as well as the amendments brought by Law of 17 December 2021 and Law of 22 June 2022.

1. Legal basis

The main provisions on confiscation are Artt. 31 and 32 LCC which together form Section V LCC titled “*de la confiscation spéciale*”. The two articles provide a comprehensive framework for confiscation: While Art. 31 LCC contains the legal basis for ordering confiscation and defines its conditions and scope, Art. 32 LCC regulates restitution, the rights of the victim and third parties and the right to challenge a confiscation order, as well as the procedure and the competent authority.

Apart from this general provision, there are several fragmented provisions in the LCC as well as in special laws that provide for confiscation in case of specific crimes, often by referring to Artt. 31 and 32 LCC, e.g. Art. 384 second indent LCC for child pornography, or the aforementioned Law of 19 February 1973 concerning the sale of medicinal substances and the fight against drug addiction (see above I.3.a.).

Furthermore, jurisprudence established confiscation of dangerous items as a security measure even in cases where neither Art. 31 LCC nor special laws apply (see above I.2. and below III.2.). A dangerous item can be confiscated irrespective of a legal basis, provided, as a sole precondition, that it is linked to criminal proceedings.⁷³

2. Nature

Confiscation has a dual character in Luxembourg law: It is both a penalty and a *mesure de sécurité ou de précaution*.

Even though the nature of confiscation is not explicitly mentioned in Art. 31 LCC, it is clear that Luxembourg criminal law in general as well as Article 31 LCC in particular look at confiscation as a penalty. Confiscation is imposed in response to a criminal offence and listed explicitly and

⁷³ Cour supérieure de Justice, 9 juillet 2002, n° 204/02 V, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 221; Cour Supérieure de Justice, 10 novembre 1966, Pas. lux. 20.228; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (145); Spielmann, D./Spielmann, A. *Droit pénal général luxembourgeois*, 2nd edition, Bruylant Bruxelles 2004, pp. 422 f.

equally among other classic penalties in Artt. 7 3), 14 3) and 25 2) LCC as a “*peine*”. This understanding is also supported by case law⁷⁴ and doctrine.⁷⁵

This classification as a penalty, however, cannot be upheld in view of the so-called rehabilitative confiscation (*mesure de sécurité ou de précaution*), as it clearly does not require prior conviction, but bases confiscation on the need to withhold and exclude dangerous items from further harmful circulation, i.e., to prevent the risk of further damage and harm directly attributable to the respective item itself. The sole condition of applying such rehabilitative confiscation is that it is linked to criminal prosecution (see above, I.2.), keeping the latter within the ambit of criminal law.

In the course of transposing EU law into Luxembourg law, in line with both international and European criminal policy consideration, Luxembourg also introduced non-conviction based confiscation as a new form of *confiscation spéciale*. Although non-conviction based confiscation is formulated in Art. 31 LCC, it clearly lacks penal character, since it can be imposed in case of acquittal, exemption from penalty, as well as when prosecution is time barred or pre-closed for other statutory reasons.

3. Conditions

Since confiscation is considered a penalty and is designed as such, it can only be imposed on a convicted offender (see Art. 2 first indent LCC: “No offence may be punished by penalties which were not provided for by law prior to the commission of the offence.”). Accordingly, confiscation presupposes, on the one hand, a conviction for an offence punishable by confiscation and, on the other hand, that the object of confiscation belongs to the convicted offender. This follows directly from the punitive nature of confiscation, namely the principle of guilt and the principle of the personality of the punishment (*principe de la personnalité des peines*).⁷⁶

Confiscation spéciale is mandatory for crimes (*crime*)⁷⁷ and certain offences in the area of money laundering and terrorism (Art. 112-1, 135-1 to 135-6, 135-9, 135-11 to 135-16 and 506-1 to 506-8 LCC). In case of other misdemeanours (*délit*),⁷⁸ confiscation is optional and with

⁷⁴ Cour supérieure de Justice, 25 septembre 2013, n° 453/13 X; 8 janvier 2008, n° 11/08 V, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 212; 11 décembre 2007, n° 584/07 V, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 210.

⁷⁵ Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (141); Spielmann, D./Spielmann, A. *Droit pénal général luxembourgeois*, 2nd edition, Bruylant Bruxelles 2004, p. 410.

⁷⁶ Cour Constitutionnelle, 7 janvier 2011, n° 59/11 and n° 60/11; Cour supérieure de Justice, 21 octobre 2014 n° 433/14 V, , in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, pp. 229 f.

⁷⁷ A crime is an offence punishable by a criminal penalty, Art. 1 first indent Code Pénal: „L’infraction que les lois punissent d’une peine criminelle est un crime.”

⁷⁸ A misdemeanour is an offence punishable by law with a correctional penalty, Art. 1 second indent Code Pénal: „L’infraction que les lois punissent d’une peine correctionnelle est un délit.”

regard to contraventions (*contravention*)⁷⁹ it can only be pronounced in the cases stipulated by law (Art. 31 (1) LCC).⁸⁰

Confiscation is generally restricted to assets belonging to the offender (*appartenant au condamné*), that is, his or her property. This condition has historically been interpreted broadly. Confiscation of the property of the offender can thus affect shared property as well as property belonging no longer to the offender (see above I.2.).⁸¹ Today there are many derogations from this general rule (see below III.1.a.).

In cases where confiscation is optional, the principle of proportionality must be observed.⁸²

4. Material Scope

Confiscation spéciale applies to the object or the proceeds of the offence (Art. 31 (2) 1° LCC), the instruments of the offence (Art. 31 (2) 2° LCC), substituted property (Art. 31 (2) 3° LCC), assets the value of which corresponds to that of the assets to be confiscated if either those assets have disappeared (confiscation by equivalent, Art. 31 (2) 4° LCC) or if no assets liable to confiscation have been identified or if the identified assets are insufficient to cover the object or the direct or indirect proceeds of an offence or a pecuniary advantage derived from the offence (value confiscation, Art. 31 (4) LCC). In certain cases, extended confiscation (Art. 31 (2) 5° LCC) and non-conviction-based confiscation (Art. 31 (3) LCC) are also provided for (see below III.1.b. and III.1.c.).

Confiscation spéciale applies to all assets, regardless of their nature, whether corporal or incorporeal, movable or immovable, tangible or intangible, as well as legal documents or instruments in any form, including electronic or digital, evidencing title to or interest in such assets.

III. Special types

There are some forms of confiscation which deviate from the aforementioned rules and can be considered as types of extended confiscation (in the broader sense):

⁷⁹ A contravention is an offence punishable by law with a police penalty, Art. 1 third indent Code Pénal: „L'infraction que les lois punissent d'une peine de police est une contravention.”

⁸⁰ Art. 31 LCC: „(1) [first indent] La confiscation spéciale est toujours prononcée pour crime, et pour les infractions visées aux articles 112-1, 135-1 à 135-6, 135-9, 135-11 à 135-16 et 506-1 à 506-8. Elle peut l'être pour les autres délits.

[second indent] Elle n'est prononcée pour contravention que dans les cas déterminés par la loi.”

⁸¹ Spielmann, D./Spielmann, A. Droit pénal général luxembourgeois, 2nd edition, Bruylant Bruxelles 2004, 417; Cour supérieure de Justice, 28 octobre 2013, n° 508/13 VI, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, pp. 216 f.; 21 janvier 2009, n° 42/09 X, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 219.

⁸² Cour supérieure de Justice, 28 octobre 2014, n° 448/14 V, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 220.

1. Special forms of confiscation provided for in Art. 31 LCC

a. Third party confiscation

There are different provisions that allow for third party confiscation in Art. 31 LCC. They can be divided into two groups: Those in which confiscation is carried out irrespective of ownership (aa), and those based on the free disposal of the offender (bb).

aa. Confiscation irrespective of ownership (third party confiscation)

According to Art. 31 (2) 1° LCC objects and products of the crime as well as their substitutes⁸³ are subject to confiscation irrespective of the owner. In the cases stipulated in Art. 31 (3) LCC, the confiscation of instrumentalities takes place even if the item in question does not belong to the perpetrator (Art. 31 (3) second sentence LCC). This form of confiscation represents a case of third party confiscation, since there is in fact no legally convicted perpetrator (see below III.1.c).

Confiscation in these instances cannot be regarded as a punishment, as this would violate the principles of guilt and personality of punishment,⁸⁴ even though this is not mentioned anywhere in the legal framework. It also does not necessarily fit the logic of a security measure, as not only dangerous items are concerned. Third party confiscation must therefore be considered a measure *sui generis* in these cases. It aims at ensuring that no third party is permitted to retain the objects, proceeds or instrumentalities of an offence.

bb. Notion of free disposal

The second form of third party confiscation is the possibility to confiscate not only property of the convicted person, but also assets that are at his or her free disposal (*libre disposition*). This is foreseen in Art. 31 (2) 2° LCC for instrumentalities and in Art. 31 (2) 5° for cases of extended confiscation.

The free disposal-form aims to include assets which are not formally the property of the convicted person, but which he or she can freely dispose of, i.e., is the only person who has control of or benefits from them. Such assets are put on the same footing as the property of the convicted person.

The confiscation is subject to the rights of an owner acting in good faith.⁸⁵ There is an assumption of good faith, the bad faith has to be proven.⁸⁶ The assessment is a matter for the judge.⁸⁷

⁸³ Art. 31 (2) 3° LCC. Spielmann, D./Spielmann, A. *Droit pénal général luxembourgeois*, 2nd edition, Bruylant Bruxelles 2004, p. 414.

⁸⁴ Cour supérieure de Justice, 10 juillet 2017, n° 281/17 VI, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 214.

⁸⁵ Projet de loi n° 7220, Avis du Parquet général, n° doc. parl. 7220, p. 8.

⁸⁶ Projet de loi n° 7220, Avis de la Cour supérieure de justice, n° doc. parl. 7220/1, pp. 1 f; Avis du Conseil d'État, n° doc. parl. 7220/2, p. 2.

⁸⁷ Commission juridique, Procès-verbal n° 37 de la réunion du 13 juin 2018, p. 5; Kirmann, *Réflexions sur la loi du 1er août 2018 modifiant le régime de la confiscation et incriminant deux nouvelles formes de recel et de blanchiment*, DPPP n° 1/2018, 10 (11 f.).

The free disposal-form was introduced to prevent criminals from hiding their illegally gained assets by transferring ownership.⁸⁸ It includes e.g. the case of a natural person who is the economic beneficiary of property belonging to a legal person with separate legal personality.⁸⁹ This form of confiscation is generally regarded as indispensable by doctrine to effectively combat white-collar crime.⁹⁰

The confiscation aims, even though a third party is concerned in their formal position as an owner, to affect the convicted person as the “real” owner who stands behind the mere pretended owner. The free disposal-form of third party confiscation can thus be considered a punishment, as it is directed against the offender.

b. Extended Confiscation

aa. Art. 31 (2) 5° LCC

Extended confiscation pursuant to **Art. 31 (2) 5° LCC** allows for the confiscation of assets when neither the convicted person, nor the owner, when given the opportunity to explain, is able to justify the origin of the property to be confiscated.

It applies in cases of any crime or misdemeanour punishable by at least four years of imprisonment and having resulted in a direct or indirect profit. It was thus implemented beyond the scope required by the Directive 2014/42/EU.⁹¹

Thus, if a person is convicted for such an offence, the judge can now confiscate all assets of that person, if the convict is not able to prove their legitimate origin. It is no longer necessary to connect the assets directly to the offence.⁹²

Concerns were raised about the compatibility of the provision with Art. 17 of the Luxembourg Constitution, but these have become obsolete since its abolition. However, the property rights of family members of the convicted person may be greatly affected.⁹³ It was feared the provision would lead to an upheaval of the essential principles of criminal law by introducing a reversal of the burden of proof.⁹⁴

⁸⁸ Projet de loi n° 7220, Avis du Conseil d’État, n° doc. parl. 7220/3, p. 7.

⁸⁹ Commission juridique, Procès-verbal n° 37 de la réunion du 13 juin 2018, p. 4.

⁹⁰ Kirmann, Réflexions sur la loi du 1er août 2018 modifiant le régime de la confiscation et incriminant deux nouvelles formes de recel et de blanchiment, DPPP n° 1/2018, 10 (11 f.).

⁹¹ Projet de loi n° 7220, Amendements, n° doc. parl. 7220/2, p. 3.

⁹² Kirmann, Réflexions sur la loi du 1er août 2018 modifiant le régime de la confiscation et incriminant deux nouvelles formes de recel et de blanchiment, DPPP n° 1/2018, 10 (11).

⁹³ Kirmann, Réflexions sur la loi du 1er août 2018 modifiant le régime de la confiscation et incriminant deux nouvelles formes de recel et de blanchiment, DPPP n° 1/2018, 10 (11).

⁹⁴ Commission juridique, Procès-verbal n° 37 de la réunion du 13 juin 2018, p. 5.

bb. Connection to Art. 324quater LCC

Extended confiscation pursuant to Art. 31 (2) 5° LCC is closely connected to and to be read in conjunction with the new **Art. 324quater LCC**, which criminalises the non-justification of resources and facilitating the justification of fictitious resources.

This provision is based on the French Art. 321-6 *Code Pénal* and related to the offences of receiving stolen goods (*recel*) and money laundering.⁹⁵ It is a type of offence previously unknown to Luxembourg law which is based on the recourse to a legal presumption which the defendant must disprove.⁹⁶

It contains two different offences: In the first indent, the non-justification of resources, which targets persons close to offenders who benefit from the proceeds of their offences and which can be qualified as a kind of presumed handling of stolen goods ("*recel présumé*"), and in the second indent what is effectively a special form of money laundering, the facilitation of the justification of fictional resources.⁹⁷

The provision has been criticised, and it was questioned whether it complies with certain traditional principles of criminal law and whether it is necessary and effective.⁹⁸ In particular, it was debated whether the provision can be reconciled with the right to silence and the principle of guilt.⁹⁹

In the end, with reference to Belgian, French and ECtHR jurisprudence, the provision was considered in principle constitutional and was adopted.¹⁰⁰

c. Non-conviction based confiscation

The ambit of non-conviction based confiscation pursuant to Art. 31 (3) LCC is restricted on the one hand to certain exhaustively enumerated offences and to four variants of non-conviction on the other hand. These offences are the assassination of internationally protected persons, terrorism and money laundering (Arts. 112-1, 135-1 to 135-6, 135-9, 135-11 to 135-16 and 506-1 to 506-8 LCC). The alternatives of non-conviction are acquittal (*acquittement*), impunity (*exemption de peine*), termination of the prosecution (*extinction de l'action publique*) and the prosecution being time barred (*prescription de l'action publique*).

In the aforementioned cases, confiscation as foreseen in Art. 31 (2) LCC is mandatory. Accordingly, all variants of confiscation pursuant to Art. 31 (2) can be carried out as non-conviction

⁹⁵ Kirmann, *Réflexions sur la loi du 1er août 2018 modifiant le régime de la confiscation et incriminant deux nouvelles formes de recel et de blanchiment*, DPPP n° 1/2018, 10 (12).

⁹⁶ *Projet de loi n° 7220, Avis du Conseil d'État*, n° doc. parl. 7220/2, pp. 3 f.

⁹⁷ Kirmann, *Réflexions sur la loi du 1er août 2018 modifiant le régime de la confiscation et incriminant deux nouvelles formes de recel et de blanchiment*, DPPP n° 1/2018, 10 (12).

⁹⁸ *Projet de loi n° 7220, Avis de la Cour supérieure de justice*, n° doc. parl. 7220/1, pp. 2 f.; *Avis du Conseil d'État*, n° doc. parl. 7220/2, p. 7.

⁹⁹ *Projet de loi n° 7220, Avis du Conseil d'État*, n° doc. parl. 7220/2, p. 7.

¹⁰⁰ *Projet de loi n° 7220, Avis des Parquets de Luxembourg et de Diekirch*, n° doc. parl. 7220/3, pp. 4-6; *Avis du Parquet général*, n° doc. parl. 7220/3, p. 8; *Commission juridique, Procès-verbal n° 37 de la réunion du 13 juin 2018*, p. 6.

based confiscation if the respective conditions are met. Instruments of the crime are exceptionally confiscated irrespective of ownership, Art. 31 (3) second sentence LCC. The use of the notion “convict” (*condamné*) in this context is misleading, since this provision is specifically applicable when no one has been (definitively) convicted. It should instead be read as “perpetrator”.¹⁰¹

Confiscation pursuant to Art. 31 (3) LCC (in conjunction with Art. 31 (2) LCC) is pronounced without the final conviction of an offender, thus derogating from the principle of guilt. It follows from jurisprudence that confiscation under these conditions cannot have the character of a punishment.¹⁰² Neither does it fit the logic of confiscation as a security measure, as the dangerous nature of the assets is not a condition for its application. It instead has to be considered a measure *sui generis*.

Even though the legislator was aware of the exceptional character of non-conviction based confiscation,¹⁰³ it was still included into Art. 31 LCC as a distinct subset of special confiscation, with the result that, though not a penalty in the strict sense of the term, the same criminal law guarantees apply for all cases of special confiscation.

2. Confiscation as a security measure

The confiscation conceived as a penalty is to be distinguished from confiscation as a simple security measure relating to harmful objects that must be taken out of circulation in the public interest even if the defendant has been acquitted, i.e., is to be regarded as innocent. These cases typically concern the confiscation of illegal or dangerous items such as arms, drugs or forged documents.¹⁰⁴

Often, confiscation as a security measure is provided for in statutes other than the criminal code, which in turn often refer back to Artt. 31 and 32 LCC. Such statutes can also be of mixed character, combining security and penal aspects. Depending on the closer circumstances, the confiscation of a dangerous item can simultaneously embrace both elements of a security measure and of a penalty.

But even without a provision, jurisprudence has historically applied confiscation as a precautionary measure to remove dangerous or harmful objects from circulation, provided, as a unique precondition, that it is linked to criminal prosecution (see above I.2.).¹⁰⁵

Since the Law of 22 June 2022, Art. 32 (3) third indent LCC allows for the Public Prosecutor to refuse the restitution of items qualified as dangerous or harmful by law, or that is unlawfully

¹⁰¹ Projet de loi n° 7220, Avis du Tribunal d'arrondissement de et à Luxembourg, n° doc. parl. 7220/3, p. 2.

¹⁰² See above; e.g. Cour supérieure de Justice, 10 juillet 2017, n° 281/17 VI, in: Putz, *Recueil de jurisprudence pénale 2023 - Tome 1 - Droit pénal*, 12th edition, Windhof, Larcier Luxembourg 2023, p. 214.

¹⁰³ Projet de loi n° 7220, Avis de la Cour supérieure de justice, n° doc. parl. 7220/1, p 2.

¹⁰⁴ Spielmann, D./Spielmann, A. *Droit pénal général luxembourgeois*, 2nd edition, Bruylant Bruxelles 2004, pp. 422 f.

¹⁰⁵ Cour Supérieure de Justice, 10 novembre 1966, Pas. lux. 20.228; Nies, La confiscation en droit luxembourgeois: une peine en pleine évolution, in: Barreau du Luxembourg (ed.): *Quo Vadis droit luxembourgeois*, 1st edition, Windhof, Larcier Luxembourg 2013, 141 (143, 145); Spielmann, D./Spielmann, A. *Droit pénal général luxembourgeois*, 2nd edition, Bruylant Bruxelles 2004, p. 422 f.

held. Such items become property of the state if no decision is requested (Art. 32 (3) sixth indent LCC) or, if the court refuses to return the item after being requested to do so, it is confiscated (Art. 32 (3) fifth indent LCC).

IV. Individual rights and legal remedies

Since the Law of 1 August 2018, the formerly scattered provisions on the rights of the victim and third parties in the event of confiscation are contained in Art. 32 LCC.¹⁰⁶ Art. 32 (1) and (2) LCC set out the jurisdiction and procedure for the restitution of confiscated property, while Art. 32 (3) LCC concerns the case where no court has ruled on the restitution.

Restitution may be launched by any person claiming ownership of the property, Art. 68 (1) Luxembourg Code of Criminal Procedure (*Code de Procédure Pénale*, hereinafter LCCP).

Any person who claims to have a right to an item placed under the hands of the law has the right to an attorney (Art. 3-6 (1) n° 11 LCCP).

A third party with legitimate interests benefits from the rights of the accused with regard to expert evidence, Art. 87 (7bis) LCCP. The aim is to allow a concerned third party to prove a legitimate personal interest without having been formally accused in the context of the judicial investigation.¹⁰⁷ Such a third party can also request the annulment of an investigative act, Art. 126 (1) LCCP.

The accused, the defendant, the civil party, the person at whose hands the seizure was made, any person who is the owner of the goods which are the subject of the judgment and any third party whose rights in respect of those goods are directly affected by the judgment are also entitled to various rights during the administration of the seized assets (*gestion des avoirs saisis*, Artt. 579 ff. LCCP).

Even though the legislator stated on occasion of the transposition of Directive 2014/42/EU by Law of 1 August 2018 with regard to the guarantees of an effective remedy and a fair trial under Art. 8 of the Directive, that Luxembourg law already provides all the necessary guarantees with regard to the rights of defence and actions for annulment or restitution,¹⁰⁸ several of the third party rights were only introduced or extended to the necessary extent by Law of 22 June 2022.¹⁰⁹

¹⁰⁶ Kirmann, *Réflexions sur la loi du 1er août 2018 modifiant le régime de la confiscation et incriminant deux nouvelles formes de recel et de blanchiment*, DPPP n° 1/2018, 10 (12).

¹⁰⁷ *Projet de loi n° 7220, Avis du Conseil d'État, n° doc. parl. 7220/2, p. 2.*

¹⁰⁸ *Projet de loi n° 7220, Document de dépôt, n° doc. parl. 7220, p. 10.*

¹⁰⁹ *Projet de loi n° 7452, Document de dépôt, n° doc. parl. 7452, pp. 15 f.*