

# EXTENDED CONFISCATION IN CRIMINAL LAW

National, European and International  
Perspectives

Malin THUNBERG SCHUNKE



intersentia

Cambridge – Antwerp – Portland

# CONTENTS

<i>Preface</i> .....	v
<i>Table of Cases</i> .....	xiii
<i>List of Abbreviations</i> .....	xix

## PART I. INTRODUCTION

<b>Chapter 1. Background and Scope of the Study</b> .....	3
1.1. <i>Go for the Money!:</i> The Development and Expansion of a New Law Enforcement Strategy .....	3
1.2. International and National Legislative Action .....	6
1.3. On the Subject Matter .....	9
1.3.1. The Overriding Purpose of the Study .....	9
1.3.2. The Different Stages of Confiscation .....	10
1.3.3. A Note on Terminology .....	12
1.4. The Perspectives of the Study and Delimitations .....	15
1.4.1. National and International Perspectives .....	15
1.4.2. Delimitations .....	16
1.5. An Outline of the Different Parts and Chapters .....	17

## PART II. SUBSTANTIVE PROVISIONS ON EXTENDED CONFISCATION

<b>Chapter 2. Legislative Action by the EU</b> .....	25
2.1. FD 2005/212/JHA .....	25
2.1.1. Introduction .....	25
2.1.2. Extended Confiscation .....	26
2.1.3. Third Party Confiscation and Rules on Procedural Rights .....	28
2.2. Reviews of the European Confiscation Powers .....	29
2.3. Directive 2014/42/EU .....	33
2.3.1. The General Framework of the Directive .....	33
2.3.2. The Provision on Ordinary Confiscation .....	35
2.3.3. The Provision on Extended Confiscation .....	37
2.3.4. Third Party Confiscation .....	39
2.3.5. Procedural Safeguards .....	39

<b>Chapter 3. Legislation in England and Wales.</b>	<b>43</b>
3.1. The Development of the Legislation on Extended Confiscation in England and Wales.	43
3.2. Overview of POCA 2002.	45
3.3. Confiscation Orders Pursuant to Part 2 of POCA 2002	49
3.3.1. Introduction	49
3.3.2. A Twin Track Confiscation System	51
3.4. Criminal Lifestyle Confiscation	53
3.4.1. Basic Requirements	53
3.4.2. The Determination of Benefit in Criminal Lifestyle Cases.	54
3.4.2.1. The Statutory Assumptions	54
3.4.2.2. The Burden and Standard of Proof	57
3.4.2.3. Benefit and the Available Amount.	58
3.5. Some Special Features of the English Confiscation Procedure	65
3.6. A Commentary on the English Confiscation Regime on Lifestyle Confiscation	67
3.6.1. A Draconian but Efficient Confiscation Regime?	67
3.6.2. The Classification of Defendants as Lifestyle Offenders	70
3.6.3. The Assessment of Benefit on the Basis of the 'Criminal Lifestyle' Assumptions	71
3.6.4. Lack of Judicial Discretion	74
3.6.5. The Burden of Proof on a Defendant.	76
3.6.6. Confiscation Orders and the ECHR	78
3.6.6.1. Case-law from the ECtHR	78
3.6.6.2. Confiscation Orders and the Human Rights Act 1998.	85
3.6.6.3. Remarks on the Compatibility of the Regime with the ECHR.	86
3.6.7. Difficulties Regarding the Enforcement of Confiscation Orders.	87
<b>Chapter 4. Legislation in Germany</b>	<b>91</b>
4.1. The Development of the Measure of Extended Confiscation in German Law	91
4.2. Generally on the Confiscation Regime	97
4.3. Extended Confiscation in German Law	99
4.3.1. Basic Substantive Rules and the Procedural Framework	99
4.3.2. The Triggering Offences and the Scope for Extended Confiscation	102
4.3.3. The Evidentiary Standard for Extended Confiscation.	104
4.3.3.1. Legal Provision and the Legislative Works.	104
4.3.3.2. Decision by the Bundesgerichtshof in 1994.	106

4.3.3.3.	Decision by the Bundesverfassungsgericht in 2004 . . . .	108
4.3.3.4.	The Application of the Evidentiary Standard in Case-law . . . . .	110
4.4.	A Commentary on the German Regime of Extended Confiscation . . . .	113
4.4.1.	A Complex and Partly Controversial Asset Recovery Regime . . . . .	113
4.4.2.	The Interpretation and Application of the Evidentiary Standard . . . . .	114
4.4.3.	The Present Scope of the Legislation . . . . .	117
4.4.4.	The Proposal for a New German Provision on Extended Confiscation . . . . .	118
4.4.5.	The Proposal for a New Form of Non-Conviction-Based Confiscation . . . . .	122
4.4.6.	The Practice of Administrative “ <i>Präventive Gewinnabschöpfung</i> ” . . . . .	126
Chapter 5. Legislation in Sweden . . . . .		129
5.1.	The Development of the Measure of Extended Confiscation in Swedish Law . . . . .	129
5.2.	Generally on the Regime for Confiscation in Sweden. . . . .	131
5.3.	The Provision on Extended Confiscation in Swedish Law . . . . .	134
5.3.1.	Basic Substantive Rules and the Procedural Framework . . . . .	134
5.3.2.	The Triggering Offences and the Scope for Extended Confiscation . . . . .	137
5.3.3.	Special Criteria for Extended Confiscation. . . . .	138
5.3.4.	The Burden and Standard of Proof. . . . .	140
5.3.5.	Third Party Confiscation . . . . .	144
5.4.	Swedish Case-Law on Extended Confiscation . . . . .	145
5.4.1.	Introduction . . . . .	145
5.4.2.	Assets Found under “Suspicious” Circumstances . . . . .	147
5.4.3.	The Financial Situation of the Defendant . . . . .	150
5.4.4.	<i>NJA 2010 p. 374</i> . . . . .	154
5.5.	An Analysis of the Swedish Confiscation Regime . . . . .	157
5.5.1.	The Issue of Confiscation of Relatively Low Amounts of Cash . . . . .	157
5.5.2.	The Scope of Confiscation and the Triggering Offences. . . . .	162
5.5.3.	The Swedish Hardship Rule. . . . .	170
5.5.4.	A Lowered Standard or a Reversed Burden of Proof? . . . . .	171
5.5.5.	The Procedural Framework for a Motion on Extended Confiscation . . . . .	173
5.5.6.	The Efficiency of the Regulation. . . . .	175

<b>Chapter 6. Brief Overview of the Legislation in Norway, Denmark and Finland.</b>	<b>179</b>
6.1. Norway	179
6.1.1. The Provision on Extended Confiscation	179
6.1.2. The Burden of Proof.	181
6.1.3. The Procedural Framework.	182
6.2. Denmark	183
6.2.1. The Provision on Extended Confiscation	183
6.2.2. The Burden of Proof.	184
6.2.3. Danish Legislation and Directive 2014/42/EU.	184
6.3. Finland	185
6.3.1. The Provision on Extended Confiscation	185
6.3.2. The Burden of Proof.	187
 <b>Chapter 7. Directive 2014/42/EU: A Reform with Significant Legal Changes?</b>	 <b>189</b>
7.1. The Necessity of a New EU Instrument on Confiscation	189
7.2. The Challenges to a More Harmonised EU Regime	193
7.3. Triggering Offences and the Scope of Directive 2014/42/EU.	197
7.4. The Establishment of Illegal Origin	202
7.4.1. Some Special Supportive Legislative Criteria	202
7.4.2. The Evidentiary Standard and Burden of Proof.	204
7.5. Exceptions to Extended Confiscation	210
7.6. The Absence of a Hardship Clause.	212
7.7. Procedural Safeguards for the Individual	214
7.8. The Relationship Between Confiscation and Compensation for Victims.	216
7.9. Third Party Confiscation	217
7.10. Concluding Remarks: What Has Been Achieved and What Still Needs to be Done?	218
 <b>PART III. THE LEGAL FRAMEWORK FOR INTERNATIONAL COOPERATION</b>	
 <b>Chapter 8. International Cooperation in the Area of Confiscation.</b>	 <b>225</b>
8.1. Introduction	225
8.2. International Instruments on MLA	226
8.3. EU Instruments on Mutual Recognition.	228
8.4. The Directive on EIO	230
8.5. An Outline of the Following Chapters.	233

<b>Chapter 9. Cross-Border Asset Tracing and Exchange of Information . . . . .</b>	<b>237</b>
9.1. The Legal Framework . . . . .	237
9.1.1. Requests within the Framework of International Police Cooperation . . . . .	237
9.1.2. Requests within the Framework of International Cooperation between Judicial Authorities . . . . .	241
9.1.3. The FD on Asset Recovery Offices . . . . .	248
9.2. Commentaries to the Regime of International Cooperation Regarding the Tracing of Assets . . . . .	250
9.2.1. The Scope and Practical Application of the Legal Framework . . . . .	250
9.2.2. The Setting up of Efficient AROs . . . . .	256
9.2.3. The German Asset Recovery Offices . . . . .	260
 <b>Chapter 10. International Cooperation in Order to Seize or Freeze Assets . . . . .</b>	 <b>263</b>
10.1. The Legal Framework . . . . .	263
10.1.1. Requests for MLA . . . . .	263
10.1.2. Orders for Seizure or Freezing Based on Mutual Recognition . . . . .	265
10.1.2.1. The FD on Freezing Orders . . . . .	265
10.1.2.2. The Directive on EIO . . . . .	268
10.2. A Commentary to the EU Regime on Cross-Border Seizure of Assets . . . . .	269
10.2.1. The FD on Freezing Orders: A Lack of Application in Legal Practice . . . . .	269
10.2.2. An Abolition of Double Criminality: The Example of Sweden . . . . .	274
10.2.3. The Need for Urgent Measures: Is the Present Legal Framework Sufficient? . . . . .	276
 <b>Chapter 11. International Cooperation in Order to Execute Final Confiscation Orders . . . . .</b>	 <b>281</b>
11.1. The Legal Framework . . . . .	281
11.1.1. Requests for MLA . . . . .	281
11.1.2. The FD on Confiscation Orders . . . . .	282
11.1.2.1. General Provisions . . . . .	282
11.1.2.2. Mutual Recognition of Orders on Extended Confiscation . . . . .	286
11.2. A Commentary on the EU Regime on Cross-Border Execution of Final Confiscation Orders . . . . .	287
11.2.1. Generally on the Legal Construction of the FD on Confiscation Orders . . . . .	287

11.2.2. The Execution of Final Orders Based on the Powers of Extended Confiscation .....	288
11.2.2.1. Mutual Recognition and the FD on Confiscation Orders .....	288
11.2.2.2. The Example of Sweden: Execution of Foreign Orders Regarding Extended Confiscation. ....	292
11.2.3. Special Difficulties for the UK: Recognition and Execution of NCB Confiscation Orders .....	296
<b>Chapter 12. The Proposal for a Regulation on Mutual Recognition .....</b>	<b>303</b>
12.1. The Background to the Proposal .....	303
12.2. The Motives for EU Action .....	304
12.3. The Legal Basis, Choice of Instrument and General Structure .....	305
12.4. The Scope of Application .....	307
12.5. Grounds for Non-Recognition and Non-Execution .....	311
12.6. Time Limits for Recognition and Execution of Orders .....	312
12.7. General Provisions on Procedure .....	313
12.8. Some Special Provisions Regarding Freezing Orders .....	314
12.9. The Priority of the Rights of Victims .....	316
12.10. Mutual Recognition and the Respect for Fundamental Rights .....	317
<b>Chapter 13. Final Remarks: “To Go for the Money” – But How? .....</b>	<b>323</b>
<i>Bibliography</i> .....	329
<i>Index</i> .....	351
<i>About the Author</i> .....	353