Extended Asset Recovery

– increased functionality or unjustified deviation from the requirements of Rechtssicherheit

LL.D. Johan Boucht

1. This research project deals with asset recovery, particularly extended forms of asset recovery, in Finnish, Norwegian and Swedish law. Asset recovery refers to the seizure of property, without compensation, related to criminal activity.

Organised and economic crime have grown to become a major criminal justice issue in recent times, due to the threat to the economy that this criminality represents.[1] It is moreover inappropriate from the view of criminal justice policy that enrichment from a criminal lifestyle is potentially feasible. Extended forms of forfeiture are therefore relevant particularly in relation to persons leading a *criminal lifestyle* in possession of assets to an extent that does not reasonably reflect their lawful income.[2] Different measures, both national and international, to tackle these forms of criminality are therefore necessary and hence it is fundamentally important that the legal apparatus is adequately constructed.

2. Against this background, the first research question deals with the position of extended confiscation within the criminal justice system and the purpose that it serves: Is it preventive or penal, or a bit of both?; Is it supplementary to the traditional penal sanctions, or does it fulfil a role as an independent sanction?; Ought it to be directed against every individual who has committed a sufficiently serious crime (as in Norway), or only against individuals leading a criminal lifestyle (as in Finland and Sweden, and partly Norway)?

Some writers argue that the broadened use of confiscation of criminal proceeds along with the criminalisation of money laundering as general law enforcement tools, have inaugurated a 'new criminal justice policy', oriented towards the financial profits of crime, which 'strives to curb crime by taking away the profits of crime, rather than by punishing the individuals who have allegedly committed the crimes'.[3] The argument is interesting, but can be questioned *inter alia* by using arguments from law and economics.

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[1] Re-investment of tainted assets into the economy can, for instance, distort the competition between legal businesses. See e.g. the Norwegian Government's action plan, *Regjeringens handlingsplan mot økonomisk kriminalitet*, Justis- og politidepartementet. Finansdepartementet (G-0422).

[2] Institutional ssupport is found in international instruments. Examples are the UN Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) Art. 5(1) and Corruption (2003) Art. 31. The Council's framework decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (2003) in the EU also specifically requires states to facilitate extended powers of confiscation to seize profits that originate in organised crime. The EU Commission has now proposed a new directive on the freezing and confiscation of proceeds of crime in the European Union, which also includes a provision on extended confiscation (COM 85 final). According to its art. 3, each member state "shall adopt the necessary measures to enable it to confiscate, either wholly or in part, property belonging to a person convicted of a criminal offence where, based on specific facts, a court finds it substantially more probable that the property in question has been derived by the convicted person from similar criminal activities than from other activities."

[3] Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge: Cambridge University Press 2000), p. 12.

Another important discussion concerns the basic parameters that underlie the dogmatic construction of extended forfeiture statutes. It seems that here, as elsewhere in public law, a tension exists between efficacy and *Rechtssicherheit*.

Criminal law must be functional and effective for its purposes. It is in fact possible that criminal law is just an 'old machine' that does not function optimally in relation to some new forms of criminality, e.g. organised crime and economic criminality, if strict adherence to the traditional safeguards and principles of law is insisted upon. It is, however, vital not to put aside the fundamental values upon which the criminal justice system, as a reflection of what the good society ought to be, traditionally functions. It clearly seems that some elements of extended confiscation are difficult to accommodate within the traditional principles of criminal and criminal procedural law.

One such important basic principle is the presumption of innocence (POI), which is enunciated in Art. 6(2) of the European Convention on Human Rights (ECHR). This principle becomes relevant, *inter alia*, in relation to the allocation of the onus of proof between the prosecutor and the defendant, to the evaluation of evidence and to the threshold of evidence. To the extent that the onus of proof is reversed, as for instance in Norwegian law, uncertainties arise as to the conformity with art. 6(2).

4. Having set out the basic premises, the next task is an analysis of the rules on extended confiscation in Finland, Norway and Sweden.[4] The rules are fairly similar, but still reveal national differences. The ambition in this section is twofold: Firstly, to present a (dogmatic) analysis of the existing legislation in a comparative perspective, which includes an evaluation of how it fits together with the basic principles presented in the former chapter; and secondly, to present suggestions as to how the rules ought to be designed in order to optimise conflicting ambitions in light of what has been said in earlier chapters.

5. The final chapter deals, in a *de lege ferenda* perspective, with the question of whether the existing options are sufficient in view of the ambitions discussed earlier. The concept of civil asset forfeiture (CAF), which at present is quite unknown in the Nordic countries, will be introduced and discussed as a potential supplement to existing alternatives.[5] CAF is normally defined as a civil action, detached from criminal proceedings, which is directed against tainted property (proceeds of crime) and intends to facilitate forfeiture of suspected proceeds even in situations when a criminal conviction is unsuccessful.[6] This section will include a discussion on whether CAF could be a feasible alternative in the Nordic countries, and if so, how the rules should be constructed in order to respect both the requirement of *Rechtssicherheit* and the necessity of efficacy as set out above.

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[4] Danish law is not included in the comparison even though this could seem adequate from a Nordic perspective. However, a limit must be drawn at some point and it is *prima facie* unclear what additional value Danish law would give. The limitation, as well as the choice of countries, is further based on my personal 'connections'. I depart from the presumption that the probability of a successful comparison increases considerably if the author also holds an 'internal' perspective on the law he studies. My 'connections' are an LL.M. and Readership from Finland, an LL.D. from Sweden and the fact that I am residential and currently employed in Norway. Danish doctrine will however be considered in the discussion.

[5] CAF has been an alternative sanction in the UK alongside criminal forfeiture since the introduction of POCA in 2002.

[6] See e.g. Anthony Kennedy, 'Designing a Civil Forfeiture System: An issues List for Policymakers and Legislators', *Journal of Financial Crime* (2/2006), 145.