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Confiscation of assets in the EU: Legal or (just) effective?

Konfiskata mienia w Unii Europejskiej – prawnie uzasadnione czy (tylko) skuteczne?

Abstract: The European Union is empowered to legislate in criminal matters; the European Parliament and the Council may establish minimum rules, in certain areas, concerning the definitions of criminal offences and sanctions or facilitating cross-border cooperation. However, in the field of asset confiscation, the EU authorities seem to go beyond these competences in their legislative activity. In this paper the author refers to this and other problems of EU legislation in criminal matters: covering up the insufficient competence to legislate with the argument of needing harmonisation, the lack of reliable data that would justify EU legislative activity and the problematic concept of effectiveness in EU legislation.

Keywords: asset confiscation, extended confiscation, EU criminal law, harmonisation, the effectiveness-based approach, asset recovery, asset forfeiture

Abstrakt: Organy Unii Europejskiej są uprawnione do tworzenia regulacji karnych; Parlament Europejski i Rada UE mogą w niektórych obszarach, ustanowić normy minimalne dotyczące definicji przestępstw i sankcji lub inne mające ułatwić współpracę transgraniczną. Wydaje się jednak, że w obszarze konfiskaty mienia władze unijne wykraczają w swojej działalności legislacyjnej poza przyznane im kompetencje. W niniejszym artykule autorka odnosi się do tego i innych problemów stanowienia przez UE prawa w sprawach karnych: ukrywania niewystarczających kompetencji w tym zakresie za argumentem koniecznej harmonizacji, braku rzetelnych danych uzasadniających działalność legislacyjną UE oraz problematycznego pojęcia efektywności w prawodawstwie unijnym.

Słowa kluczowe: konfiskata mienia, konfiskata rozszerzona, prawo karne UE, harmonizacja, podejście oparte na efektywności, odzyskiwanie mienia, przepadek korzyści

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The legislative power of the European Union in criminal law has been a controversial topic for a long time. The judgements of the European Court of Justice in the"Environmental Crime" case (EJC judgment of 13 September 2005, C-176/03, *Commission v. Council*) and the subsequent "Ship-Source Pollution" case (EJC judgment of 23 October 2007, C-440/05, *Commission v. Council*) made it clear that if the EU authorities see the need to adopt criminal sanctions in order to enforce EU policies by the legal instruments at their disposal, and they wish to avoid repeated actions for annulment, they shall benefit from a clear competence (conferral of power) in this field. Eventually, the Lisbon Treaty included in Art. 83 of the Treaty on European Union (TFEU) the explicit grounds (but also limitation) for the European Parliament and the Council to create substantive criminal law provisions, and included in Art. 82 TFEU the EU's competence to create rules for judicial cooperation in criminal matters. However, not all controversial issues of criminal law legislation at the EU level have been definitively solved. Some of the remaining problematic ones discussed in this paper are the EU authorities' competence to create instruments for asset confiscation, the existence of reliable evidence-based grounds for expanding those instruments and the meaning of "effectiveness" in EU legislation.

This article is divided into four sections. In the first one, the legal basis for the competence of the EU authorities to legislate within the field of criminal law is presented, with a special focus on different language versions of relevant provisions. In the second section, the author refers to the concept of "sanction" under EU law in order to answer whether asset confiscation can be perceived as an instrument under the scope of the competence for Union harmonisation (Art. 83 TFEU) or whether the relevant legal basis should be sought elsewhere (in particular in Art. 82(2) TFEU). In the third section, further problems of EU legislation in this field are indicated, with special attention being paid to the potential problem of insufficient competence being rationalised with the need to create a harmonised regime for EU confiscation (3.1) and the effectiveness requirement being emphasised even when it cannot be substantiated adequately with data (3.2). The fourth section presents some final reflections.

This work presents the partial results of the research project called "Extended confiscation and its justification in light of fundamental rights and general principles of EU law", which is financed by the National Science Centre, Poland (*Narodowe Centrum Nauki*) for the period 2021–2024 (project number: 2020/39/D/HS5/01114). More information on the project, including 16 national reports, is available on https://konfiskata.web.amu.edu.pl/en/.

1. EU legal basis to legislate in criminal law

Article 82(1) TFUE gives the EU authorities – the European Parliament and the Council – the competence to create rules on facilitating mutual cooperation in criminal matters, which includes the approximation of the laws and regulations of the Member States in areas referred to in Art. 82(2) TFUE (mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings, the rights of victims of crime and other specific aspects of criminal procedure, which the Council has identified in advance via decision) and in Art. 83 TFUE. Article 83(1) TFUE addresses the EU competence to establish minimum rules concerning the definition of criminal offences and sanctions for particularly serious crimes with a cross-border dimension, known as "eurocrimes". These areas are listed, but "on the basis of developments in crime" the Council may adopt a decision identifying other areas of crime which meet the criteria (as is currently happening in reference to the violation of EU restrictive measures; Ballegooij 2022: 146–151; Proposal 2022a; Council Decision 2022; Proposal 2022c). Article 83(2) TFEU expands the EU legislative competence in criminal law to "effet-utile crimes", existing in areas which have been subject to harmonisation measures if the approximation of criminal laws and regulations of the Member States proves essential in order to ensure the effective implementation of a Union policy. However, in the latter case, the EU directives may also establish only minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

Other provisions of the Treaties which may serve as a basis for criminal law legislation are Art. 79 TFEU on trafficking in human beings, Art. 86(2) TFEU on the European Public Prosecutor Office, Art. 114 TFUE on national legislation regulating the market, Art. 325(4) TFUE on the protection of the financial interests of the EU and Art. 352 TFUE on adopting specific measures necessary to achieve one of the objectives of the Treaties, even in the absence of explicit competence. However, these other potential legal bases do not include a clear reference to criminal law or restrictions similar to those explicitly formulated in Articles 82 and 83 TFEU, including the "emergency brake" procedure regulated in their third paragraphs. Therefore, although other legal grounds sometimes appear in the Commission's proposals as complementary bases, the Council – by legislating in the field of criminal law – consistently adheres to Articles 82 and 83 TFEU (Franssen 2017: 88–92; Wieczorek 2020: 109–113). However, as none of these provisions explicitly refer to the harmonisation of asset confiscation schemes, it becomes necessary to consider whether asset confiscation can be understood as a "sanction" in terms of Art. 83 TFEU or whether the legal basis for harmonising confiscation regimes at the EU level should instead be Art. 82(2) TFEU.

When investigating the meaning of sanction in Art. 83 TFEU, it should be borne in mind that this term appears only in some language versions of the Treaty, e.g. in English (sanctions), French (*sanctions*) or Italian (*sanzioni*), whereas in the other language versions a term equivalent to "penalties" is used. This latter

term can be found, e.g. in the German (*Strafen*) and Polish (*kary*) versions of Art. 83 TFEU. Its meaning in the context of national criminal law may lead to problematic conclusions. In German criminal law a clear distinction is made between sanctions and penalties; within a three-track system of sanctions, penalties (first-track instruments) are conceived as instruments of repression, preventive instruments (second-track instruments) have a protective nature and restoring measures (third-track instruments) aim to deprive an individual of the proceeds of crime (Hochmayr 2012: 65–68). Similarly, the use of the term "penalties" (*kary*) in the Polish-language version of Art. 83 TFEU may indicate a desire to create minimum rules only in reference to the instruments of a punitive nature, which excludes confiscation – in particular, in view of the amendment of the Polish Penal Code carried out in 2015, which regulated confiscation (forfeiture) in one chapter, along with compensatory measures, and clearly separated them from criminal measures (Płońska 2015: 91–93; Raglewski 2015: 171–172).

The observation that "no two texts in different languages will ever have exactly the same meaning" and the fact that even significant differences between language versions of a text cannot fully be avoided, especially due to inadequate translations and political meddling, are nothing new (Schilling 2010: 50). The problem of discrepancies between various language versions of the same provision has already been confronted by the CJEU, which assumed that in such a case a uniform interpretation of a provision of EU law requires a teleological interpretation with reference to the context and purpose of the rules of which it forms part (CJEU judgments of 26 April 2012, C510/10, *DR and TV2 Danmark*, para. 45; of 25 April 2013 C89/12, *Bark*, para. 40; and of 17 September 2015 C-257/14, *Van der Lans*, para. 25). This approach effectively forms the law and leads to solutions that fit better with the EU legal order "in the light of its broader set of rules and principles and of its context of application" (Maduro 2008: 141; in reference to asset recovery, cf. CJEU judgements of 14 January 2021, C-393/19, paras. 46–58; and of 12 October 2021 in joint cases C-845 and C-863, paras. 32–34). Such an interpretation of multilingual texts may not correspond to what was previously sought by the legislature, but it is in accordance with the concept of dynamic and principle-based development of the EU integration and its legal order: "universal principles maintain the legal text updated" and minimise the risk of an interpretative manipulation of the legislation (Maduro 2008: 141–145; Helios 2014: 184–197 with reference to R. Dworkin). This approach may also result in the creation of a standardised EU legislative language (an official version, which should not be confused with the technical "Euro-speak"; Kużelewska 2014: 159–161; cf. Ringe 2022: 140–159), consisting of concepts and connotations autonomously construed at the EU level as a common frame of reference for interpreting Union legal acts. Such "terminologisation" has already been observed in the CJEU case law (Schilling 2010: 51, 55–56; Helios, Jedlecka 2018: 134–137, 182–186). This attitude could even contribute to solving the problem of defining the scope of power that has been conferred by the Member States to the European Union.

In reference to the different terms used for the instruments of reaction to crime which can be harmonised under Art. 83 TFEU, German authors indicate that where the EU legislature used the term "penalties" in the German version of the relevant provisions, it was meant broadly as "sanctions" (cf. Hochmayr 2017, para. 43; Böse 2019, para. 20). In accordance with the teleological interpretation of Art. 83 TFEU, a "sanction" can be understood as an autonomous concept of EU criminal law: an instrument aimed at smoothing cross-border cooperation of national authorities working towards freedom, security and justice; in such a case it encompasses not only instruments of repression ("penalties"), but a wide scope of reactions to criminal offences, which evolve over time. This interpretation may be inconsistent with the German-language version of Art. 83 TFEU, but it meets the common superior aims when interpreting EU law: it maintains external consistency in the understanding of "sanctions" in the Union and enables a more effective (homogeneous) reaction to criminal offence once it is expected at the EU level, particularly for serious crimes with a cross-border dimension.

Further verification of whether the EU authorities have the power to harmonise confiscation regimes will be based on the English version of Art. 83 TFEU. In recent years English has become the main language of the European Commission's internal communication and drafting, most often used to create a "reference version" of EU legal documents from which they are translated into the other official languages (Robinson 2005: 4–5, 9–10; Robinson 2010: 131–132, 147; Schilling 2011: 1483–1484), whereas the language of deliberation of the CJEU is, by custom, French (https://curia.europa.eu/jcms/jcms/Jo2_10739/en/). The English version of a relevant provision can then be perceived as an output for interpretation and as binding until there are convincing arguments in favour of a different (i.e. inconsistent with the English version) interpretation of certain legal terms. In this case the English version of Art. 83 TFEU includes the term "sanction", understood more broadly than "penalty", which prima facie increases the chance to find an interpretative solution according to which the EU authorities are competent to harmonise compensation regimes.

2. Confiscation as a sanction under EU law?

As pointed out in the literature, confiscation measures were introduced even before the Lisbon Treaty, in special instruments such as Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime or Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property. However, they were not considered sanctions and, under the Lisbon Treaty, they still do not fit very well into the framework of Art. 83 TFEU (Asp 2012: 100).

Confiscation of assets at the EU level is currently regulated by 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, which includes three generations of confiscation regimes: regular confiscation, extended confiscation and non-conviction-based confiscation (Boucht 2019: 529–534). "Confiscation" in terms of the Directive should be understood as "a final deprivation of property ordered by a court in relation to a criminal offence" (Art. 2(4) Directive). Article 5.1. of the Directive obliges Member States to enable confiscation of property belonging to a person who is convicted of a criminal offence that may bring economic benefit, extending such confiscation to every situation where a court, based on the circumstances of the case (e.g. the disproportionality between the value of property and the lawful income of the convicted person), "is satisfied" that the property in question is derived from criminal conduct. This kind of confiscation – going beyond the scope of property acquired through crime as (positively) proven by evidence – can be defined as "classic extended confiscation". Another possible extension of the scope of confiscation is "confiscation from a third party", where forfeiture goes beyond the property of the suspected (accused) person to property transferred to or acquired by third parties from the suspected (accused) person (Art. 6 Directive). Confiscation may also go beyond the time limits set by the moments of committing a crime and of issuing a court sentence; this kind of "retrospective confiscation" is not directly mentioned in Directive 2014/42/EU, but falls within the limits of its Art. 5. Moreover, the Directive points out that confiscation need not be adjudicated on the basis of a final conviction; even if conviction is not possible, it should still be legally feasible to confiscate instrumentalities and proceeds, at least where such impossibility is a result of the suspected (accused) person's illness or abscondence and the initiated criminal proceedings could have led to a criminal conviction if the suspected (accused) person had been able to stand trial. This "non-conviction-based confiscation" (NCBC) is regulated in Art. 4 of the Directive. On 25 May 2022 the European Commission, within the EU Strategy to tackle Organised Crime 2021–2025, presented a proposal for a new Directive of the European Parliament and of the Council on asset recovery and confiscation (Proposal 2022b). The understanding of "confiscation" in the proposal is similar to the one in the 2014 Confiscation Directive, but the scope of regulation is broader: it covers additional criminal offences and includes a new (fourth) generation of confiscation regimes: confiscation of unexplained wealth linked to criminal activities.

The understanding of asset confiscation in the 2014 Confiscation Directive in the 2022 Proposal is quite broad, going beyond the direct connection of eligible property to a criminal offence and to the final conviction of the perpetrator. Deprivation of property ordered in relation to a criminal offence can be perceived by a perpetrator as a severe ailment, in particular by extended confiscation, when a convict effectively loses more than they had acquired by committing a trigger offence, or by other types of confiscation, if they are applied in accordance with "the gross principle" covering the whole income resulting from an offence, without the

chance to deduct any invested (licit) funds or expenses. In such cases, confiscation of assets which goes beyond pure profit from a proven offence may imply a repressive character, which may justify this kind of reaction to criminal offence being perceived as a sanction in the "narrow sense" (equated with a penalty). However, the unwanted loss of assets, even of legal origin, does not automatically constitute a sanction, just like an obligation to repair the damage caused or to pay taxes is not qualified as such. Moreover, the general preventive function of economic evil, which is inflicted on the perpetrator when applying the gross principle to asset confiscation, also exists in civil law in the event of violations of the law or good morals (§ 817 of the German Civil Code) and is therefore assumed to follow from the overall legal system (Rönnau, Begemeier 2017: 7–8).

In the context of Art. 83 TFUE, a sanction can be (and often is) understood according to the criteria developed in the judgment of the European Court of Human Rights (ECtHR) of 8 June 1976 in the case *Engel & Others v. Netherlands* (appl. no. 5100/71 et al.) as an instrument of criminal nature, being a synonym of "penalty", having a repressive character, marked by ethical blame, which opens the door for applying guarantees of fundamental rights (European Parliament 2013: 22; Rui, Sieber 2015: 261, 286). If the Engel criteria shall be decisive, it should be kept in mind that one of the main arguments for considering an instrument a criminal sanction is its legal classification under national law (Rui, Sieber 2015: 256). Closer examination of this issue shows that confiscation (forfeiture) in national legal orders is often qualified as an instrument of criminal law, also where it is deprived of a punitive aim and nature (regarding extended confiscation, cf. de la Cuesta 2022: 10–12; Maugeri 2022: 6–9; Kilchling 2023: 23–24; and other national reports available on https://konfiskata.web.amu.edu.pl/en/). Even the ECtHR has observed that the imposition of a confiscation order may amount to a penalty for the purposes of the European Convention of Human Rights (e.g. the judgment of 26 February 1996, *Welch v. the United Kingdom*, appl. no. 17440/90).

Still, in many cases confiscation differs significantly from the concept of a penalty. The relevant instruments can, as in Italian law, be preventive in nature (although, in practice, there is much evidence for the principally restorative function of Italian preventive confiscation: Mazzacuva 2017: 103–110; Trinchera 2020: 65–71). Confiscation measures can also, as in Germany or Scandinavian countries, be aimed mainly at re-establishing the situation prior to an unlawful act (Rui, Sieber 2015: 285–286). In a more systemic approach it was indicated that confiscation measures may fall within the scope of different disciplines, which determine their function and the legal constructions under which property can be confiscated: criminal law perceives confiscation as a category of sanction (in a narrow sense), police law applies confiscation in order to prevent future damage caused by or with this property, civil law enables property to be seized in order to re-establish the situation before an offence took place and tax law – if income from an undisclosed source or even criminal gain is taxable according to the law – enables (at least) a certain percentage of the perpetrator's gain to be taken by the state (Rui, Sieber 2015: 249).

Just as the term "confiscation" can be understood in various ways, the meaning of *sanction* can differ under the circumstances. The established rules of legal methodology permit the same term to be interpreted differently, depending on the context. A "sanction" in a competence norm (of Art. 83 TFEU) need not be identical with a *sanction* in a norm guaranteeing human rights. Whereas the latter term ("sanction in a narrow sense") must be interpreted strictly (e.g. by the Engel criteria), the former ("sanction in a broad sense") can relate to almost any negative legal consequences of committing a criminal offence (Rui, Sieber 2015: 285–286). Nevertheless, in order to classify such a consequence as a "sanction", it is still necessary to identify some distinguishing features of it.

An important aspect of a criminal sanction "in a narrow sense" is the sanction-specific ailment, which exceeds the simple inconvenience of depriving beneficiaries of the proceeds of crime (Rui, Sieber 2015: 250–251, 255). This inconvenience is usually perceived as something that goes beyond affecting honour, and results in an 'objectively perceptible' fine or imprisonment. However, the ethical blame, strongly linked to the area of criminal law, which results in a "subjectively perceptible" influence of a criminal law instrument on the "good name" of an affected individual should not be underestimated. Even if an instrument regulated by criminal law is formally qualified as a purely compensatory consequence of committing an offence which is aimed at simply depriving someone of the proceeds of crime in a way that is free from repressive factors (the so-called "third-track instrument"; cf. Hochmayr 2012: 65–68), its placement within criminal law cannot be declared irrelevant. This aspect also appears with a criminal sanction "in a broad sense". There are no "neutral" instruments of criminal law: placing a legal solution in the context of criminal law has a significant effect on its perception as a part of the reaction to crime. The systemic placement of an instrument in a legal system influences the contextual interpretation of relevant provisions (Padjen 2020: 192) and their perception by the society. A person against whom such instrument is applied in a criminal proceeding becomes involved in some kind of "illicit activity", which itself creates an important aspect of criminal repression. Being forced to prove the lawful origin of one's assets in order to combat the legal presumption that they were obtained through some previous, unspecified criminal activity is potentially very stigmatising for the affected person, who may be perceived as a persistent offender, and it may significantly affect their individual privacy and professional career (Stanton-Ife 2007: 156–158; Boucht 2017: 136–138, 189, 198–199). Such an effect of a "shade of involvement in suspicious business" was observed even in *in rem* proceedings, where the proceeds of crime, rather than the owner of the property, are the target (Naylor 1999: 41).

However, perceiving every instrument of reaction to crime as a specific sanction in terms of Art. 83 TFEU, due to its link with the law of repression, can be seen as a way to circumvent the Member States' conferral to the Union powers in criminal law, which should be interpreted – in accordance with Art. 5(2) TEU – strictly, as a kind of exceptional legislative competence. With this approach, achieving

compatibility between the wording of Art. 83 TFUE and the EU competence to legislate matters of confiscation relies on understanding "sanction" in a narrow sense, in terms of a penalty: an instrument inflicting objective hardship on the offender. In such a case confiscation is not a sanction, but may still fall within the scope of Art. 83 TFUE in accordance with the rules of legal interpretation. One of these rules is *argumentum a maiori ad minus* (from greater to lesser): the assumption that if a legal norm allows one to do more, it also allows one to do less, particularly if it is perceived as being enough to achieve the same aim (Ziembiński 2007: 251–253). Therefore, if the EU has the explicit competence to harmonise (minimum definitions of criminal) sanctions, which are instruments of repression, it should – especially with respect to the principle of proportionality – also be entitled, in similar circumstances, to harmonise non-repressive instruments intended to deprive an offender of the benefits of crime, i.e. asset confiscation schemes. However, it should be borne in mind that the result of interpretation still depends on the concept behind the conferral of powers (e.g. as a general or exceptional competence). This concept may change with time and political aims, in which case the slightly modified concept of a sanction proposed in first section of this paper – a reaction to an (already committed) offence, provided by criminal laws of EU member states – seems to be the most convenient one.

However, even if such a concept is found convincing, still some reservation can be made with regard to the NCBC schemes. It has been pointed out that non-conviction-based confiscation is not imposed following a particular criminal conviction, but, like freezing orders, is rather a preventive measure to ensure that illicit assets are not to be left at the offender's disposal (Forsaith et al. 2012: 188–196). Consequently, NCBC – especially when it targets property instead of a person – should not be considered a sanction in any possible understanding of the term within Art. 83 TFEU, but an instrument of civil law, which can be harmonised under Art. 81(1) TFEU referring to judicial cooperation in civil matters (Forsaith et al. 2012: 189–190; Rui, Sieber 2015: 284–288; Simonato 2015: 213, 221; Boucht 2017: 67–93; Thunberg Schunke 2017: 304–308, 316).

3. Even if confiscation is a sanction, the problem is not resolved

3.1. Rationalization before competence

Article 83 (1) TFEU limits the legislative competence of the Union in substantive criminal law to specific, listed types of crime. For this reason, it cannot serve as a basis for the general harmonisation of confiscation measures (Rui, Sieber 2015: 287). Article 83(2) TFEU, which also creates a basis for harmonising substantive criminal laws, does not include any list of criminal offences; it is applied based

on the existence of a "Union policy in an area which has been subject to harmonisation measures". Consequently, confiscation rules under Art. 83(2) TFEU can only be adopted once a Union policy has first been harmonised – and, as yet, no such policy can be identified in the context of confiscation (Rui, Sieber 2015: 288); in particular, asset recovery and confiscation do not autonomously create an EU policy area under Art. 83(2) TFEU (Sakellaraki 2022: 485).

An alternative legal basis for harmonising criminal laws is Art. 82(2) TFEU. However, being aimed at developing procedural rules on the mutual recognition of judicial decisions (including confiscation matters, also NCBC) it does not include the explicit competence to harmonise confiscation regimes as well. Relevant rules could be based on a general reference to "the rights of victims of crime" but this would cover only a very limited part of the subject matter. Therefore, the Council should first – acting unanimously and with the consent of the European Parliament – clearly expand the EU competence to legislate matters related to confiscation (Forsaith et al. 2012: 59–62, 188–190; Rui, Sieber 2015: 290). This could, however, still cover only procedural issues.

Thus, EU authorities currently swim in the murky waters of their declared competences in terms of confiscation. The solution reached in the adoption of Directive 2014/42/EU was to use the dual legal basis of Articles 82(2) and 83(1) TFEU, which evades the question of whether confiscation is a sanction or a judicial cooperation mechanism (Mitsilegas 2016: 59–60). In the proposal for this Directive, the European Commission emphasised the "functional rationale" of creating harmonised rules on confiscation, indicating that the Union is better placed than individual Member States to regulate confiscation of assets, because its prime target – organised crime – is often transnational in nature and therefore needs to be tackled jointly (Proposal 2012: 8). This "functional rationale" is then mainly about the presumed higher "effectiveness" of legislative activity expected at the EU level than at the national one. However, as it was clearly expressed in the literature,

> to the extent that the effectiveness rationale for EU action in the field of criminal law holds legitimating power, it cannot justify encroachments upon the constitutional principles (conferral and subsidiarity) regulating the relationship between the EU and the Member States. On the contrary, in such circumstances, it opens the floor to a questioning of the legitimacy of European integration in this very sensitive field. (Öberg 2021: 414)

In other words, the effectiveness rationale cannot compensate for the deficiencies in the conferral of powers (or other EU principles).

Nevertheless, the "functional rationale" appears as the main justification for legislating at the EU level. Choosing, on the basis of Art. 82(1) TFEU, the legal measure of Regulation No. 2018/1805 on the mutual recognition of freezing orders and confiscation orders, the Commission indicated that in

> cross-border procedures, where uniform rules are required, there is no need to leave a margin to Member States to transpose such rules. A regulation is directly applicable,

> provides clarity and greater legal certainty, and avoids the transposition problems that the Framework Decisions on mutual recognition of freezing and confiscation orders were subject to. (Proposal 2016: 7)

From a formal perspective, Art. 82(1) TFEU accepts (any) measures (in the meaning of those listed in Art. 288 TFEU) to lay down rules and procedures for ensuring and facilitating judicial cooperation in criminal matters in the European Union – and from this perspective a regulation is an acceptable choice. However, such a regulation may also create a hidden requirement for harmonisation of confiscation measures in Member States, and thus substantive criminal law, for which Articles 83 and 82(2) TFEU provide the instrument of a directive. This hidden requirement follows from the expectancy of a certain proximity of European legal systems in terms of similar instruments of law (including criminal law), which is necessary for effective judicial cooperation. In other words, the concept of mutual trust needs a solid formal basis of similar legal solutions (Willems 2020: 52, 130–131).

The proximity of legal solutions in the EU Member States either exists naturally or must be achieved by progressive and enforced harmonisation, which can be obtained directly by a requirement in a directive to implement a certain legal solution, or indirectly, as a result of the positive knock-on effect of mutual recognition on substantive matters (Oliveira de Silva 2022: 202). In the field of asset confiscation, efforts to establish common minimum rules on freezing and confiscating assets were made even before the Lisbon Treaty entered into force, on the basis of joint action and framework decisions requiring their implementation into national legal orders. However, this resulted in regulatory dissonance reaching an alarming level (Oliveira de Silva 2022: 200–201). Even the provisions of the 2014 Confiscation Directive were perceived as offering little guidance on the interpretation of its requirements and therefore as being insufficient to achieve satisfactory approximation of relevant legal solutions, resulting in the observation that many aspects covered by the Directive remain to be explored and discussed (Ligeti, Simonato 2017: 5–8).

Due to the above-mentioned problems and in order to ensure the effective mutual recognition of freezing and confiscation orders, the EU legislative authorities decided to establish the mentioned Regulation 2018/1805. This legally binding and directly applicable EU act was perceived as a remedy for the pitfalls of previous failed harmonisation: it should have allowed the enforcement of even fully unknown instruments (in criminal matters) from one legal system in another one without the need to approximate confiscation mechanisms (Oliveira e Silva 2022: 202). Still, properly executing a freezing or confiscation order is much easier if an equivalent instrument can be found in the legal order of the executing state. Otherwise, due to significant differences in terminology and legal concepts in the field of asset confiscation, as well as the fact that national provisions are not designed to respond to specific and difficult problems of transnational cases, a foreign confiscation order referring to an unknown measure may not be applied effectively by the executing state (Ligeti, Simonato 2017: 5; Thunberg Schunke 2017: 306; Meyer 2020:

143–144, 166–167; Brandão 2022: 36–37). Such an understanding of conditions for effective judicial cooperation within the European Union led, for example, to the Polish Ministry of Justice's 2019 conclusion that in order to adjust Polish law to the requirements of Regulation 2018/1805 on the mutual recognition of freezing and confiscation orders, it is necessary to create a new instrument of *in rem* confiscation in Polish law (Warchoł 2021).

This example from Poland shows how the problem of an insufficient legislative basis to harmonise confiscation schemes on substantive criminal law (Art. 82(2) and 83 TFEU) can be overcome by an indirect harmonisation measure of judicial cooperation (Art. 82(1) TFEU): EU Member States, based on their previous experience, may find the approximation of legal solutions for asset confiscation indispensable to effective interstate cooperation. If the decision in this regard belongs to the Member States, it cannot be said that such harmonisation was explicitly required by the Union's legislative authorities. Nevertheless, if the scope of an EU regulation in criminal matters clearly goes beyond the mutual recognition of judicial decisions and creates minimum rules of interstate cooperation in order to overcome insufficient harmonisation in a relevant field, the allegation of hidden, forced harmonisation (the so-called side-door solution) cannot be avoided (Ochnio 2018: 442–445). It was noted by the EU legislative authorities, who stipulated in Rec. 53 of the Preamble to Regulation 2018/105 that "the legal form of this act should not constitute a precedent for future legal acts of the Union in the field of mutual recognition of judgments and judicial decisions in criminal matters". In fact, the most recent legislative activity in this area is the Commission's Proposal from 25 May 2022 for a new directive on asset recovery and confiscation.

In accordance with the Commission's documents accompanying the 2022 Proposal, the new Confiscation Directive should be based on Articles 82(2), 83(1), 83(2) and 87(2) TFEU. In the Explanatory memorandum to the Proposal, the understanding of confiscation as a sanction in the meaning of Art. 83(1) TFEU is taken for granted and the focus is again placed on the functional rationale. In reference to Art. 83(2) TFEU, the memorandum invokes the essentiality of a broad perspective on confiscation to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. Article 83(1) TFEU is mentioned in the context of preventing and combating organised crime and other "eurocrimes". Articles 82(2) and 87(2) TFEU are cited in terms of procedural safeguards, compensation for victims and facilitating prevention and detection of offences, even – in the case of Art. 87 TFEU – going beyond those covered by Art. 82 and 83 TFEU (Explanatory memorandum 2022: 4; Commission 2022: 29–30). In accordance with the Commission's impact assessment report,

> [t]he combination of these legal bases (Art. 82, 83 and 87 TFEU) allows for harmonising measures on freezing, confiscation and management of illicit assets, measures that directly facilitate cross-border cooperation as well as other measures that govern Member States' internal procedures to the extent necessary to ensure the effective

> implementation of asset recovery and confiscation measures while also contributing to cross-border cooperation. (Commission 2022: 29)

Invoking multiple legal bases, however, resembles an attempt to create the impression that many EU competence provisions for confiscation legislation exist, where there is not even a single substantive one. The Commission's emphasis on the reasonableness and practical character of EU legislative activity should convince the audience that any concern about the existence of a legal basis for legislation on confiscation is not to take precedence over practical harmonisation needs. Arguments such as "let's not fuss over formalities when important aims are ahead", however, are difficult to accept from a legal point of view, which requires a clear, explicit competence norm in such a delicate filed as criminal law.

3.2. Effectiveness without data

The effectiveness-based approach played an important role in creating the single market within the EU (Melander 2014: 284; Öberg 2014: 374). Also, effectiveness is currently a driving force underlying EU legislative activity, one of the principles of EU law and a precondition for the success of the EU legal system (Melander 2014: 278). At the same time, its meaning – particularly in criminal law – seems to be unclear, making assessment of it a difficult task.

In the context of criminal matters within the EU, effectiveness is mainly understood as swift cooperation based on mutual recognition, free from significant legal or practical hurdles. Its meaning in EU substantive criminal law, where the harmonisation of confiscation schemes takes place, is more enigmatic. In terms of Art. 83(1) TFEU, "effectiveness" is understood as the effective harmonisation of national sanctioning systems in order to develop a coherent sanctioning regime at the EU level (Satzger 2019: 116). In terms of Art. 83(2) TFEU, it means that criminal laws should in some way contribute positively to the implementation of EU policies, whereas "the essentiality test" examines whether criminal laws are more effective than non-criminal laws in enforcing the EU policy at issue (Öberg: 2014: 379–380).

In any case, the lack of empirical studies gives the concept of effectiveness a rather symbolic character (Suominen 2014: 402–413). There is little hard evidence available about the actual effects of asset confiscation on criminal conduct, whether as a disincentive or achieving the restorative aim. Although the latter can be assessed, e.g. by measuring the amount of confiscated assets to the amount of alleged total criminal wealth (Boucht 2019: 537), when the amount of criminal wealth is unknown, the estimated percentage of this unknown number cannot lead researchers and policymakers much further. This has an important impact on justifying the creation of new instruments in this field, especially at the EU level. The argument that "although existing statistics are limited, the amounts recovered from proceeds of crime in the Union seem insufficient compared to the estimated proceeds" (Rec. 4 of the 2014 Confiscation Directive) was answered

by indicating that the Union legislature should not justify a new instrument with stronger confiscation powers using such a poor statistical basis (Thunberg Schunke 2017: 189–193; de Bondt 2014), as it violates the subsidiarity principle (*Verstoß gegen das Subsidiaritätsprinzip*; German 2012: 2–3). In such a case, the belief remains that once criminal law provisions are adopted at the EU level and transposed to national legal orders, they will automatically work effectively, a belief that the literature calls the "over-reliance on the magic of criminal law" (Forsaith et al. 2012: 59–62; Herlin-Karnell 2014a: 272; Suominen 2014: 396–397, 402–413; Franssen 2017: 106). This concept may work in theory, where rational offenders decide to conduct their criminal activity after calculating the probability of detection and successful prosecution and the celerity and severity of potential sanction (Öberg 2014: 375). However, life seems to be more complex than a rational choice (or any other) theory.

Empirical research on legal compliance has shown that individuals obey the law when they perceive that they have a moral obligation to comply (where criminal law corresponds to the internalised social norms) or when criminal sanction correlates with the individual's subjective perceptions of the risk and threat of punishment (Öberg 2014: 378); both factors can hardly be influenced by legislation, not only at the EU level (Franssen 2017: 101–103), but also at the national one. Potential offenders are commonly unaware of the legal provisions which have been formulated to produce a behavioural effect, or they tend to discount their practical meaning, perceiving the likelihood of punishment as small and distant (Robinson, Darley 2004; Schoepfer 2007: 152). The same refers to asset confiscation regimes. Therefore, it cannot be said with confidence that criminals understand them and take them into account in their decisions regarding criminal activity (Ulph 2010: 278), particularly when the possible assets are distant and uncertain (e.g. the concept of forfeiting royalties received from monetising the knowledge and experience of committing a crime through book sales or revenue earned from YouTube videos: Mamak et al. 2022: 305–320). Additionally, the capacity of members of a criminal group to let consequences guide their actions might be weakened by group pressure (Robinson, Darley 2004: 180–181). Offenders who have lost their proceeds may trigger new criminal activities in order to recover their losses or may develop new counter-strategies to prevent the seizure of assets, especially since they may have problems finding legitimate work thanks to their conviction (Ulph 2010: 278). Their new criminal activities will also, consequently, lead to more restrictive follow-the-money strategies (Nelen 2004: 524–526), going round the vicious legal spiral and eventually resulting in the observation that it is much easier to legislate than to effectively apply the law in practice (Keiler, Klip 2022: 6).

The existing confiscation regimes may not be sufficiently efficient at deterring potential offenders from engaging in acquisitive crime (by removing the economic incentive to commit an offence), preventing future offences or restoring the *status quo ante*. Speculative estimates of illicit assets based on methodologically weak, more or less plausible assumptions (due to a lack of reliable data) cannot serve as a firm basis of a convincing *plaidoyer* for legislation of confiscation. Effectiveness

can, however, be achieved another way, as a result of correctly determining the cause of identified deficiencies in criminal justice: possible shortcomings in existing legal provisions or in their application. If the problem is finding and tracing the assets in question or sharing information between different public bodies, creating more severe confiscation schemes or conferring more power to the courts in this regard is unlikely to solve the problem (Boucht 2019: 534–536).

An example of good practice may be the audit of the Polish system of asset recovery carried out in 2019 by the Polish Supreme Audit Office (*Najwyższa Izba Kontroli*). The controlling body analysed statistics prepared for the period 2016–2018 by authorities engaged in asset recovery, and it observed significant methodological discrepancies in the provided data, which prevented a consistent picture of the scope of asset recovery conducted by Polish law enforcement authorities. In the period under review, the Polish Ministry of Justice collected statistical data on the number of convicted persons against whom confiscation was ordered, but not on the value of effectively enforced confiscation orders. In the period covered by the audit, the Polish National Prosecutor's Office (*Prokurator Krajowy*) did not have a system that would reliably analyse the effectiveness of asset security carried out by prosecutors, in particular because there was no consistent information on the value of the assets secured. The statistical data collected by the police for the purpose of assessing the effectiveness of its officers in detecting and recovering assets was recognised by the controlling body as unreliable because it was based on fragmentary use of data from various IT systems with different functions. In the period covered by the audit, the state authorities had no knowledge about the amount of losses incurred by the state budget as a result of various types of crime and the Polish Ministry of Justice could not provide data from 2014 to 2018 which would indicate the value of effectively enforced asset confiscation orders in relation to global indicators (NIK 2019: 31–38). In this situation, although the Polish entities involved in the recovery of criminal assets worked within their competences, the Polish Supreme Audit Office found that the lack of coordination and monitoring of the efficiency of the process precluded them from describing the existing Polish system of asset recovery as efficient. In particular, the lack of reliable data on the level of acquisitive crime and on the amount of property losses caused thereby made it impossible to assess whether and to what extent the slight increase in secured assets observed in the period 2014–2018 in Poland resulted from legal amendments covering extended confiscation schemes (NIK 2019: 10).

The audit of (the efficiency of) the asset recovery system in Poland shows that before introducing new solutions in the area of asset confiscation, in particular creating at the EU level instruments in the "new generation of confiscation regimes" (currently represented by the unexplained wealth mechanism in the 2022 Proposal), it is first necessary to examine how the existing asset recovery schemes work in Member States. Otherwise, the Union will act like a poor doctor, who increases the dosage of a drug without investigating why the previous dosage did not help or whether the wrong type of drug was chosen.

Or perhaps the concept of effectiveness is what needs to be re-examined? Effectiveness may eventually be understood "symbolically", as a collective manifestation of a common understanding of justice and of respect for the same fundamental values in the EU (Elholm, Colson 2016: 48–64; Öberg 2021: 412). A current example of such an approach is the Proposal for a Directive of the Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures (2022c). In another case of the above-mentioned 2022 Proposal for further harmonisation in the field of confiscation, however, the Commission sticks to the more traditional concept of effectiveness: the ability to achieve a desired goal (Commission 2011: 9). The proposed draft was described as being based on choosing from different options of criminal policies the one which was expected to give "the qualitative leap in the confiscation rate" and, at the same time, be "proportionate in relation to the administrative burden and interference with Member States' organisational set-ups as well as be balanced against safeguards and the policy objective sought, given the scale of the problem" (Commission 2022: 7–65, 151–154; Explanatory memorandum 2022: 1–15). Nevertheless, in view of the conditions for effective legislation discussed above, the Commission's choice seems to be based more on hopes and expectations than on solid, evidence-based grounds. In that case, one must hope that even if there is no evidence of the expected effectiveness (however it is understood) of the new confiscation law, it will at least result in consistent EU standards for protection of affected individuals (cf. CJEU judgements of 14 January 2021, Case C-393/19, paras. 46–58; and of 12 October 2021 in joint cases C-845 and C-863, paras. 32–34; Mirandola 2020: 417–419).

4. Final reflections

One of the main principles of criminal law legislation is the principle of legality, perceived as a conjunction of intertwining rules going beyond the non-retroactivity of criminal law and including a verification of whether the relevant authority (legislative as well as judiciary) operates on the basis of and within the limits of the conferred powers (cf. Herlin-Karnell 2014b: 1119–1121).

Currently, neither Art. 83 TFEU nor Art. 82 TFUE nor any other provision establishes a clear and explicit legal basis for harmonising confiscation laws at the EU level. The legislative competence of the Union in asset confiscation is taken for granted, and it can be assumed that the new EU directive on asset confiscation will be adopted under one of the given (not expanded) provisions, including even minimum rules on additional confiscation regimes. However, it should be remembered that the burden of proof that the EU authorities are acting within their competences when legislating in the field of confiscation lies with the legis-

lative body. Therefore, they are the ones who take the risk that a member of the Council may at some point pull the "emergency brake", pointing out – pursuant to Art. 83(3) TFEU – that the EU authorities legislating beyond the conferral of powers affects a fundamental aspect of the criminal justice system of (one of) the Member States.

The easiest way to resolve the competence problem would be to establish a clear legal basis. In particular that both mentioned articles provide for the possibility to expand the EU legislative competences and, as stated in the literature, "[s]ince confiscation is an area where third-pillar legislation already exists, there should be more readiness on the part of the EU institutions to include it in Art. 82(2) TFEU" (Forsaith et al. 2012: 188–190). This solution is nonetheless not optimal: the Council decision taken in accordance with Art. 82(2) TFEU is limited to specific aspects of criminal procedure; the alternative provided by Art. 83(1) TFEU may cover only particularly serious crimes with a cross-border dimension (and the subsidiarity clause from Art. 5(3) TEU seems not to allow for further legislative extensions). Article 83(2) TFEU may also provide a solution worth considering, but first a relevant Union policy should be identified in an area which has been subject to harmonisation measures.

On the other hand, establishing a clear legal basis for EU legislative competence over asset confiscation might put into question the existence of a sufficient basis for previous legal acts issued in this area. The competence basis problem could then be (at least partly) removed by creating an autonomous concept of a "sanction" (or "penalty" in some language versions of Art. 83 TFEU) in EU law, understood as any reaction to criminal offences regulated by criminal laws of the EU Member States (further extension would be inconsistent with the framework of Art. 83 TFEU; cf. CJEU judgement of 28 October 2021, C-319/19, paras. 32–41), the harmonisation of which may contribute to smooth cross-border cooperation of national authorities within the area of freedom, security and justice. Whether it is still consistent with the scope of powers conferred by the Member States to the EU authorities in the Lisbon Treaty remains an open question. Another option applied by the EU authorities based on Art. 82(1) TFEU is a side-door solution, where the harmonisation of confiscation regimes is a result of the need to adapt national legal systems to effectively apply the EU cooperative regulation (2018/1085) in the same field. This choice, however, was perceived as an exceptional one-time solution even by the EU authorities themselves.

Nevertheless, finding a proper basis for competence would not solve all the problems with the EU legislation on confiscation. Another relevant aspect is the "effectiveness" of a chosen solution at combating serious acquisitive crime with a cross-border dimension, for which neither a clear, solid concept of how the harmonised confiscation law should discourage offenders from committing crimes nor reliable data to justify EU legislation on the matter can be established. It may even be problematic to clarify whether the reason for alleged deficiencies in criminal justice are the shortcomings of existing legal provisions on confiscation or

problems with their practical application, which seems to be a basic step before any legislative activity is to be undertaken, particularly at the EU level. This problem could be solved by modifying the concept of "effectiveness" in the framework of EU legislation and perceiving it as a "symbolic effectiveness" expressed through a smooth approximation of the criminal law regimes of the EU Member States, where a joint response to certain problem is expected (here, cross-border crime). However, any modification of the EU legal terms should be made carefully, so as not to make a verbal manipulation for the sole sake of justifying another harmonisation at the EU level, where solid evidence is lacking.

The main concept underlying this paper is not to criticise EU activity on asset confiscation, but to emphasise that if the EU expects the Member States to act in accordance with the best legislative practices, it should give them a good example of how to proceed. Several questionable bases for competency over EU confiscation legislation are not better than one solid, substantive one. The need to support asset recovery is understandable, but it should not become a justification for circumventing the conferral of powers in the Treaties or other legislative principles. Even the best concepts of effective instruments of asset recovery and management must still be subject to the common rules of good legislation. Otherwise, exceptions will be created, which in the long run can supersede or replace legal principles guaranteeing respect for fundamental freedoms and can transform the system of legal protection into a tool of oppression.

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References

Asp P. (2012). *The Substantive Criminal Law Competence of the EU*. Stockholm: Stockholm University.

Ballegooij W. (2022). 'Ending impunity for the violation of sanctions through criminal law.' *Eucrim* 2, pp. 146–151. https://doi.org/10.30709/eucrim-2022-009

Bondt W. de (2014). 'Evidence based EU criminal policy making: In search of matching data.' *European Journal on Criminal Policy and Research* 20, pp. 23–49. https://doi.org/10.1007/s10610-013-9209-3

Böse M. (2019). *'Art. 83 AEUV'* [Art. 83 TFEU]. In J. Schwarze, U. Becker, A. Hatje, and J. Schoo (eds.) *EU-Kommentar* [EU Commentary]. Tübingen: Nomos.

Boucht J. (2013). 'Extended confiscation and the proposed directive on freezing and confiscation of criminal proceeds in the EU: On striking a balance between efficiency, fairness and legal certainty.' *European Journal of Crime, Criminal Law and Criminal Justice* 21, pp. 127–162. https://doi.org/10.1163/15718174-21022024

Boucht J. (2017). *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds*. Oxford: Hart Publishing.

Boucht J. (2019). 'Asset confiscation in Europe – past, present, and future challenges.' *Journal of Financial Crime* 26(2), pp. 526–548. https://doi.org/10.1108/JFC-04-2018-0043

Brandão N. (2022). 'The right of defence under Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders.' *New Journal of European Criminal Law* 13(1), pp. 28–41. https://doi.org/10.1177/20322844221084334

Elholm T. and Colson R. (2016). *'The symbolic purpose of EU criminal law.'* In R. Colson and S. Field (eds.) *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice*. Cambridge: Cambridge University Press, pp. 48–64. Available online: https://hal.science/hal-03318583 [10.07.2023].

Forsaith J., Irving B., Nanopoulos E., and Fazekas M. (2012). *Study for an Impact Assessment on a Proposal for a New Legal Framework on the Confiscation and Recovery of Criminal Assets, Prepared for the European Commission Directorate General Home Affairs*. Cambridge: RAND Europe.

Franssen V. (2017). *'EU criminal law and effet utile: A critical examination of the Union's use of criminal law to achieve effective enforcement.'* In J. Banach-Gutierrez and Ch. Harding (eds.) *EU Criminal Law and Policy. Values, Principles and Methods*. London–New York: Routledge, pp. 84–110.

Helios J. (2014). *'Sędziokracja w Unii Europejskiej? Uwagi w kontekście działalności interpretacyjnej Trybunału Sprawiedliwości Unii Europejskiej'* [Judiciary in the European Union? Remarks in the context of the interpretative activity of the Court of Justice of the European Union]. In A. Bator, J. Helios, and W. Jedlecka (eds.) *Rządy prawa i europejska kultura prawna* [Rule of law and European legal culture]. Wrocław: Prace Naukowe Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, pp. 181–194.

Helios J. and Jedlecka W. (2018). *Wykładnia prawa Unii Europejskiej ze stanowiska teorii prawa* [Interpretation of European Union law from the point of view of

the theory of law]. Wrocław: Prace Naukowe Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.
Herlin-Karnell E. (2014a). 'Effectiveness and constitutional limits in European criminal law.' *New Journal of European Criminal Law* 5(3), pp. 267–273. https://doi.org/10.1177/203228441400500302
Herlin-Karnell E. (2014b). 'What principles drive (or should drive) European criminal law?.' *German Law Journal* 11(10), pp. 1115–1129. https://doi.org/10.1017/S2071832200020137
Hochmayr G. (2012). 'Neue kriminalsanktionen im rechtsvergleich' [New criminal sanctions in a legal comparison]. *Zeitschrift für die gesamte Strafrechtswissenschaft* 124(1), pp. 64–86. https://doi.org/10.1515/zstw-2012-0003
Hochmayr G. (2017). *'Art. 83 AEUV.'* In M. Pechstein, C. Nowak, and U. Häde (eds.) *Frankfurter Kommentar zu EUV, GRC und AEUV* [The Frankfurt Commentary on TEU, ChFR and TFEU]. Tübingen: Mohr Siebeck.
Huomo-Kettunen M. (2014). 'EU criminal policy at crossroads between effectiveness and traditional restraints for the use of criminal law.' *New Journal of European Criminal Law* 5(3), pp. 301–326. https://doi.org/10.1177/203228441400500304
Keiler J. and Klip A. (2021). 'The sentence is only the beginning: Hiccups in the cross-border execution of judgments in the Euregion Meuse-Rhine.' *European Journal of Crime, Criminal Law and Criminal Justice* 29, pp. 189–217. https://doi.org/10.1163/15718174-bja10016
Kużelewska B. (2014). 'Unity in diversity. The language policy of the European Union.' *Studies in Logics Grammar and Rhetoric* 38(51), pp. 151–165. https://doi.org/10.2478/slgr-2014-0037
Ligeti K. and Simonato S. (2017). *'Asset recovery in the EU: Towards a comprehensive enforcement model beyond confiscation? An introduction.'* In K. Ligeti and M. Simonato (eds.) *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU*. Oxford: Hart Publishing, pp. 1–21.
Maduro P.M. (2008). 'Interpreting European law: Judicial adjudication in a context of constitutional pluralism.' *European Journal of Legal Studies* 1(2), pp. 137–152. http://dx.doi.org/10.2139/ssrn.1134503
Mamak K., Barczak-Oplustil A., Kwiatkowski D., Małecki M., and Zając D. (2022). 'Should gains from criminal knowledge be forfeited?.' *Crime, Law and Social Change* 77, pp. 305–320. https://doi.org/10.1007/s10611-021-09994-7
Mazzacuva F. (2017). *'The problematic nature of asset recovery measures: Recent developments of the Italian preventive confiscation.'* In K. Ligeti and M. Simonato (eds.) *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU*. Oxford: Hart Publishing, pp. 101–115.
Melander S. (2014). 'Effectiveness in EU criminal law and its effects on the general part of criminal law.' *New Journal of European Criminal Law* 5(3), pp. 274–300. https://doi.org/10.1177/203228441400500303
Meyer F. (2020). 'Recognizing the unknown – the new confiscation regulation.' *European Criminal Law Review* 10(2), pp. 140–170. https://doi.org/10.5167/uzh-190284

Mirandola S. (2020). 'Borderless enforcement of freezing and confiscation orders in the EU: The first regulation on mutual recognition in criminal matters.' *ERA Forum* 20, pp. 405–421. https://doi.org/10.1007/s12027-019-00581-x

Mitsilegas V. (2016). *Defining EU Competence in Substantive Criminal Law: From Securitised to Functional Criminalisation, EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*. Oxford: Hart Publishing.

Naylor R.T. (1999). 'Wash-out: A critique of follow-the-money methods in crime control policy.' *Crime, Law and Social Change* 32, pp. 1–58. https://doi.org/10.1023/A:1008386203362

Nelen H. (2004). 'Hit them where it hurts most? The proceeds-of-crime approach in the Netherlands.' *Crime, Law and Social Change* 41, pp. 517–534. https://doi.org/10.1023/B:CRIS.0000039570.41125.fa

Öberg J. (2014). 'Do we really need criminal sanctions for the enforcement of EU law?.' *New Journal of European Criminal Law* 5(3), pp. 370–387. https://doi.org/10.1177/203228441400500307

Öberg J. (2021). 'Normative justifications of EU criminal law: European public goods and transnational interests.' *European Law Journal* 27, pp. 408–425. https://doi.org/10.1111/eulj.12451

Ochnio A.H. (2018). 'Between the medium and the minimum options to regulate mutual recognition of confiscation orders.' *New Journal of European Criminal Law* 9(4), pp. 432–445. https://doi.org/10.1177/2032284418806667

Oliveira de Silva S. (2022). 'Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: A headlong rush into Europe-wide harmonisation?.' *New Journal of European Criminal Law* 13(2), pp. 198–215. https://doi.org/10.1177/20322844221104916

Padjen I.L. (2020). 'Systematic interpretation and the resystematization of law: The problem, corequisites, a solution, use.' *International Journal for the Semiotics of Law* 33, pp. 189–213. https://doi.org/10.1007/s11196-019-09672-x

Płońska A. (2015). 'Charakter prawny instytucji przepadku po zmianach nowelizacyjnych wprowadzonych do Kodeksu karnego ustawą z dnia 20 lutego 2015 r.' [Legal nature of the institution of forfeiture after the amendments introduced to the Penal Code by the Act of 20 February 2015]. *Nowa Kodyfikacja Prawa Karnego* 37, pp. 91–100.

Raglewski J. (2015). *'Przepadek.'* [Forfeiture]. In W. Wróbel (ed.) *Nowelizacja prawa karnego 2015. Komentarz* [Amendment of the criminal law 2015. Commentary]. Kraków: Krakowski Instytut Prawa Karnego, pp. 171–176.

Ringe N. (2022). *The Language(s) of Politics. Multilingual Policy-Making in the European Union*. Ann Arbor: University of Michigan Press.

Robinson P.H. and Darley J.M. (2004). 'Does criminal law deter? A behavioural science investigation.' *Oxford Journal of Legal Studies* 24(2), pp. 173–205. https://doi.org/10.1093/ojls/24.2.173

Robinson W. (2005). 'How the European Commission drafts legislation in 20 language.' *Clarity* 53(5), pp. 4–10.

Robinson W. (2010). 'Manuals for drafting European Union legislation.' *Legisprudence* 4(2), pp. 129–155. https://doi.org/10.2880/5575

Rönnau T. and Begemeier M. (2017). 'Grund und Grenzen der Bruttoeinziehung. Zur Gestaltung der Bruttoabschöpfung anlässlich der Reform der strafrechtlichen Vermögensabschöpfung' [Reason and limits of gross confiscation. On the design of the gross confiscation on the occasion of the reform of the criminal property confiscation]. *Goltdammer's Archiv für Strafrecht* 1, pp. 1–19.

Rui J.P. and Sieber U. (2015). *'Non-conviction-based confiscation in Europe. Bringing the picture together.'* In J.P. Rui and U. Sieber (eds.) *Non-Conviction-Based Confiscation in Europe*. Berlin: Duncker & Humblot, pp. 245–304.

Sakellaraki A. (2022). 'EU asset recovery and confiscation regime – quo vadis? A first assessment of the commission's proposal to further harmonise the EU asset recovery and confiscation laws. A step in the right direction?.' *New Journal of European Criminal Law* 13(4), pp. 478–501. https://doi.org/10.1177/20322844221139577

Satzger H. (2019). 'The harmonisation of criminal sanctions in the European Union – a new approach.' *Eucrim* 2, pp. 115–120. https://doi.org/10.30709/eucrim-2019-007

Schilling T. (2010). 'Beyond multilingualism: On different approaches to the handling of diverging language versions of a community law.' *European Law Journal* 16(1), pp. 47–66. https://doi.org/10.1111/j.1468-0386.2009.00496.x

Schilling T. (2011). 'Multilingualism and multijuralism: Assets of EU legislation and adjudication?.' *German Law Journal* 12(7), pp. 1460–1491. https://doi.org/10.1017/S2071832200017399

Schoepfer A., Carmichael S., and Leeper Piquero N. (2007). 'Do perceptions of punishment vary between white-collar and street-crimes?.' *Journal of Criminal Justice* 35(2), pp. 151–163. https://doi.org/10.1016/j.jcrimjus.2007.01.003

Simonato M. (2015). 'Directive 2014/42/EU and non-conviction based confiscation. A step forward on asset recovery?.' *New Journal of Criminal Law* 6(2), pp. 213–228. https://doi.org/10.1177/203228441500600205

Simonato M. (2017). 'Confiscation and fundamental rights across criminal and non-criminal domains.' *ERA Forum* 18, pp. 365–379. https://doi.org/10.1007/s12027-017-0485-0

Stanton-Ife J. (2007). 'Strict liability: Stigma and regret.' *Oxford Journal of Legal Studies* 27(1), pp. 151–173.

Suominen A. (2014). 'Effectiveness and functionality of substantive EU criminal law.' *New Journal of European Criminal Law* 5(3), pp. 388–415. https://doi.org/10.1177/203228441400500308

Thunberg Schunke M. (2017). *Extended Confiscation in Criminal Law. National, European and International Perspectives*. Cambridge–Antwerp–Portland: Intersentia.

Trinchera T. (2020). 'Confiscation and asset recovery: Better tools to fight bribery and corruption crime.' *Criminal Law Forum* 31, pp. 49–79. https://doi.org/10.1007/s10609-020-09382-1

Ulph J. (2010). 'Confiscation orders, human rights and penal measures.' *Law Quarterly Review* 126, pp. 251–278.

Wieczorek I. (2020). *The Legitimacy of EU Criminal Law*. Oxford: Hart Publishing.
Willems A. (2020). *The Principle of Mutual Trust in EU Criminal Law*. Oxford: Hart Publishing.
Ziembiński Z. (2007). *Logika praktyczna* [Practical logic]. Warszawa: Wydawnictwo Naukowe PWN.

Documents

Commission (2011). Communisation from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. Brussels, 20.9.2011, COM(2011) 573 final.
Commission (2022). Staff Working Document. Impact Assessment Report. Accompanying the document Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation. Brussels, 25.5.2022 SWD(2022) 245 final.
Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union [Council Decision], OJ L 308, 29.11.2022, pp. 18–21.
European Parliament (2013). Committee on Civil Liberties, Justice and Home Affairs: Report on the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Com(2012)0085 – C7-0075/2012 – 2012/0036(COD), 20.5.2013.
Explanatory memorandum to the Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, Brussels 25.5.2022 COM(2022) 245 final (2022).
German Federal Bar Association (2012). Opinion No. 38/2012. Bundesrechtsanwaltskammer, Stellungnahme Nr. 38/2012.
Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM(2022) 247 final, Brussels 25.5.2022 (2022a).
Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Brussels 12.3.2012 COM(2012) 85 final (2012).
Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, Brussels, 25.5.2022 COM(2022) 245 final (2022b).
Proposal for a Directive of the Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures, COM(2022) 684 final, Brussels, 2.12.2022 (2022c).
Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders COM(2016) 819 final, Brussels 21.12.2016 (2016).

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

Internet sources

Cuesta J.L. de la (2022). *Spanish Report on Extended Confiscation*, Konfiskata.web.amu.edu.pl. Available obline: https://konfiskata.web.amu.edu.pl/wp-content/uploads/2023/01/Country-Report-Spain-1.pdf [10.07.2023].

Hryniewicz-Lach E. (2022). *Polish Report on Extended Confiscation*, Konfiskata.web.amu.edu.pl. Available online: https://konfiskata.web.amu.edu.pl/wp-content/uploads/2022/02/Country-Report-Poland-1.pdf [10.07.2023].

Keiler J. and Klip A. (2022). *Dutch Country Report on Extended Confiscation*, Konfiskata.web.amu.edu.pl. Available online: https://konfiskata.web.amu.edu.pl/wp-content/uploads/2023/01/Country-Report-from-the-Netherlands.pdf [10.07.2023].

Kilchling M. (2023). *German Report on Extended Confiscation*, Konfiskata.web.amu.edu.pl. Available online: https://konfiskata.web.amu.edu.pl/wp-content/uploads/2023/03/Extended-confiscation_Germany.pdf [10.07.2023].

Maugeri A.M. (2022). *Italian Country Report on Extended Confiscation*, Konfiskata.web.amu.edu.pl. Available online: https://konfiskata.web.amu.edu.pl/wp-content/uploads/2022/06/Country-Report-Italy-.pdf [10.07.2023].

Najwyższa Izba Kontroli [NIK] (2019). *Informacja o wynikach kontroli: Odzyskiwanie mienia pochodzącego z przestępstw* [Information about the results of control of asset recovery in Poland], Nik.gov.pl. Available online: https://www.nik.gov.pl/plik/id,21745,vp,24397.pdf [10.07.2023].

Warchoł M. (2021). *Odpowiedź na interpelację nr 6115 w sprawie prewencyjnej konfiskaty majątku* [Reply to Interpellation No. 6115 on Preventive Confiscation of Assets], Sejm.gov.pl. Available online: https://www.sejm.gov.pl/Sejm9.nsf/InterpelacjaTresc.xsp?key=BX6HNN [10.07.2023].