The Limits of Asset Confiscation

On the Legitimacy of Extended Appropriation of Criminal Proceeds

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Introduction

I. The Rise of Extended Appropriation as a Criminal Policy Measure

It is a basic point of departure in criminal justice policy that a perpetrator should not profit from his crime (*ex turpi non oritur actio*).[1] Effective schemes for the purpose of depriving offenders of their ill-gotten economic gains are therefore important resources for the control of criminal conduct and its consequences.

For many years asset confiscation as a crime control measure led a relatively unassuming existence in many countries. Only a few decades ago it was not even unheard of that perpetrators could stand free to benefit from the fruits of their crime after having served their sentences or paid their fines, because of the absence of sufficient asset confiscation schemes.[2] During the past few decades, however, this has come to change. There is today a trend towards a 'follow-the-money approach', whereby the proceeds of unlawful conduct are targeted. The aim is to hit criminals 'where it hurts the most'.[3] Stessens suggested 15 years ago that this trend in international criminal justice policy, orientated towards the financial profits of crime, 'strives to curb crime by taking away the profits of crime, rather than by punishing the individuals who have allegedly committed the crimes'.[4] Under such

[1] Criminal policy is understood here in a broad sense, 'as a whole, covering the public debate and decision-making pertaining to crime prevention and to the control and sanctioning of criminal behaviour': R Lahti, 'Towards a Rational and Humane Criminal Policy. Trends in Scandinavian Penal Thinking' (2000) 1 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 141, 142.

[2] For example, in the infamous English drug-trafficking case, *R v Cuthbertson* [1981] AC 470, the House of Lords had to admit, with 'considerable regret', that it lacked the legal competence necessary to strip the defendant of the whole of his ill-gotten gains or the total profits of his unlawful enterprises. Section 27(1) of the Misuse of Drugs Act 1971, as it applied at the time, only provided the courts with powers to confiscate the instruments of the crime, but did not as such extend to the proceeds of crime.

[3] H Nelen, 'Hit Them Where it Hurts the Most? The Proceeds-of-Crime Approach in the Netherlands' (2004) 41 *Crime, Law & Social Change* 517.

[4] G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press, 2000) 12. RT Naylor, 'Mafias, Myths and Markets: On the Theory and Practice of Enterprise Crime' (1997) 3(3) *Transnational Organized Crime* 1, 34, argues that the legislative response to organised crime (in the US) has been evolving through a three-fold innovative sequence: 'First came measures to stop criminals from controlling legitimate businesses; second came attempts to strip criminals of their assets before they could be utilized; and third came (in some jurisdictions) efforts to make membership *per se* in "criminal organizations" a crime'. This depiction is probably not only valid for the US.

a policy approach, effective confiscation of criminal profits is of crucial importance. The creation of effective confiscation schemes as a means of controlling criminal profiteering and acquisitive crime has therefore become an increasingly prioritised topic, both internationally and nationally.[5]

The implementation of asset confiscation regimes has also been encouraged by a number of international instruments. Examples are the UN Convention against Illicit Traffic in Narcotic and Psychotropic Substances 1988 (the Vienna Convention), the UN Convention against Corruption 2003, as well as the UN Convention against Transnational Crime 2000 (the Palermo Convention). The UN Convention for the Suppression of the Financing of Terrorism 1999 and the Council of Europe Conventions on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 and 2005 are also important. These instruments often advocate confiscation powers that are as broad as possible within the domestic legal system and according to domestic legal principles. Several instruments also recommend states to consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of judicial and other proceedings.

Furthermore, the Financial Action Task Force (FATF), an intergovernmental organisation founded in 1989 on the initiative of the G7 to develop policies to combat money laundering, has acted as an important pressure group in this context. The mandate of the group 'is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system'.[6] In 1990 the group issued 40 recommendations to combat the misuse of financial systems by persons laundering drug money, and to make the control of money laundering more efficient. These recommendations have subsequently been revised (in 1996 and 2003), as well as expanded (to terrorism funding in 2001). Incentivising states to adopt sufficient confiscation measures is an important

[5] See, eg, the European Parliament Resolution of 25 October 2011 on organised crime in the European Union (2010/2309 (INI)) para 8, where the Parliament considered the legal framework at EU level inadequate for serious action against the threat of organised crime. It urged the Commission to submit a proposal for a directive on the seizure and confiscation of criminal proceeds in order, inter alia, 'to elaborate rules on the effective use of extended and non-conviction-based confiscation', and 'to elaborate rules concerning the mitigation of the burden of proof after the conviction of an offender of a serious offence (including offences related to organised crime) concerning the origin of assets held by the offender'. See also *Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme* (COM (2010) 171 final), para 5. For the Norwegian strategy, see Regjeringens handlingsplan mot økonomisk kriminalitet, Justis- og politidepartementet. Finansdepartementet (G-0422) and Mld St 7 (2010–2011). For an overview of the development of asset confiscation law, see M Fernandez-Bertier, 'The history of Confiscation Laws: From the Book of Exodus to the War on White-Collar Crime', in K Ligeti and M Simonato (eds), *Chasing Criminal Money. Challenges and Perspectives On Asset Recovery in the EU* (Hart Publishing, 2017), 51–73.

[6] Financial Action Task Force, *The FATF Recommendations. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (February 2012; published 2013) 7.

part of the group's policy ambitions. According to Recommendation no 4, countries should adopt measures

> to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of bona fide third parties: (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or (d) property of corresponding value.

It is also recommended, to the extent that it is consistent with domestic principles of law, that countries either adopt NCB confiscation measures allowing for confiscation without requiring a criminal conviction, or use a reversed burden of proof in criminal confiscation proceedings that would require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation.

In Europe, the EU has also been an important actor in developing confiscation law for the purpose of making confiscation in the EU more effective. The EU has been particularly active in the field of harmonising confiscation regimes, for facilitating mutual recognition of confiscation orders and horizontal cooperation between the EU member states.[7]

This development towards a stronger profit-orientated crime-fighting approach may also be viewed against the policy narrative relating to the fight against serious and organised crime.[8] The growing focus on the potency of asset confiscation seems to some degree to have coincided with a growing awareness of the threat from organised crime and serious economic crime.[9] Along with

[7] M Simonato, 'Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?' (2015) 6 *New Journal of Criminal Law* 213, 216–17.

[8] An important motivation for organised crime groups is often considered to be the generation of financial gain. See L Holmes, *Advanced Introduction to Organised Crime* (Elgar, 2016) 2–14.

[9] Confiscation of criminal proceeds particularly as a means to fight organised crime and drug trafficking began to receive political attention in the 1980s. See M Pieth, 'Recovering stolen assets—a new issue' in Pieth, M (ed), *Recovering Stolen Assets* (Peter Lang Verlag, 2008) 6. In the UK, eg, confiscation provisions empowering courts to confiscate the proceeds of drug-related offences were enacted in England and Wales as a result of the work of the Hodgson Committee (which was set up in 1982). This resulted in the confiscation regime in the Drug Trafficking Offences Act 1986 (which was replaced by the 1994 Act), and subsequently was extended to most other offences by the Criminal Justice Acts 1988 and 1990. The asset confiscation provisions were consolidated by the Proceeds of Crime Act (POCA) 2002 (which also replaced the POCA 1996). Controlling and containing organised crime also seems to have been an important reason for introducing extended confiscation at EU level, see COM (2012) 85 final, p 15. See also, eg, the action plan, 'The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new Millennium' [2000] OJ C124/01, particularly recommendation 19, which urges that an examination be made of 'the possible need for an instrument which, taking into account best practices operating in the Member States and with due respect to fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime' (see also 'Part 1: Background'). See further Pre-accession Pact on organised crime between the Member States of the European Union and the applicant countries of Central and Eastern Europe and Cyprus [1998] OJ C220/01, 1. A similar tendency can also be seen in other jurisdictions. For example, regarding the development in Australia, see A Goldsmith, D Gray and RG Smith, 'Criminal Asset

this came a realisation that existing criminal confiscation regimes might not be sufficient for effectively recovering criminal proceeds. A broader approach to confiscation, 'expected to have a considerable impact in terms of bringing organised criminals to justice',[10] was thus considered necessary. For example, characteristic of what in this context is referred to as 'regular criminal confiscation' is that only proceeds that the state is able to clearly link causally to a particular offence, of which the defendant has been duly convicted, may be confiscated. A strict causal requirement may, however, inhibit effective implementation in cases where it is difficult to prove that particular assets derive from a specific criminal offence. Even if the assets in question are likely to originate from criminal activity (for example, the individual possesses property to an extent that is exceedingly disproportionate to his lawful income), a confiscation claim may nevertheless be rejected where the assets have not been linked to an offence of which the defendant is convicted.

Confiscation proceedings may also be linked with practical and evidential difficulties, particularly in connection with more sophisticated offences, such as large-scale financial frauds, substantial drug trafficking and people trafficking, which may involve many people and are often mobile, transnational and organisationally complex.[11] Difficulties may originate in lack of evidence and the defendants' unwillingness to cooperate, as well as in the practical features of the crimes in question. The challenges faced by the state were aptly described by Lords Neuberger, Hughes and Toulson in *R v Ahmad*:[12]

> First, there are the practical impediments in the way of identifying, locating and recovering assets actually obtained through crime and then held by the criminals. The defendants will often, indeed normally, be as misleading and uninformative as they can, and the sophistications and occasional corruptions in the international financial community are such as to render the task of locating the proceeds of crime very hard, often impossible. Secondly, again owing to the reticence and dishonesty of the defendants, there will often be considerable, or even complete, uncertainty as to (i) the number, identity and role of the conspirators involved in the crime, and (ii) the quantum of the total proceeds of the crime, or how, when, and pursuant to what understanding or arrangement, the proceeds were, or were to be, distributed between the various conspirators.

In attempting to overcome some of the difficulties involved and to make confiscation more effective, the focus of policymakers has in many jurisdictions

Recovery in Australia' in C King and C Walker (eds), *Dirty Assets, Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate, 2014) 115–39. For an analysis of the impact of the organised crime narrative on UK legislation, see L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing, 2013).

[10] Home Office, *New Powers against Organised and Financial Crime* (July 2006) 24.

[11] These problems have been further reinforced by globalisation and the opened borders in Europe. See, eg, Europol SOCTA 2013.

[12] *R v Ahmad* [2014] 3 WLR 23, para 36.

increasingly come to be on what in this context is referred to as 'extended appropriation'.[13] This term refers to two kinds of measures, which both aim at making it 'easier' for the state to successfully claim confiscation: extended criminal confiscation and non-conviction based confiscation (NCB confiscation). In order to initiate extended criminal confiscation proceedings, a predicate criminal conviction is required, but the requirement to concretise the criminal conduct from which the assets allegedly derive (ie the causal requirement) is moderated. Instead of targeting proceeds of a particular offence, extended criminal confiscation thus facilitates the confiscation of proceeds from more vague prior criminal activity, of which the defendant has not been convicted but from which the defendant has presumably benefited. Not only will it not be necessary to identify any particular offence in which the assets originate, but, depending on how the scheme is constructed, the illicit provenance of the assets may, following conviction of a relevant predicate offence, only have to be proved to a lower standard or can simply be presumed (ie a reversed burden of proof). However, in order to limit the applicability of extended confiscation, the target area (ie who can be targeted and in which situations) is often (somewhat) narrowed down compared to regular confiscation, for example so that only certain more serious predicate offences trigger confiscation. Extended criminal confiscation schemes are today implemented in many European countries.[14]

The second kind of confiscation rules discussed here facilitates confiscation of proceeds without the existence of a predicate criminal conviction. Non-conviction based confiscation proceedings are normally detached from criminal proceedings, and are often pursued within a procedural framework generally reserved for civil proceedings. The main difference from extended criminal confiscation is that NCB confiscation is available even in the absence of a predicate criminal conviction. As the proceedings are often considered to be *in rem*, ie against the property rather than against the person, the culpability of the owner/holder of the property is, at least in principle, irrelevant. Such NCB confiscation is therefore often considered to emphasise the unlawful nature of the property rather than being punitive and deterrent. A number of European countries have established

[13] A relatively new way of targeting illicit assets is also by way of various unexplained wealth mechanisms. Through this kind of mechanism, the burden of proving the licit origin may, for example, be shifted on to the individual. Ultimately it may involve the criminalisation of unexplained wealth. See, for an overview, M Fernandez-Bertier, 'The confiscation and recovery of criminal property: a European Union state of the art' (2016) *ERA Forum* 1, 9–10. See also Ch 1 of the Criminal Finances Bill 2016 for the proposed UK mechanism (which does not propose to criminalise unexplained wealth).

[14] This also follows from the EU's regulations in this field. Extended confiscation was introduced at EU level by the Council's 2005 Framework Decision. However, in the UK, broad rules on both regular and extended criminal confiscation were already introduced in the Drug Trafficking Act 1986. Norway, which is not an EU member, introduced its rules on extended confiscation in 1999. In Sweden the rules on extended confiscation entered into force in 2008. See Ch 2 of this volume.

NCB confiscation schemes, for example the UK, Ireland, Italy, Bulgaria and Slovenia.[15] The introduction of NCB confiscation measures at EU level was considered in connection with the proposal for a directive on the freezing and confiscation of unlawful assets in 2012, but was eventually scrapped.[16]

Linked to this broadening development in asset confiscation law is the fight against money laundering. According to Stessens, money laundering essentially has two goals: to conceal the predicate offences from which these proceeds are derived; and to ensure that the offenders can benefit from their proceeds, by consuming or investing them in the legal economy, without the risk of having them confiscated.[17] Money-laundering regulation normally follows a twin-track system: preventive financial (banking) law, which creates, for example, reporting duties for financial institutions, and repressive criminal law, which criminalises money laundering.[18]

Even if the focus of anti-money-laundering measures is more on the illicit assets than on the underlying predicate offences, the measures are often seen as a tool in seeking to reduce predicate crime.[19] One reason for criminalising money laundering is the evidential difficulties that may be connected with criminal proceedings against criminal networks: because of how these networks operate, it may be difficult to link top-level criminals to the predicate offences in question. When money laundering is criminalised the state no longer needs to prove a direct link to the predicate offence, as long as it can prove, for example by way of identifying a paper trail, that the individual has come into contact with unlawfully obtained proceeds.[20]

[15] On NCB confiscation measures in Europe, see JP Rui and U Sieber (eds), *Non-Conviction Based Confiscation in Europe. Possibilities and Limitations on Rules Enabling Confiscation Without a Criminal Conviction* (Duncker Humblot, 2015) 69. In the US, NCB confiscation schemes (both federal and State) have existed for a long time. See SD Cassella, *Asset Forfeiture Law in the United States* (JurisNet LLC, 2013) 31–37. The first leading NCB confiscation case was apparently *Boyd v United States*, 116 US 616 (1886), 634. In Norway an inquiry into the possible need for introducing an NCB confiscation scheme is underway, see JP Rui, *Betenkning: Sivilrettslig inndragning rettet direkte mot formuesgoder* (Justisdepartementet, 2016).

[16] See Art 5 in the Commission's proposal COM (2012) 85 final.

[17] Stessens, *Money Laundering*, 5, 83, who described the corresponding aims of law enforcement as 'detecting the crimes that were committed in order to bring the alleged perpetrators to trial, and identifying the proceeds from crime so that they can be confiscated'. The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering, The [US] President's Commission on Organized Crime (Washington, DC, 1985) 7, describes money laundering as 'the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legal'. As regards the EU's measures against money laundering, see Directive (EU) 2015/849 of the European Parliament and the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (20.05.2015) (the Fourth Money Laundering Directive). On 5.2.2013 the Commission proposed a new directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (COM/2013/045 final and 2013/0025 (COD)).

[18] See Stessens, *Money Laundering*, 96–112.

[19] For a critique, see P Alldridge, 'The Moral Limits of the Crime of Money Laundering' (2001) 5 *Buffalo Criminal Law Review* 279, 288, who questions whether money laundering will have the effect of reducing predicate offences.

[20] Money laundering may be seen as morally objectionable, as a kind of *post factum* complicity in the predicate offence. Where the launderer has had the criminal intent to assist in laundering

When the defendant is convicted of money laundering, his assets may then be confiscated by way of regular criminal confiscation.

The criminalisation of money laundering means that the criminalised sphere is moved considerably further away from the predicate offence. The reasons for extending asset recovery schemes essentially therefore seem to coincide with those instigating criminalisation of money laundering: the difficulties in proving a connection to criminal offences by leaders of criminal organisations or high-level criminals leading a criminal lifestyle, due to the highly organised character of the groups and the distance between the primary offence and the assets.[21] While criminalising money laundering broadens the use of regular criminal confiscation, extended appropriation strives at broadening the sphere of asset confiscation in other cases. Extended appropriation and the criminalisation of money laundering may therefore be seen as supplementary to one another.

The moral imperative that no one should benefit from his crime is generally strong. There is considerable public policy support for having mechanisms in place that facilitate effective appropriation of illicit profits generated, in some cases even where the individual has not been convicted.[22] Economically motivated crime, such as corruption, serious fraud, drug and people trafficking and so on, have adverse effects on many parts of society, and the illicit profits generated through these activities may be considerable. It is also important that the rules are constructed in a way that facilitates effective implementation and the achievement of their objectives. However, when implementing confiscation schemes it is crucial that the rights of the individual are also effectively safeguarded. It is, in other words,

the proceeds of a criminal offence prior to committing the offence, he could in many instances be convicted of complicity in the predicate offence. P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing, 2003) 210, notes that '[o]ffences of handling have the obvious similarity to offences of laundering in that they are offences of disposal of unlawfully acquired property. There is a substantial overlap between handling and laundering offences and there have been suggestions that the laundering offences are little but an updated version of handling. In many ways the panic surrounding laundering now has echoes of that surrounding Wild and the other thief-takers in the eighteenth century.' See also S Green, *13 Ways to Steal a Bicycle* (Harvard University Press, 2012) 341, fn 200. However, for a critique of this argument, see Alldridge, 'The Moral Limits of the Crime of Money Laundering', 288–89. For a critical overview of (economic) justifications for criminalising money laundering, see Alldridge, *Money Laundering Law*, 29–43. See also P Alldridge, *What Went Wrong with Money Laundering Law* (Palgrave Macmillan, 2016).

[21] Stessens, *Money Laundering*, 85, observes: 'The primary reason for fighting money laundering is to enable law enforcement authorities to confiscate the proceeds of predicate criminal activities in those situations where confiscation might not otherwise be possible. … As with the confiscation of proceeds from crime, the criminalisation of money laundering aims to undermine crime and especially organized crime by taking away the incentive for these criminal activities, that is, the financial gains'. See also JP Rui, *Hvitvasking. Fenomenet, regelverket, nye strategier* (Universitetsforlaget, 2012) 72.

[22] Although the current approach has not been without its critics. For example, RT Naylor, 'Wash-out: A Critique of Follow-the-Money Methods in Crime Control Policy' (1999) 32 *Crime, Law and Social Change* 1, 1, argues that the perceived appeal of the follow-the-money approach has 'its roots in myth and misunderstanding about the nature and operation of the criminal marketplace'. See also Alldridge, *Money Laundering Law*, 42.

important to find a fair balance, both substantively and procedurally, between the public interests of the state and those of the individual. The maxim 'the end justifies the means' should not apply without limitations.

Although the focus on criminal profits of crime is positive as such, the present development gives rise to a number of concerns. Even if the introduction and initial development of broader asset confiscation (and anti-money-laundering) regimes were to a considerable degree motivated by the fight against organised crime and international drug trafficking, these powerful criminal law measures now seem to have taken on a momentum of their own. They are no longer necessarily limited to being used in the fight against drug trafficking and organised crime, but represent general law enforcement tools that may be invoked in regard to most acquisitive crime.[23] Even if certain draconian measures may be legitimate in some instances, or at least less controversial against certain kinds of offences, these measures may impose excessive burdens on other individuals ('regular offenders').

Extended appropriation schemes represent potent crime control resources that potentially facilitate the confiscation of considerable assets following more or less substantiated allegations of criminal origin in proceedings where traditional safeguards of criminal proceedings aimed at protecting defendants have been diluted. Extended criminal confiscation following the conviction of a predicate offence, based on an assumption of prior criminality of which the defendant has not been convicted, raises issues, for example, in regard to the presumption of innocence.[24] In NCB confiscation no predicate criminal conviction is even required at all. The broader these schemes are, and the further away from concretised predicate criminal conduct they operate, the greater also is the risk of targeting legitimate possessions, which should not have been liable to confiscation in the first place. In addition, confiscation imposing a more far-reaching detriment on the individual than is necessary for achieving a restitutionary aim will in principle be of a repressive nature.[25] This again brings into question the relationship with criminal punishment. Imposing such a detriment is even more problematic if it occurs without the existence of a criminal conviction. These concerns should be taken seriously.

In many cases, of course, the assets targeted in fact are or represent criminal proceeds, and the ordering of confiscation is therefore legitimate. However, an important policy question is how the distribution of error—that is, the risk of targeting assets that are in fact legitimate—should be allocated. There is a tendency to emphasise the difference between asset deprival and the establishment

[23] There seems to be a tendency to invoke the organised crime narrative not only as an argument to create confiscation schemes directed particularly at this kind of criminality, but also as a justification for introducing generally applicable and broader confiscation schemes, thus increasing the general harshness of the criminal justice system.

[24] Regarding the presumption of innocence and extended confiscation, see, eg, T Weigend, 'Assuming that the Defendant is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice' (2014) 8 *Criminal Law and Philosophy* 285, 295.

[25] See Ch 5 of this volume.

of criminal liability, in the sense that the former requires fewer safeguards to be put in place. Thus the traditional Blackstonian standard of rather acquitting 10 guilty persons than wrongly convicting one innocent is not considered to apply, at least not with the same force. It is true that there is a difference in principle between measures aiming at the establishment of criminal guilt and those that target allegedly illicit assets. However, even if such difference is acknowledged, it may be questioned, in view of the potential consequences of extended appropriation, how far this argument can legitimately be used in justifying the dilution of procedural safeguards and substantive restrictions in asset confiscation proceedings. Moreover, where legitimate property is wrongly confiscated, the individual's right to property is in principle violated. Furthermore, as suggested in Chapter 4, the potential stigmatising effects, as well as the negative effects of confiscation on an individual's reputation, should not be underestimated. As confiscation may target assets of considerable magnitude, even the entirety of an individual's possessions, it may also have adverse social effects on the individual who is liable to confiscation. Such effects may relate to the re-socialisation of offenders into society, the social situation of the individual (losing considerable wealth may lead to divorce, loss of a job, or even suicide) and the impact on family members (for example, where the family home is confiscated). These aspects also should not be taken lightly. All this seems to suggest that there should be safeguards in place that are capable not only of reducing the risk of wrongful confiscation decisions, but also of ensuring that equitable considerations are taken into account when assessing the magnitude of the order, where this is reasonable.

There are other concerns as well. Confiscation schemes are sometimes created in fairly broad terms and rely on a presumption of reasonable discretion being exercised by the prosecutors and judges who pursue them. The increased focus on asset confiscation as a tool in the fight against serious organised and economic crime can, however, make policy makers blind to the potential risk to individuals' rights that overly broad powers potentially may entail. Considering the potency of these tools and the consequences they may impose on the individual, it would seem reasonable to expect the rules to be sufficiently clearly and narrowly defined, and that they should not confer too wide a discretion. Particularly in regard to NCB confiscation proceedings, there is also a worry that some cases that should properly have been dealt with within the criminal procedural framework are pursued only within NCB confiscation proceedings because it is easier merely to go after the money. The focus of law enforcement agencies should, where appropriate, be on establishing criminal liability (and criminal confiscation), rather than on taking the 'easy way' by targeting the assets and disregarding the potential criminal law aspects of the case.[26] As a point of departure, NCB confiscation should only be supplementary to the criminal track.

[26] In *Guidance for prosecutors and investigators on their asset recovery powers under Section 2A of the Proceeds of Crime Act 2002* by the UK Attorney-General's Office (29 November 2012), criminal

It may be possible to seek to explain the development of far-reaching asset confiscation regimes by reference to various policy-based assumptions relating to ideology (policy), causality and efficiency.[27] The ideological assumptions invoked in order to justify confiscation tend to vary between backward-looking and forward-looking considerations (although these are occasionally mixed up to a degree that makes identification of the ultimate aim(s) difficult). Confiscation of criminal proceeds is generally intended to fulfil one or more of the following purposes: *deterrence* (by reducing the economic incitement to commit crime); *prevention* (by hindering the re-investment of the assets into the legal economy, and preventing them from being used either to fund further criminality or to give rise to additional criminality);[28] *restoration* of the *status quo ante* (depriving individuals of tainted benefit fulfils the underlying aim that no one should benefit from unlawful conduct); and *remedy* (compensating either the victims of criminal conduct, or the state for costs related to law enforcement).[29]

As to the causal assumptions, there is generally a strong belief that confiscation will reduce crime by removing the economic incentive to commit acquisitive crime. Indeed, a system that permitted criminals to retain the fruits of their crime would undoubtedly send an unfortunate message not only to potential criminals, but also to the population at large. However, although intuitively a powerful assumption, there is relatively little hard evidence available about the actual effects of asset confiscation on criminal conduct. Not only does this point at the need for more research on the effects of assets confiscation on crime levels, but it also suggests that the expected benefits of confiscation should probably not be exaggerated.[30]

The third assumption underlying the confiscation debate relates to efficiency considerations. The need for implementing more draconian measures is often explained by the insufficiency of existing measures to achieve the policy goals, and is supported by a belief that the new measures will be implemented and used by law enforcement agencies.[31] Increased effectivity often implies making it 'easier'

proceedings are considered primary to civil recovery proceedings. Art 1 states that '[t]he reduction of crime is in general best secured by means of criminal investigations and criminal proceedings. However, the non-conviction based asset recovery powers available under the Act can also make an important contribution to the reduction of crime where (i) it is not feasible to secure a conviction, (ii) a conviction is obtained but a confiscation order is not made, or (iii) a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal.'

[27] See Nelen, 'Hit Them Where it Hurts the Most', 522–27.

[28] For example, in order to launder money derived from drug-trafficking, one or several officials at a foreign bank may have to be bribed.

[29] For a discussion on the justification of asset confiscation, see Ch 4.

[30] For example Nelen, 'Hit Them Where it Hurts the Most', 529–31, concludes, concerning the situation in the Netherlands, that the high hopes regarding the deprivation of illegally obtained advantage are unrealistic, and that the amount of money of which criminals have actually been deprived during the first decade does not come close to the political expectations in the period during which the legislation was drafted.

[31] Ibid, 526.

for the state to successfully claim confiscation, and thus to increase the volume of confiscated assets, but it may also denote 'the impact of raising the financial risks from crime upon the local level of crime and upon its level of organisation'.[32] As already noted, it is important that sufficient confiscation schemes are in place. However, reforms within a knowledge-driven and rational criminal justice policy, for example when making existing schemes more repressive or when new schemes are introduced, should be based on knowledge. Thus, as Naylor forcefully argues, it would be reasonable to expect that the state does not deploy such measures,

> unless and until their need has been unambiguously established, their objectives clearly delineated, and the public well informed both of their actual (as distinct from purported) purpose and of any 'collateral damage' their use might entail. It should be first convincingly demonstrated that any perceived failure of existing methods of crime control results from deficiencies of existing laws, rather than from deficiencies in the application of existing laws, that a crisis exists of sufficient order of magnitude to require radical alternatives, and that such alternatives have a good chance of being effective in rectifying those deficiencies.[33]

The actual need for implementing a more severe confiscation regime should therefore always be considered seriously. Research indicates, for example, that the insufficient insight into the effects of existing schemes may result in the implementation of unnecessary measures.[34] Moreover, more severe rules do not necessarily result in a higher output.[35]

When assessing the need for implementing broader powers in terms of the size of confiscated assets, it may also be noted that this, although often referred to as a yardstick of the efficacy of the legislation, does not necessarily say a great deal about how effectively a confiscation scheme actually functions. Naylor observes that in order to say anything about the effect of confiscation, it would first of all be important to find the ratio of confiscated assets to total criminal wealth. If that ratio goes up, the net assets available to criminal individuals and organisations go down. However, establishing the total criminal wealth in circulation may be difficult. Naylor points out that a comparison should also be made between

> the rate of growth of criminal income relative to legal income to ascertain if the chunk being taken out of criminal wealth is actually affecting adversely the ability of illegal

[32] M Levi, *Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey*, (2000) Best Practice Survey No 2, Council of Europe, 10–11.

[33] Naylor, 'Wash-out: A Critique' 1, 3.

[34] Nelen, 'Hit Them Where it Hurts the Most', 526.

[35] PA Sproat, 'To What Extent is the UK's Anti-Money Laundering and Asset Recovery Regime Used Against Organised Crime? (2009) 12 *Journal of Money Laundering Control* 134, 146. Sproat did a cross-reference analysis of four sets of data and found that the powers provided by the POCA 2002 were mainly employed against offences other than organised crime. Sproat (at 147) notes that either the extent of organised crime in the UK is far smaller than the quantitative claims in policy documents suggest, or it is unlikely that the measures will have any considerable effect on organised crime due to the small risk of its being subjected to any of these measures. See also J Harvey, 'Asset Recovery: Substantive or Symbolic' in C King and C Walker (eds), *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate, 2014) 189.

> markets to service their clientele. If the growth of criminal income begins to slow relative to legal, or if it falls absolutely, then clearly something besides general economic conditions has affected the criminal sector. If nothing else has radically changed on the law enforcement front, it might be reasonable to impute that change at least partially to the impact of the net loss of criminal assets.[36]

This calculation may also be difficult to perform. The estimates of criminal turnover therefore easily become speculative and possibly exaggerated.

When discussing efficacy-related matters in this field, it is moreover important to maintain focus on the confiscation system as a whole. The efficiency of asset confiscation regimes is contingent not merely on the scope of the legal powers conferred on the courts, but also on other parts of the confiscation process functioning effectively.[37] Effective confiscation is thus also dependent on, inter alia, thorough financial investigations identifying and tracing the assets in question, effective freezing powers being in place (including management mechanisms), effective enforcement of confiscation orders and successful international cooperation, both at the investigative stage and at the enforcement stage.[38] Shortcomings in confiscating criminal assets may therefore be caused, for example, by assets' not having been identified and traced, both domestically and internationally,[39]

[36] Naylor, 'Wash-out: A Critique', 15.

[37] See also M Simonato, 'Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?' (2015) 6 *New Journal of Criminal Law* 213, 216. See further, eg, National Audit Office, *Confiscation Orders. Report by the Comptroller and Auditor General* 17 December 2013 (2013–14, HC 738), which concludes that the problems of inefficient confiscation mainly lie in factors other than the legal rules. These factors include the absence of a coherent overall strategy for confiscation orders, that absence of good performance data or benchmarks across the system weakens decision-making, the insufficient awareness of proceeds of crime and its potential impact throughout the criminal justice system, the hampering of enforcement efficiency and effectiveness by outdated and slow ICT systems, data errors and poor joint working, and the inefficiency of the main sanctions for not paying orders. See also House of Commons Committee of Public Accounts, *Confiscation Orders*, Forty-ninth Report of Session 2013–14, 21 March 2014, which further points at the fact that not enough is being done to enforce confiscation orders once they have been made, especially in higher-value cases, and that bodies involved with confiscation orders lack the information they need to manage the system effectively. See also Pieth, 'Recovering stolen assets', 10–16.

[38] Financial investigations may have a considerable impact on how the confiscation claim is shaped. How financial investigations are conducted is therefore also in need of regulatory guidance. For a perspective on this, see K Bullock, 'Criminal benefit, the confiscation order and the post-conviction confiscation regime' (2014) 62 *Crime, Law and Social Change* 45, 48–63.

[39] Many factors may inhibit the effectivity of financial investigations. The mind-set of investigating police officers, even of officers specialising in economic crime, may be focused more on investigating the criminal offence rather than on the proceeds it has generated (financial investigation may even be considered a distraction, as it takes time and resources away from the criminal investigation). Financial investigations may be initiated too late in the process (or not at all), rather than being carried out in parallel with the criminal investigation. There may furthermore be a lack of resources in investigating units, so that when the money trail is complicated and the benefit involved does not appear considerable, other tasks may have to be prioritised. Also access to crucial information, essential for successfully carrying out financial investigations, may be inadequate between government bodies, as the free flow of information from government agencies (such as tax or social welfare authorities) to the investigating authorities may be hampered by 'watertight bulkheads' between bodies. See J Boucht, 'European Cooperation in Financial Investigations—An Overview of the Legal Foundation and Future Challenges' in Z Durdevic and E Karas (eds), *European Criminal Procedure Law in Service of Protection*

rather than because of the inadequacy of the legal powers conferred on the courts. This calls for a certain amount of caution, when lack of effectivity is sought to be redressed simply by making schemes more severe, based on a general unsubstantiated assumption that more draconian measures will be more effective.[40]

The legal nature of asset confiscation is complex and gives rise to many complicated issues, both practical and theoretical, which span criminal and procedural law, property law, the law of restitution and human rights. In spite of the increased national and international political interest in asset confiscation in recent years, as well as the complex legal nature of asset confiscation law, there has been relatively little systematic conceptual analysis available, for example compared to other areas of criminal law, although this has been changing in recent years. Much analytical work has in fact also been done by the courts. However, as the perspective of a court is different from that of the legal scholar, this is not without its problems. As Hart rightly points out, '[a] judicial bench is not and should not be a professorial chair'.[41] The lack of theory can also make it easier for political systems to adopt, without being challenged, ever more draconian measures for the asserted purpose of increasing efficiency in the recovery of criminal proceeds.

It is against this background that this book was written. It represents an attempt at analysing the nature of extended appropriation within the criminal justice system, and to discuss a normative framework that may assist in assessing the legitimacy of various confiscation regimes.[42] It also seeks to explore what a fair and reasonable balance between the interests of the state and those of the individual in this field might look like. The purpose is not, however, to present any comprehensive model confiscation regime. Nor is it to analyse as such the general acceptability of these measures. The analysis starts from an acknowledgement of the moral imperative that no one should benefit from his crime and of the need, therefore, to have effective confiscation regimes in place, but also of the need to protect the interests of the individual.

The title of the book is intentionally ambiguous. On the one hand it refers to the limits of what it is possible to achieve by having asset confiscation regimes in place, for example in restorative and deterrent terms. What kind of output is it fair to expect from a confiscation regime? A certain amount of criminal gains will

of European Union Financial Interests: State of Play and Challenges (Croatian Association of Criminal Law, 2016) 118. See also M Levi and L Osofsky, *Investigating, Seizing and Confiscating the Proceeds of Crime* (Home Office Police Research Group, 1995) 38–48.

[40] See also M Levi, 'Following the Criminal and Terrorist Money Trails' in P van Duyne, K von Lampe and JL Newell (eds), *Criminal Finances and Organizing Crime in Europe* (Wolf Legal Publishers, 2003) 115–16. See also A Freiberg and R Fox, 'Evaluating the effectiveness of Australia's confiscation laws' (2000) 33 *Australian and New Zealand Journal of Criminology* 239–65; and Nelen, 'Hit Them Where it Hurts the Most', 526–27. See also J Boucht, 'Utvidgat förverkande enligt norska straffeloven § 34 a—ökad funktionalitet eller obefogat avsteg från hävdvunna rättssäkerhetskrav?' (2012) 12 *Tidsskrift for Strafferett* 382, 410, who notes that the extended powers of confiscation in Norway are only sparingly used in spite of their draconian character.

[41] HLA Hart, *Punishment and Responsibility* (Clarendon Press, 1968) 2.

[42] For an outline of the book and a note on delimitations, see sections V and VI below.

probably always remain out of the reach of governments, no matter the nature of the confi scation regime implemented, and this should be kept in mind when constructing confiscation regimes.[43] Linked to the latter, the title also points at certain normative constraints that should reasonably apply in any just criminal justice system based on the rule of law. This raises the question of fi nding the right balance between the costs (broadly understood as also encompassing social costs) and the benefi ts of asset confi scation regimes. The latter aspect corresponds to the core of the normative ambitions of this book.

[43] See Nelen, 'Hit Them Where it Hurts the Most', 529–31. Regarding the realisation of the limits of the criminal justice system to control crime in modern society, see D Garland , *The Culture of Control:Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001) 107–09.

VI. Outline of the Book

Asset confiscation is a wide and complex area of law that involves elements of substantive criminal law, procedural law, the law of restitution, property law and human rights law. This book represents a modest attempt to link extended

appropriation to a broader and more principled discussion of the legitimacy of these measures and, ultimately (by analogy to Hart), to identify adequate limiting principles of distribution crucial for achieving legitimacy. The analysis will, it is hoped, stimulate further (critical) discussion of the use and legitimacy of asset confiscation as a crime control measure.

The book is divided into five main chapters (in addition to this introductory chapter). The first substantive chapter, Chapter 2, deals with extended asset confiscation within the framework of criminal proceedings. After a discussion of the principal features of extended confiscation, the extended confiscation regimes in Norway, Sweden, England and Wales, and the EU are presented.

The focus of Chapter 3 is NCB confiscation. The structure is similar to that of Chapter 2. Attention is first given to the principal features of NCB confiscation. Thereafter the NCB confiscation schemes in England and Wales, Ireland and the EU are presented.

The ambition in Chapter 4 is two-fold. First, to analyse the justifying aims of confiscation. Identifying the underlying ratios is important, since they also affect the construction of a particular confiscation scheme. In some discussions of asset confiscation, prospective and retrospective interests can be mixed in a way that makes it difficult to ascertain which justification is actually doing the job. Using by analogy Hart's basic distinction between general justifying aims and principles for distribution, the discussion attempts analysis of the interests justifying confiscation.[84]

Chapter 5 is directly linked to the conclusion in the first section of Chapter 4, as the ambition is to normatively reconstruct adequate principles of distribution regarding extended appropriation. The chapter sets out to identify a framework of distribution that may function as a constraint on how confiscation schemes operate. Three main parameters are identified: target area, substantive proportionality and procedural safeguards. Extended criminal confiscation and NCB confiscation are discussed separately. This is not a normative statement but is based on how the regimes, and the discussion surrounding them, tend to be framed. Moreover, keeping the two regimes separate may also serve pedagogical purposes, as not all jurisdictions may be familiar with both concepts.

Chapter 6 summarises the discussion in the previous chapters.

[84] See Hart, *Punishment and Responsibility*, 8–13. Although Hart's analysis is related to punishment proper, and confiscation measures do not normally constitute punishment, this approach appears fruitful for present purposes too.