Section II

THE NATIONAL FRAMEWORK

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1. *Substantial aspects of confiscation*

In Belgian law, confiscation can be of two different kinds. On the one hand, confiscation is an accessory penalty in addition to a main penalty (criminal confiscation). On the other hand, confiscation of property may be pronounced as a *safety measure*: it is then intended to put out of circulation dangerous products or objects (weapons, narcotics, child pornography images…) and is then independent of a criminal conviction.

This chapter is mainly devoted to criminal confiscation. The general regime of this confiscation is provided for in Articles 42 to 43-*quater* of the Penal Code (hereinafter P.C.). These articles set out general principles which, for each type of item that is liable to be confiscated – the object of the offense, the instruments of the offense, items, products and benefits resulting from the offense – specify as follows: 1°) the conditions of the confiscation; 2°) if the latter is obligatory or optional; 3°) if it is direct or can take place by equivalent; 4°) whether it presupposes that the item is the property of the convict or not (third-party confiscation); 5°) and in which cases extended confiscation is an option.

The current legal regime of criminal confiscation is the result of a recent amendment of the legislation (2018): the legislator was led to take into account *a*) the decision n° 12/2017 of the Belgian Constitutional Court (hereinafter C.C.), annulling the former Article 43, § 1 of the P.C., and *b*) the Directive 2014/42/EU. This general regime is besides made more complex by the existence of specific rules for certain criminal offenses. Finally, it should be mentioned that a Preliminary Draft of Book I

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of the P.C.[2], currently under discussion in Belgium, provides for the reform of the system of criminal confiscation for the sake of consistency and simplification. As they have not yet entered into effect, we are not dealing here with these new rules envisaged by the draft reform of the P.C.

1.1. *Confiscation in criminal matters*

1.1.1. *Criminal confiscation*

a) Criminal confiscation is provided for in Articles 42 to 43-*quater* of the P.C. It consists in confiscating a property belonging, as a rule, to the convicted person and transferring said property to the State. It can also consist, when the transfer of this property is not possible, in imposing on the convict the payment of a sum of money equivalent to the value of the property which should have been confiscated ("confiscation by equivalent").

Pronounced by the trial judge[3], confiscation is an accessory penalty that may or must accompany a main penalty imposed on the perpetrator of a crime, misdemeanor or contravention[4]. If pronounced, this sentence cannot be suspended[5]. Confiscation is always *special*, dealing with property related to the offense[6]. It may relate to the assets of a natural person or a legal person. If the confiscated item or its equivalent is attributed or returned to the civil party to the trial (P.C., art. 43-*bis*, § 3), the confiscation also constitutes a measure of civil compensation[7].

b) The general system of criminal confiscation is organized in Belgian criminal law according to the assets liable to be confiscated:

1°) The first asset, envisaged in Article 43, § 1. of the P.C., is constituted by the things "constituting the object of the offense". This is the

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[2] Commission de réforme du droit pénal (Criminal Law Reform Commission; J. Rozie, D. Vandermeersch et al.), *Proposition d'avant-projet de livre 1er du Code pénal*, Bruxelles: La Charte, 2016.

[3] Exceptionally, the investigating court may or must pronounce the confiscation when it acts as a court of law (for example in the event of suspension of the pronouncement of the sentence, or measure of internment).

[4] Exceptionally, confiscation can be pronounced in the absence of a principal sentence (non-conviction-based confiscation). See, point 1.1.3.).

[5] Law of 29 June 1964, art. 8, § 1, 1st subpara.

[6] The Belgian Constitution (art. 17) forbids general confiscation.

[7] M. Fernandez-Bertier, «Les peines patrimoniales prévues par le projet de livre Ier du Code pénal: l'amende, la confiscation et la peine pécuniaire en fonction du profit de l'infraction», in Ch. Guillain, D. Scalia (eds.), *La réforme du Livre 1er du Code pénal belge*, Bruxelles: Larcier, 169-209.

"*corpus delicti*", namely the material object of the offense (for example, illegal drugs or weapons)[8]. Confiscation is *compulsory* in the event of a conviction for a crime or offense (P.C., art. 43, § 1), but will be pronounced in the event of a contravention only in cases where the law provides for it (P.C., art. 43, § 2)[9]. In principle, the confiscated item must be the *property of the convicted person*[10], thus excluding *third-party confiscation*. This condition of ownership is a de facto judgment of the trial judge, which is not held by documents attesting the ownership of a third-party[11]. If the convicted person is only the co-owner of the item, the confiscation has the effect of creating an undivided co-ownership between the State and the other co-owners[12]. Moreover, with the exception of money laundering, the object of the offense *cannot be confiscated by equivalent*[13].

2°) The second object, also envisaged in Article 43, § 1 of the P.C., is constituted by the *instruments* of the offense. This refers to items "which served or were intended toward committing the offense". These are material objects the use of which has permitted or facilitated the carrying out of the offense, such as, for example, weapons, a car, a counterfeit key[14] or funds destined for the financing of a terrorist activity[15]. The existence of this condition falls within the sovereign domain of the trial judge's discretion[16]. Confiscation is also required in the case of a punishable attempted offense (crime or misdemeanor), whether the items were used to prepare the offense or instruments used after the offense, and which were used to commit it[17]. Moreover, it does not matter whether the instruments were actually used to commit the offense or the attempted offense: it is sufficient for the author to having mobilized them for that purpose[18]. Except

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[8] F. Lugentz, D. Vandermeersch, *Saisie et confiscation en matière pénale*, Bruxelles: Bruylant, 2015, 21.

[9] Some authors consider that the confiscation of the object of the offense is also compulsory in the event of contravenalization of a crime (D. Bernard, C. Guillain, B. Dejemeppe, «La confiscation pénale: une peine finalement pas si accessoire», in C. Guillain, P. Jadoul, J.F. Germain (eds.), *Questions spéciales en droit pénal*, Bruxelles: Larcier, 2011, 13).

[10] This condition is assessed at the time when the offense is committed (Cass., 25 November 2008, *Pas.*, 2008, n° 664).

[11] B. Dejemeppe, «La confiscation - L'état du droit en 2004», in *Saisie et confiscation des profits du crime*, Anvers: Maklu, 2004, 110.

[12] *Ibidem*.

[13] Cass., 4 April 2006, *Pas.*, 2006, n° 200.

[14] M.-A. Beernaert, H. Bosly, D. Vandermeersch, *Droit de la procédure pénale*, Bruxelles: Larcier, 2014, 458.

[15] Bruxelles, 27 June 2013, unpublished, quoted in F. Lugentz, D. Vandermeersch, *op. cit.*, 23.

[16] Cass., 5 June 1944, *Pas.*, 1944, 371.

[17] D. Bernard, C. Guillain, B. Dejemeppe, *op. cit.*, 16-17.

where otherwise provided by law[19], confiscation here also presupposes that the instrument *is the property of the convicted person*, a condition which is assessed at the time of the offense. This implies that *third-party confiscation* is here excluded. If the author of the offense is only co-owner of the confiscated instruments, the confiscation has the effect of creating a joint possession between the State and the other co-owners. In addition, the confiscation of an immovable property used to commit the offense is not authorized, except in cases where the law expressly provides for it[20]. Finally, it should be noted that, barring exceptions[21], *confiscation by equivalent* of the instrument of the offense was until recently not possible. The Law of 18 March 2018 amending various provisions of criminal law, criminal procedure and judicial law, amended Article 43-*bis*, § 2 of the P.C. in this respect. It has introduced confiscation by equivalent of the *instruments* of the offense, which puts the Belgian criminal law in conformity with the Directive 2014/42/EU[22].

Confiscation, whether direct or by equivalent, is here *compulsory* under the same regime as that in effect for the confiscation of the object of the offense. In the case of a conviction for a crime or misdemeanor, the compulsory nature of the confiscation presupposes, however, that the confiscation *does not have the effect of subjecting the convicted person to an unreasonably harsh penalty* (P.C., art. 43, § 1). This reduction in the compulsory nature of confiscation is the result of recent developments. In 2006, the Belgian Court of Cassation ruled that the purely compulsory nature of the confiscation was not contrary to Article 1 of the Additional Protocol to the ECHR when it involved acts used to commit a crime or a misdemeanor[23]. However, in its judgment n° 12/2017 of 9 February 2017, the Belgian Constitutional Court ruled that Article 43, § 1 of the P.C. violated Articles 10 and 11 of the Constitution, when read in conjunction with Article 1 of the First Additional Protocol to the European Convention on Human Rights, "in that it obliges the judge to pronounce the confiscation of the item which served to commit a crime or an offense when

[18] *Ibidem*, 15.

[19] See, point 1.2.

[20] This is the case in matters of pimping and matters relating to slumlords.

[21] Cass. 4 April 2006, *Pas.*, 2006, n° 200. An exception to this principle is provided, for those procuring and keeping a house of debauchery, slumlords, and human smuggling.

[22] Article 4.1 of the Directive provides that "Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia".

[23] Cass., 3 May 2006, *Pas.*, 2006, n° 254.

the sentence constitutes such a burden on the financial situation of the person to whom it is imposed as a violation of the right of ownership" (B.14). The Court considers here that the special confiscation of the instrument of the offense may, in certain cases, "put such burden on the financial situation of the person to whom it is imposed that it constitutes a measure disproportionate to the legitimate aim pursued, resulting in a violation of the right of property guaranteed by this provision of international law" (B.12). The absence of the judge's power of moderation, linked to the compulsory nature of confiscation, is therefore a source of unconstitutionality (Doc., Ch., 2017-2018, n° 2753/1, 59-60). The Belgian legislator therefore amended Article 43, § 1 of the P.C. by the Law of 18 March 2018 but also of recital 18 of Directive 2014/42/EU[24]. The new Article 43, § 1 of the P.C., maintains the compulsory nature of the confiscation of the instrument of the offense except "when it has the effect of subjecting the convicted person to an unreasonably harsh penalty". This mitigation of the compulsory nature of confiscation concerns only the instruments of the offense and not the object or proceeds of the offense.

3°) The third object consists of the *proceeds* of the offense (not to be confused with the profits derived from the offense - see below). Article 42, § 2 of the P.C. specifies that confiscation may relate to "things that have been produced by the offense". This refers to things that are created by or result from the offense, such as a counterfeit painting, counterfeit banknotes, narcotics from illegal cultivation or manufacture, etc. Here again, confiscation is *compulsory* in case of crime or misdemeanor but will be pronounced for the contraventions *only in the cases determined by the law*. On the other hand, this confiscation does not suppose that the product is the property of the convict, which makes it possible to deduce that *third-party confiscation* is here possible. This makes important the distinction, sometimes difficult to make in practice[25], between the object of the offense (for which *third-party confiscation* is not provided) and the proceeds of an offense (for which *third-party confiscation* is possible, since the product will be confiscated even if it is not or no longer the property of the convicted person). In fact, one and the same item (e.g. narcotics) may be both the object and the proceeds of the

[24] Recital 18 of Directive 2014/42/EU provides that "Member States may provide that, in exceptional circumstances, confiscation should not be ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person (…) ". However, the Directive states that "Member States should make a very restricted use of this possibility" and that it should be allowed only "in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive".

[25] P.E. Trousse, "Les principes généraux du droit pénal positif belge", *Les Novelles, Droit Pénal*, t. 1, Bruxelles: Larcier, 1967, 183, n° 890.

offense (in which case, the most severe regime will apply). Finally, it should be noted that, with some exceptions, *confiscation by equivalent* of the proceeds of the offense is not allowed.

4°) The fourth item is constituted by the *profits* derived from or generated by the offense. Article 42, § 3 of the P.C. provides for the confiscation of "patrimonial benefits derived directly from the offense", of "substituted properties and values" and of "income from these invested benefits". These three assumptions are aimed at confiscating profits from a criminal offense. *Patrimonial benefits derived directly from the offense* are defined in Article 42, § 3 of the P.C. as "any property or value that the offender obtained by committing the offense"[26], whether said benefit results from the offense directly or indirectly[27]. This patrimonial benefit may take any of the following shapes: movable or immovable properties, tangible or intangible assets. The only requirement is that the pecuniary benefits result from the offense (Doc., Ch., 1989-1990, n° 987/1, 3), which is left to the sovereign appreciation of the trial judge[28], subject to review by the Court of Cassation[29]. It may be the salary of a hit-man, the amount of money resulting from the sale of drugs, profit from fraud, vehicles, buildings, works of art, etc.[30]. By *properties and values substituted for the patrimonial benefits*, Article 42, § 3 of the P.C. refers to "replacement assets" which are substitutes for the primary economic benefits. This may include, for example, goods purchased with stolen money, shares or bonds purchased with money derived from the offense, etc. As for *incomes from invested benefits*, it is all types of profits that result from both primary and replacement assets[31]. This may include bank interest generated by money of illicit origin, rents from a building purchased with profits from drug trafficking, etc.

In this area, confiscation is, with one exception[32], *optional* and must be the subject of a *written requisition by the public prosecutor* (P.C., art. 43-*bis*, § 1). It is possible for profits derived from crimes, misdemeanors and contraventions; it applies to intentional and unintentional offenses; it

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[26] C. Meunier, «*Du neuf dans les pouvoirs de saisie pénale du juge d'instruction et dans les possibilités de confiscation spéciale*», *J.L.M.B.*, 1997, 1452.

[27] The concept "directly" here does not include a limitation of confiscation to benefits obtained without any intermediate step of the offense. (F. Lugentz, D. Vandermeersch, *op. cit.*, 26).

[28] Cass., 10 January 2012, *Pas.*, 2012, n° 18.

[29] Cass., 27 September 2006, *Pas.*, 2006, 1858.

[30] B. Bilquin, A. Braem, «Blanchiment», in *Droit pénal et procédure pénale*, Bruxelles: Kluwer, 2003, suppl. 6, 32.

[31] Cass., 18 October 2011, *Pas.*, 2011, n° 555.

[32] Article 135-*bis*, § 2 of the P.C. provides for the compulsory confiscation of items received in the context of an offense against the safety of the State.

covers both ordinary criminal offenses (drug trafficking and trafficking in human beings, terrorism, etc.) as well as certain offenses of a financial nature (economic and social offenses, serious and organized tax evasion, fraud to the financial interests of the EU, financial scams…)[33]. The gross amount of profits is retained here, but since confiscation is optional, the judge may limit himself to the net amount of the benefits[34]. In case of multiple perpetrators, the profit drawn by each of the authors of the offense is not the necessary measure of confiscation: confiscation (possibly by equivalent) can relate to all the patrimonial advantages derived from the offense, independently of the personal benefit that the perpetrator has derived from it[35]. These profits derived from the offense must not be the property of the convicted person and they may never have entered the patrimony of the latter. *Third-party confiscation* is therefore provided here. However, in this case, the third-party concerned will be able to assert their rights under the "lawful possession" which they enjoy of the confiscated item (P.C., art. 43-*bis*, § 4)[36]. If the convict is co-owner of the item, confiscation will again create a joint possession between the State and the third-party owner(s). In case of multiple owners, the economic benefits resulting from the participation of the co-perpetrator or accomplice of the offense will be considered as "patrimonial benefits derived directly from the offense" and may therefore be subject to confiscation, even if these benefits are not or not anymore the property of the co-author or the accomplice (and are thus passed in the patrimony of a third-party)[37]. In addition, the amount of the confiscation cannot exceed the amount of the patrimonial benefit derived from the offense (nor of the value of the property and value substituted for the property benefits if the purchaser of the property is of bad faith)[38]. In addition, Article 43-*bis*, § 7 of the P.C. authorizes the judge to provide an amount or a value lower than this maximum amount, in order not to subject the convicted person to an "*unreasonably harsh penalty*", which the here optional character of confiscation implicitly implies. Finally, these broader patrimonial benefits or "profits" derived from the offense may be *confiscated by equivalent* when they can not be found in the offender's estate. In this case, the judge will proceed with their monetary evaluation and the con-

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[33] F. Lugentz, D. Vandermeersch, *op. cit.*, 27.

[34] *Ibidem*, 29-30.

[35] Cass., 9 May 2007, *Pas.*, 2007, n° 239.

[36] Cass., 29 May 2001, *Pas.*, 2001, n° 316.

[37] Cass., 12 November 2013, *Pas.*, 2013, n° 597.

[38] Cass., 9 May 2007, *Pas.*, 2007, n° 239. In the case of multiple authors and/or accomplices, the judge may allocate this maximum amount among the various participants in the offense.

fiscation will be based on a sum of money equivalent to these patrimonial benefits (P.C., art. 43-*bis*, § 2).

Confiscation by equivalent of these patrimonial benefits can only relate to a sum of money and not on specific items of property[39]. However, the receiver may proceed to the forced execution of this confiscation on movable and immovable property which are part of the patrimony of the convicted person (Mortgage Law, art. 7 and 8). Confiscation by equivalent is here always *optional* and here again, the judge can reduce the amount of the confiscation in order to spare the convict an "unreasonably harsh sentence" (P.C., art. 43-*bis*, § 7).

5°) The fifth object liable to confiscation is constituted by the *additional patrimonial benefits* removed from the offense (P.C., art. 43-*quater* §§ 1 and 2). This extended confiscation will be discussed in the point 1.1.2.

6°) A sixth object susceptible of being confiscated is the *patrimony of a criminal organization*. Article 43-*quater*, § 4 of the P.C. provides for the confiscation, compulsory and subject to the rights of bona fide third-party[40], of the assets of a criminal organization. This confiscation is based on the non-rebuttable presumption of the unlawful origin of the assets of the criminal organization. Because of the "vagueness" which surrounds both the notion of criminal organization and the identification of its patrimony, this provision is seldom applied by judges[41].

7°) It should also be noted that in the case of a *concurrence of offenses*, the penalties of confiscation are always cumulative and that the rules provided for in Articles 64 and 65 of the P.C. allowing a more favorable punitive regime to the offender are not applicable[42].

1.1.2. *Extended confiscation*

As pointed out above (point 1.1.1) Article 43-*quater* of the P.C. provides for the principle of extended confiscation. As was recalled by the Court of Cassation[43], this provision allows the judge to consider the confiscation of these additional patrimonial benefits or their equivalent found in the estate or in the possession of the convict, when there is serious and concrete evidence that these profits are derived from a offense.

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[39] Cass., 3 June 2009, *Pas.*, 2009, n° 370.

[40] See M.L. Cesoni, «L'organisation criminelle», in *Les infractions*, vol. 5, *Les infractions contre l'ordre public*, Bruxelles: Larcier, 2013, 614.

[41] F. Lugentz, D. Vandermeersch, *op. cit.*, 39.

[42] *Ibidem*, 64.

[43] Cass., 15 October 2014, *Pas.*, 2014, 2244.

In its first version, Article 43-*quater*, § 2 of the P.C. authorized the confiscation of the additional patrimonial benefits linked to "identical facts" to the offenses envisaged in Article 43-*quater*, § 1 of the P.C. and for which the author had not been previously sentenced, provided that the presence of these benefits in the patrimony of the convict could only be explained by the criminal activity for which they had been wholly or partly found guilty[44]. To make criminal extended confiscation in line with the requirements of Directive 2014/42/EU[45], the Belgian legislator amended Article 43-*quater*, §§ 2 and 3 of the P.C. Under the Law of 18 March 2018, the new Article 43-*quater*, § 2 of the P.C. reproduces the whole of the previous mechanism which was largely in line with the Directive. However, it provides that extended confiscation will no longer relate to profits related to "identical facts" to the offenses provided for in § 1, but to profits related to "offenses likely to give rise, directly or indirectly, to economic advantages, provided that they appear under the same heading, provided for in § 1, as the offense which is the subject of the sentence". This amendment widens the scope of the offenses liable to generate extended confiscation, even if this field remains limited to the list of offenses exhaustively listed in Article 43-*quater*, § 1 of the P.C.

The *list of offenses* liable to lead to confiscation of additional patrimonial benefits has been amended in 2018. Still provided for in Article 43-*quater*, § 1 of the P.C., this list is organized around three categories of offenses. The *first category* includes certain serious violations of International Human Rights Law as well as all terrorist offenses where they are likely to generate patrimonial benefits[46]; the counterfeiting of the euro and some facts of public and private corruption; debauchery and prostitution of minors, trafficking in human beings and human smuggling, child pornography; concealment and money laundering, traffic of certain psychotropic substances or the administration of hormones to animals. For these offenses, considered particularly serious, the conviction alone authorizes the use of confiscation, without there being necessary to demonstrate that these offenses were committed within the framework of a criminal organization (Doc. Ch., 2001-2002, n° 1601/1, 38). A *second category* of offenses includes various forms of participation in a criminal organization (P.C., art. 324-*ter*) and various offenses that can lead to con-

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[44] M.A. Beernaert, H. Bosly, D. Vandermeersch, *op. cit.*, 467.

[45] Article 5 of the Directive refers to "the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit".

[46] The list of terrorist offenses has been extended to comply with Directive 2014/42/EU.

fiscation only if committed as part of a criminal organization[47]. Finally, a *third category* concerns serious acts of tax evasion, organized or not, whether committed within the framework of a criminal organization or not (Doc. Ch., 2001-2002, n° 1601/1, 39).

From the outset, this rule posed a problem: providing for a sentence related to facts for which the author was not found guilty, it appeared hardly compatible with the right to a fair trial and the presumption of innocence. In 2002, however, the Belgian legislator was encouraged in this direction by the Philips judgment against the United Kingdom (5 July 2002), in which the ECHR admitted the compatibility of such a rule with the Convention[48]. Extended confiscation has, however, been accompanied by two types of conditions, regarding the confiscation of additional benefits. Firstly, the confiscated property benefits must have been acquired during a "relevant period of time"[49]. This relevant period begins five years before the person being charged and runs until the date of the conviction (Article 43-*quater* § 2 of the P.C.). On the other hand, it is necessary for the Public Prosecutor's Office to establish the existence of serious and concrete indicators that these pecuniary benefits derived from facts identical (or similar)[50] to the offense (cf. the list of offenses) and that the convicted person (or a third-party) cannot plausibly attest to the contrary (P.C., art. 43-*quater*, §§ 2 and 3).

Confiscation may be *direct* or pronounced *by equivalent*, but in both cases, it is always *optional* (P.C., art. 43-*quater*, § 1). It must have been the subject of a *requisition by the public prosecutor* (P.C., art. 43-*quater*, § 1). It should be noted, however, that the new Article 43-*quater*, § 1 of the P.C. does not require, contrary to the provisions of the Directive, that the confiscated property be the property of the accused. It is enough, as was already the case before, that these items be or having been "in the possession" of the accused. A form of *third-party confiscation* is therefore indeed envisaged. Belgian criminal legislation is here more stringent than the Directive, in that it "opens" the scope of extended confiscation to additional property benefits that would be the property of third-parties.

Finally, Article 43-*quater*, § 3 of the P.C. grants the judges a power of moderation: they may decide to disregard part of the relevant period or part of the income, property or values they determine in order to not subject the convict to an unreasonably harsh sentence.

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[47] This would include, for instance, theft with violence or threats, murder to facilitate theft, theft and extortion or trafficking in nuclear material, etc.

[48] European Court of Human Rights, 5 July 2002, *Philips v. UK*.

[49] This relevant period covers a period beginning five years before the accused is charged, and runs until the date of the sentencing.

[50] F. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 38.

1.1.3. Non-conviction based confiscation

Non-conviction based confiscation can intervene in different cases.

a) In the case of a *mental disorder* of the offender, resulting in the absence of a criminal conviction and the pronouncement of a measure of internment, special confiscation is pronounced (Law of 5 May 2014 on internment of persons, art. 16). The general regime of confiscation applies in this case.

b) If the offender is a *minor*, except in exceptional cases, he is referred to the juvenile court and is not criminally convicted. In this case, the juvenile court may nevertheless decide on the confiscation of property, when the act qualified as offense is declared as established (Law of 8 April 1965 on the protection of youth, art. 61).

c) In the event of the *accused absconding* before trial, he/she may be convicted by default and thus sentenced to the penalty of confiscation according to the rules mentioned in point 1.1.1.

d) In the event of *death* of the defendant before its conviction, the prosecution is extinguished. Therefore, there will be no sentence, but confiscation as a security measure may possibly be pronounced. De facto, the seized items may not be returned if the heirs cannot assert a legitimate claim on them (for example, stolen or defrauded items or money obtained by the sale of narcotics)[51].

e) In the case of a *penal transaction* the public prosecutor shall invite the offender liable to confiscation to abandon the property or assets frozen or, if they are not frozen, to surrender them to a place defined by the prosecutor (Code of Criminal Procedure, hereinafter C.C.P., art. 216-*bis*, § 1, § 6). In such a case of criminal settlement, the article does not specify that these assets must be part of the patrimony of the alleged offender. *Third-party confiscation* is thus an option here. In the case of *penal mediation*, the public prosecutor invites the offender liable to confiscation to abandon the objects already frozen belonging to him or, if they are not frozen, to hand them over to a place determined by the prosecutor (C.C.P., art. 216-*bis*, § 3). *Third-party confiscation* is not considered here. In both cases, confiscation is not a sentence in the true sense of the term, as long as it is not pronounced by a judge. It is rather "a voluntary renunciation of the right of ownership"[52].

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[51] F. Kuty, *Principes généraux du droit pénal belge*, T. IV: *La peine*, Bruxelles: Larcier, 2017, 1080-1083.

[52] F. Lugentz, D. Vandermeersch, *op. cit.*, 16.

f) In the case of *suspension of the sentence*, confiscation may or must be ordered against the suspect or the accused in accordance with the law applicable to the facts (Law of 29 June 1964 with regard to suspension, suspended sentence and probation, art. 6, § 2). As a result, the suspension of the pronouncement of the sentence has no effect on the confiscation[53]. It must be added here that the sentence of confiscation cannot be suspended (Law of 11 February 2014, art. 52).

g) If the judge confines himself to *pronouncing a conviction without main penalty*, special confiscation is nevertheless pronounced in accordance with the law applicable to the facts (Preliminary Title of the Code of Criminal Procedure, art. 21-*ter*, § 2, in fine). This rule continues to apply if the judge takes such a decision on the ground that the reasonable delay to try has been exceeded[54].

h) In the event of *prescription*, the confiscation as a security measure may possibly be pronounced.

1.1.4. *Other types of confiscation*

a) Belgian criminal law also provides for *specific criminal confiscation regimes* for certain types of particular offenses. The special rules here are either derogatory to common law, or maintain the application of common law but broaden the conditions for the application of confiscation. These special rules exist in respect of stolen goods and laundering, trafficking in human beings and human smuggling, pimping, narcotics, customs and excise, haulage and transport services, hunting, weapons and copyright and intellectual property rights. It suffices here to consider the specific regimes for dealing with stolen goods and money laundering, on the one hand, and drug trafficking on the other, insofar as they play an important role in matters of confiscation.

In order to determine the confiscation regime applicable to *concealment and money laundering*, it is necessary to combine the rules of ordinary law (P.C., art. 42 to 43-*quater*) and the rules specific to the offense of money laundering (P.C., art. 505, §§ 6 and 7)[55]. By building on the or-

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[53] D. Libotte, H. Van Bavel, «Het wel en wee van het witwasmisdrijf», *Tijdschrift voor Strafrecht*, 2007, 369-373.

[54] F. Lugentz, D. Vandermeersch, *op. cit.*, 66. The authors consider that, in this case, it should be admitted that "the judge shall confiscate to a level lower than that which he would have ordered in the absence of such an overrun".

[55] For a detailed analysis, see D. Vandermeersch, «Confiscations spéciales en matière de blanchiment», in M. Van Molle (eds.), *Blanchiment de capitaux et professions juridiques*, Limal: Anthemis, 2014, 31-58.

dinary law system, three types of confiscation can be envisaged. The first concerns the confiscation of the *object of laundering*. Article 505, §§ 5 to 7 of the P.C. provides for the direct confiscation of patrimonial benefits derived directly from the primary offense of money laundering (e.g. drug trafficking), and of substituted properties and values or incomes from invested benefits. These goods, which constitute the "object" of money laundering according to Article 42, § 1 of the P.C., will therefore be confiscated on the basis of this article (and not Article 43-*bis* of the P.C.). Confiscation is here in principle *compulsory*[56]. It does not presume that the property is (still) the property of the convicted person (P.C., art. 505, §§ 5 to 7) and thus authorizes *third-party confiscation*. In this case, third-parties – those who have not been convicted of the primary offense or of money laundering – will be able to assert their rights over the items by virtue of their "lawful possession", which remains to the sovereign appreciation of the trial judge[57]. The amount of the special confiscation may not exceed the amount of the object of the laundering[58]. *Confiscation by equivalent* of the object of money laundering is also provided, when the goods that constitute this object cannot be found in the patrimony of the convict (or elsewhere). This confiscation can only relate to a sum of money[59]. It is compulsory[60] but subordinate to the principle of subsidiarity: if the object of money laundering is part of the patrimony of the convicted person, only direct confiscation will be pronounced and the same applies if this object is found elsewhere[61]. In accordance with ordinary law (P.C., art. 42, § 1), the confiscation *of instruments intended for or used to commit the offense of money laundering* is compulsory when those instruments are found in the property of the convicted person. Ownership of property by the convict is here a condition of confiscation, and *third-party confiscation* is therefore excluded. This includes movable things (for example, a car), but not immovable properties or items that are the subject of the money laundering or the patrimonial benefits derived from that offense[62]. Pursuant to the Article 42, 3° of the P.C., *the patrimonial benefits, substituted properties and values, and income from*

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[56] Subject to the temperaments provided for in Article 505, §§ 6 and 7, *in fine* of the P.C.

[57] Cass., 4 March 2014, *Pas.* 2014, n° 170. The judge appreciates, in particular with the help of the elements of the file, the good faith of the third-party.

[58] Cass., 14 April 2010, *Pas.*, 2010, n° 80.

[59] Cass., 3 June 2009, *Pas.*, 2009, n° 370.

[60] Subject to the temperaments provided for in Article 505, §§ 6 and 7 of the P.C.

[61] F. Van Volsem, «Witwassen: de sancties», *Tijdschrift voor Strafrecht*, 2011, 413.

[62] *Ibidem*, 402.

invested benefits may be confiscated if they result directly from the offense of money laundering (e.g., a commission charged by the "launderer"). Confiscation is always *optional*, must be required by the public prosecutor, and is not subject to the ownership condition. It is the judge who decides whether a patrimonial benefit is derived, and to what extent, from the offense of money laundering[63]. According to the Court of Cassation, if the original laundered assets are the subject of money laundering, then the assets resulting from the transaction constitute economic advantages resulting from the offense of money laundering and will therefore be confiscated as such[64]. Finally, *confiscation of additional patrimonial benefits* (or of substitute properties or values, or income from invested benefits) is allowed in the case of money laundering. This confiscation is direct but can also take place *by equivalent* when the property has disappeared from the property of the convicted person. It is always *optional* and requires a requisition from the public prosecutor. Its amount may be weighted by the judge who wants to avoid an overly severe sentence (P.C., art. 43-*quater*, § 3, last subpara).

With regard to drug trafficking, Article 4, § 6 of the Law of 24 February 1921 with regard to drug trafficking provides for *optional third-party confiscation* of vehicles, devices, instruments or things that constituted the object or the instrument of the offense[65]. Third-party confiscation is therefore possible, even when the item belongs to a bona fide third-party. The Constitutional Court ruled that Article 4, § 6 violated Articles 10 and 11 of the Constitution in that it did not provide for the return of confiscated items to these persons or their summons, so that they were unable to express themselves regarding the confiscation[66].

b) We find also in Belgian law confiscation *as a safety measure*. This confiscation is intended to remove from circulation objects or substances considered dangerous or harmful to public health or safety[67]. These may be weapons, explosives, narcotics, or child pornography, for instance[68]. Confiscation may be pronounced here independently of any criminal charge or conviction.

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[63] Cass., 17 December 2013, *Pas.*, 2013, n° 690.

[64] Cass. 9 September 2014, *Pas.*, 2014, 1793.

[65] The offenses concerned are provided for in Articles 2, 2°, 2-*bis* and 3 of the Law of 24 February 1921.

[66] C. C., 3 April 2014, n° 65/2014.

[67] D. Bernard, C. Guillain, B. Dejemeppe, *op. cit.*, 40.

[68] B. Dejemeppe, "La confiscation", *in Saisie et confiscation des profits du crime*, Anvers, Maklu, 2004, 101.

1.2. *Third-Party Confiscation*

Belgian criminal law does not provide for a set of specific penal provisions relating to third-party confiscation. The existence and regime of third-party confiscation can be deduced from the implicit place left for it in Articles 42 to 43-*quater* of the P.C., or in other specific provisions relating to confiscation for certain offenses. This explains why, for each case of criminal confiscation envisaged in point 1.1, we specified when the regime of third-party confiscation was envisaged. In a pedagogical concern, we summarize here the elements outlined above, adding certain rules for specific offenses.

a) As a rule, third-party confiscation is not envisaged for the *object* of the offense (P.C., art. 42, § 1).

However, in the case of money laundering, third-party confiscation is compulsory, but third-parties may assert their rights over the item by virtue of their "lawful possession". In terms of drug trafficking, confiscation is optional, even when the thing belongs to a third-party. Bona fide third-parties may however assert their rights over the matter[69].

In the matter of slumlords, third-party confiscation is also mandatory, without prejudice to the rights of third-parties on the property concerned. It can also take place by equivalent (P.C., art. 433-*terdecies*, §§ 2 and 3).

b) As a rule, third-party confiscation is not envisaged for the *instrument* of the offense (P.C., art. 42, 1°). However, in matters of drug trafficking, optional confiscation is provided, even when the thing belongs to a bona fide third-party. Such confiscation is possible here by equivalent, but only for the convict. Similarly, with regard to pimping and keeping a brothel, Article 382-*ter* of the P.C. provides for compulsory confiscation of the instrument of the offense even if it does not belong to the convicted person, without prejudice to the rights of third-parties on the concerned goods. Confiscation can here take place by equivalent. In the area of trafficking in human beings, third-party confiscation is compulsory, without prejudice to the rights of third-parties on the property concerned. It can take place by equivalent. (P.C., art. 433-*novies*, § 6). In matters of slumlords, third-party confiscation is also mandatory, without prejudice to the rights of third-parties on the property concerned. It can also take place by equivalent (P.C., art. 433-*terdecies*, §§ 2 and 3). Finally, in the area of human smuggling, third-party confiscation of the instrument of the offense is also mandatory, without prejudice to the rights of

[69] C. C., 3 April 2014, n° 65/2014.

third-parties on the property concerned. It can also take place by equivalent (Law of 15 December 1980 on access to the territory, residence, settling and removal of foreigners, art. 77-*sexies*).

c) With regard to *proceeds* derived from the offense, third confiscation is provided for, since Article 42, § 2 of the P.C. does not condition the confiscation of a property requirement for the convicted person. It has a mandatory character and can be pronounced by equivalent.

d) With respect to *profits* derived from the offense, the same reasoning applies. Reading the Article 42, § 3 P.C. makes it possible to deduce that third-party confiscation exists and that it has an optional character (except in case of an offense against the security of the State, where it is compulsory (P.C., art. 135-*bis*, § 2)).

e) With regard to *additional patrimonial benefits in a broad sense* derived from the offense, third-party confiscation is provided for, since Article 43-*quater*, § 1 of the P.C. does not require that the confiscated things be the property of the convicted person and that one is satisfied with them being or having been in "their possession". The same principle applies to the extended confiscation of these additional patrimonial benefits, on the basis of the same provision.

f) Third-party confiscation is also possible in the event of a *penal transaction*. It is optional (C.C.P., art. 216-*bis*, § 1, subpara 6).

Kinds of confiscation	Legal basis	Compulsory	Third-party confiscation	By equivalent
Safety measure	*No general legal basis*	*Yes*	*Yes*	*No*
Object of the offense	P.C., art. 42, 1°, 43 and 43-*ter*	Yes	No	No
Instruments of the offense	P.C., art. 42, 1°, 43, 43-*bis* and 43-*ter*	Yes	No	Yes
Proceeds of the offense	P.C., art. 42, 2°, 43 and 43-*ter*	Yes	Yes	No
Profits generated by the offense	P.C., art. 42, 3°, 43-*bis* and 43-*ter*	No	Yes (but protection of bona fides third-party)	Yes
Extended confiscation	P.C., art. 43-*quater*, § 1 to 3	No	Yes (but protection of bona fides third-party)	Yes
Patrimony of a criminal organization	P.C., art. 43-*quater*, § 4	Yes	Yes (but protection of bona fides third-party)	Yes
Money laundering	P.C., art. 505	Yes	Yes (but protection of bona fides third-party)	Yes
Drug trafficking	Law of 24 February 1921, art. 4, § 6	Yes	Yes (but protection of bona fides third-party)	Yes

2. *Procedural aspects*

Confiscation should not be confused with freezing of assets, which is often, for reasons of efficiency, an indispensable prerequisite for confiscation[70]. Therefore, we will first discuss the rules on freezing and then treat those related to confiscation.

2.1. *Freezing*

2.1.1. *Procedures for the freezing of assets*

The rules on criminal freezing are found in articles 35 to 40-*bis* of the C.C.P., as far as the preliminary investigation is concerned; in Article 89, with respect to investigation; in Articles 46-*quinquies* and 89-*ter* for discreet visual inspection; in Articles 524-*bis* and 524-*ter*, in the context of the special inquiry into economic benefits, and in Articles 464/1 to 464/41, in the framework of the criminal execution investigation.

The procedures for the lifting of freezing are governed, during the preliminary investigation, by Articles 28-*sexies* and 28-*octies* of the C.C.P. and, during the investigation, by Articles 61-*quater* and *sexies* of the C.C.P.

Specific provisions on freezing are also provided for in special criminal law or in particular criminal law (see below point 2.1.4.).

2.1.2. *Competent authorities for the request of a freezing order*

In Belgium, the pre-trial investigation is composed of two phases: the preliminary investigation phase ('information') and the investigation phase ('instruction').

The preliminary investigation is the set of acts intended to search for offenses, their authors and their evidence. It aims at gathering the elements useful for the exercise of the public action. It is conducted under the direction and authority of the public prosecutor (C.C.P., art. 28-*bis*, §§ 1 to 3).

The pre-trial investigation can also be entrusted, by the public prosecutor or the victim, to the investigating judge. To ensure its independence and its impartiality, investigating judge never search for offenses, but only authors and aims at gathering the evidences useful for the demonstration of the truth (C.C.P., art. 55).

Freezing is an act that falls under both the preliminary investigation

[70] However, confiscation is not legally subject to prior freezing, so that courts can confiscate things that have not been frozen.

phase and the investigation phase. It can therefore be ordered by both the public prosecutor and the investigating judge.

Preliminary investigation acts cannot normally include any act of coercion or infringe individual rights and freedoms. Nevertheless, Article 28-*bis*, § 3 of the C.C.P. states that "these preliminary investigation acts may, however, include the freezing of the assets mentioned in Articles 35 and 35-*ter*".

In the context of preliminary investigation, freezing can be operated by the public prosecutor both in flagrant state (C.C.P., art. 35) and outside flagrance (C.C.P., art. 28-*bis*, § 3), in the context of a reactive or proactive investigation (C.C.P., art. 28-*bis*, § 3). It may also be ordered as part of a special inquiry into economic benefits or as part of the criminal execution investigation.

According to Article 89 of the C.C.P.[71], provisions relating to freezing in the context of preliminary investigation are applicable to the investigation phase. As a result, the powers of the public prosecutor and the investigating judge in matters of freezing are common.

2.1.3. *Competent authorities to impose a freezing order*

In theory, freezing can be executed by both the public prosecutor and the investigating judge. The public prosecutor has the status of judicial police officer (C.C.P., art. 9), while the investigating judge may perform all acts that fall within the jurisdiction of the judicial police (C.C.P., art. 56, § 1).

In practice, the execution of freezing will be delegated to the police. The latter have the task, in the exercise of their judicial police duties, of "seeking, freezing and making available to the competent authority the objects the freezing of which is prescribed" (Law of 5 August 1992 on the police function, art. 15, 3°). On this occasion, they must "transmit to the competent authorities the report of their mission as well as the information collected on this occasion" (Law of 5 August 1992, art. 15, 4°). The judicial police officers have the right to confiscate the documents they discover, without having to wait for instructions from the public prosecutor or the investigating judge[72] and without being required to be judicial po-

[71] C.C.P., art. 89: "The provisions of Articles 35, 35-*bis*, 35-*ter*, 36, 37, 38, 39 and 39-*bis* concerning the freezing of objects whose search may be made by the public prosecutor, in the case of *flagrante delicto*, are common to the judge of the 'instruction'. In addition, the investigating judge may perform all acts that fall within the competence of the judicial police, the information and the investigation" (C.C.P., art. 56, § 1).

[72] Antwerp, 19 March 2003, *Rechtskundig Weekblad*, 2003-2004, 1696, quoted in M.-A. Beernaert, H. Bosly, D. Vandermeersch, *Droit de la procédure pénale*, Bruges: La Charte, 2017, 487.

lice officers. However, only an agent who is a judicial police officer is authorized to draw up the minutes of freezing (C.C.P., art. 37, § 1).

It has been held that "judicial police officers who carry out a search with warrant or a regular search must confiscate all items that appear to be referred to in Article 42 of the PC and all that can be used for the ascertainment of truth (C.C.P., art. 35)"[73].

According to Article 40-*bis* of the C.C.P., "the public prosecutor may, in the interests of preliminary investigation, authorize the police to postpone the freezing … of all items referred to Article 35". This technique consists in "not immediately confiscating the object of the offense or the property directly related to the offense or not directly arresting certain alleged offenders, in order to identify the (other) perpetrators of the offense"[74].

Finally, it should be noted that, in the context of penal transaction and penal mediation, the public prosecutor must invite the perpetrator of the offense "giving rise or that may give rise to confiscation to relinquish, within a period he fixes, the property or the patrimonial benefits confiscated or, if they are not confiscated, to put them back to a place designated by the judge" (C.C.P., art. 216-*bis*, § 1 and 216-*ter*, § 4).

2.1.4. *Conditions for the imposition of a freezing order*

Substantially, according to Article 35, § 1 of the C.C.P., "the public prosecutor will freeze anything that appears to be one of the items referred to in Articles 42 and 43-*quater* of the P.C. and all that can be used to ascertain the truth".

a) *The freezing of items that can be used to ascertain the truth*. Freezing can, on the one hand, relate to the things that are intended to contribute to ascertaining the truth (C.C.P., art. 35). This is what is commonly referred to as exhibits, but also all exculpatory material[75]. It can be the murder weapon, the stained clothing of a murder victim, the seized drug, mail addressed to or received by a suspect, the bookkeeping of a company[76].

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[73] Cass., 19 February 2002, *Pas.*, 2002, n° 498.

[74] M.-A. Beernaert, N. Colette-Basecq, C. Guillain, L. Kennes, P. Mandoux, M. Preumont, D. Vandermeersch, *Introduction à la procédure pénale*, Bruges: La Charte, 2017, 153.

[75] See, in relation to this, Article 37, § 1 of the C.C.P.: "If there are suspicious papers or effects in the suspect's home which may be used for conviction or for discharge, the general attorney shall freeze said effects or papers".

[76] Fr. Lugentz, D. Vandermeersch, *op. cit.*, 104.

b) *The freezing of things that are liable to be confiscated*. Freezing may, on the other hand, relate to items that may be confiscated under Article 42 of the P.C. (see point 1.1.1.).

Among these items, are the patrimonial benefits derived directly from an offense. According to the Court of Cassation, "all that appears to constitute a patrimonial benefit derived from an offense as provided for in the aforementioned Article 35, refers not only to the economic benefits derived directly from an offense but also to all that derives from it indirectly, and therefore also the property and the values that were substituted for them or the income from these benefits invested as provided for in Article 42, 3° of the P.C.". The Court therefore considers that the public prosecutor and the investigating judge can freeze them without "establishing that the assets and values which have been substituted for the patrimonial benefits and the income from the invested benefits, correspond to the conditions set out in Article 42, 3° of the P.C., (…) It is enough that there be indications of the latter"[77]. The amount of the freezing may not exceed the amount of the alleged pecuniary benefit derived from the offense[78]. Freezing may also relate to claims (C.C.P., art. 37, § 2).

c) *Freezing of a building*. Article 35-*bis* of the C.C.P. authorizes freezing of real estate as a precaution, provided that the building appears to constitute a property benefit derived from an offense or a property that it has come to replace[79]. Freezing is therefore not possible under Article 35 of the C.C.P.[80], either when the building is the object of the offense or if it has served it or was intended to do so[81]. However, this does not apply in the case of stowage of stolen goods and money laundering: in these cases, the property benefit derived from an offense is, under Article 505, §§ 5 and 7 of the P.C., the object of the offense, which must be confiscated and thus frozen, even if the property does not belong to the convicted person: "the circumstance whereby the owner of the property is not the author or the co-perpetrator of the offense from which the initial pecuniary benefit is derived, or that the investigating judge who orders the freezing is not responsible for the investigation of this basic offense, constitutes no obstacle to said freezing"[82]. Derogations are also possible in special criminal law.

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[77] Cass., 15 February 2000, *Pas.*, 2000, n° 124.

[78] Cass., 9 May 2007, *Pas.*, 2007, n° 239.

[79] Cass., 15 February 2000, *Pas.*, 2000, n° 124.

[80] M.-A. Beernaert, H. Bosly, D. Vandermeersch, *op. cit.*, 491 and 515.

[81] Cass, 27 May 2009, *Revue de droit pén*al *et de criminologie*, 2012, 889 with contrary conclusions of general attorney D. Vandermeersch.

[82] Cass., 4 March 2008, *Pas.*, 2008, n° 152.

d) *Freezing by equivalent*. Assuming that "there is serious and concrete evidence that the suspect has obtained a pecuniary benefit as defined in Articles 42, 3° or 43-*quater*, § 2 of the P.C., and that the items which materialize this patrimonial benefit cannot or can no longer be found as such in the patrimony of the suspect who is in Belgium or have been mixed with lawful things", the public prosecutor and the investigating judge may freeze "other things which are in the patrimony of the suspect, equal to the supposed amount of said patrimonial benefit" (C.C.P., 35-*ter*, § 1). Freezing by equivalent only relates to the things referred to in Articles 42, 3° or 43-*quater*, § 2 of the P.C. and not to the things referred to in Article 42, 1° of the P.C.[83], so that it does operate "only with respect to the pecuniary benefits and not with respect to the object of the offense, its product or its instruments"[84].

However, since the Law of 5 February 2016, freezing by equivalent is applicable to the object of concealment or money laundering and, since the Law of 18 March 2018, also to the instruments which served or which were intended to commit the offense with. The purpose of the latter amendment is to bring the freezing regime in line with that of confiscation by equivalent, which relates both to the object of concealment or laundering and to its instruments (C.C.P., art. 35-*ter*, § 1): "the transposition of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of the instruments and proceeds of crime in the European Union requires the provision, in the P.C., of confiscation by equivalent of the instruments of the offense. It is therefore necessary, in order to ensure the effectiveness of its execution, also for the C.C.P., to provide for freezing by equivalent of the instruments of the offense" (Doc., Ch., 2017-2018, n° 54-2753/1, 9). In order, not to subject the person to an unreasonably harsh penalty, the public prosecutor or the investigating judge may reduce the monetary assessment, in accordance with Article 43-*bis* of the P.C.

Unlike confiscation by equivalent, which can only concern a sum of money and not specific property, freezing by equivalent can relate to movable property, real estate and receivables, but in no case exempt property (C.C.P., art. 35-*ter*, § 2). "These are, in particular, goods indispensable to the household or profession, the exempt amount of income, and property belonging to public institutions"[85].

Freezing by equivalent is subject to the principles of proportionality and subsidiarity: "on the one hand, the value of the goods frozen may

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[83] Cass. 4 April 2006, *Nullen Crimen*, 2006, 3, 208.

[84] Cass. 4 April 2008, *Pas.*, 2008, n° 204.

[85] Fr. LUGENTZ and D. VANDERMEERSCH, *op. cit.*, 118 and 119.

not exceed that of the alleged proceeds of the offense which may be taken into account for confiscation; on the other hand, like confiscation by equivalent, freezing by equivalent is subsidiary and can only be ordered if, in the assets of the suspect in Belgium, the patrimonial benefits derived directly from the offense or their substitute can no longer be found as such"[86].

e) *Freezing of additional* patrimonial *benefits*. The direct or equivalent freezing of the additional economic benefits referred to in Article 43-*quater* of the C.C.P., is possible on the basis of Articles 35 and 35-*ter* of the C.C.P. (see point 1.1.2.).

f) *Freezing of the assets of a criminal organization*. The same applies to the assets of a criminal organization that can be confiscated under Article 43-*quater*, § 4 of the P.C., so that it can also be seized on the basis of Articles 35 and 35-*ter* of the C.C.P. (see point 1.1.1.).

g) *The freezing of things under special criminal law*. Special criminal law may provide for specific measures in matters of freezing[87].

Thus, Articles 382-*ter* (corruption of youth, debauchery and pimping), 433-*novies* and *quaterdecies* (trafficking in human beings and abuse of vulnerability) of the P.C., as well as Article 77-*sexies* of the Law of 15 December 1980 (smuggling), provide for the possibility for the public prosecutor and the investigating judge to freeze movable property, buildings, rooms or any other space forming the object of the offense, served to it or were intended to commit it.

According to Article 4, § 6 of the Law of 24 February 1921 on drugs, it is possible to confiscate – and therefore to freeze – vehicles, tools, instruments or items that have served or were intended to commit offenses provided for by the law on drugs or which have been subject to it, even if they are not the property of the convict.

Other measures are considered as freezing without being of a judicial nature. This is the case with the freezing by administrative measure provided for in Article 30 of the Law of 5 August 1992 on the police function. This article allows police officers to withdraw from the free disposal of the owner, possessor or keeper, objects and animals that endanger the life and physical integrity of persons and the safety of property, in places accessible to the public, for the needs of the public peace and as

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[86] M.-A. Beernaert, N. Colette-Basecq, C. Guillain, L. Kennes, P. Mandoux, M. Preumont, D. Vandermeersch, *op. cit.*, 149.

[87] For a detailed account, see Fr. Lugentz, D. Vandermeersch, *op. cit.*, 112 to 118.

long as the necessities of the maintaining the public peace require it. Another example is the Royal Decree of 28 December 2006 on specific restrictive measures against certain persons and entities in the fight against the financing of terrorism. This Royal Decree authorizes the freezing of the funds and economic resources of persons or entities who commit, attempt to facilitate or participate in acts of terrorism. This Royal Decree partially implements UN Resolution 1373 (2001) and complements the European legal arsenal with regard to the freezing of assets of terrorists[88].

h) *The special inquiry into the pecuniary benefits* may be ordered, upon request of the public prosecutor, by the courts and tribunals in the event of the convicted person, with a view to determine the pecuniary benefits that might be taken into account for a confiscation sentence (C.C.P., art. 524-*bis* and 524-*ter*). This investigation is only possible if the public prosecutor demonstrates, on the basis of sound and concrete evidence, that the convict has derived pecuniary benefit from the offense for which he or she was convicted, or from other offenses likely to give rise, directly or indirectly, to a financial benefit, insofar as they appear in Article 43-*quater*, § 1, of the P.C. Acts performed as part of the special investigation into economic benefits may include the freezing of items referred to in Articles 35 and 35-*ter* of the C.C.P. This type of freezing can therefore affect movable and immovable property alike.

i) Freezing is also possible in the context of a criminal execution investigation (see below point 4.3.1.).

On the level of form. The defendant must be invited to explain himself about the frozen items when presented to him. A report must be drawn up by the public prosecutor or, most often, by a judicial police officer who lists the things frozen. As far as it is possible, items are individualized in the minutes (C.C.P., art. 37, § 1). "If this individualization of frozen items turns out to be impossible in practice, because of their large quantity, the wording can be limited to a more general enumeration"[89]. The minutes are signed by the person subject to the freezing, who may receive a copy free of charge (C.C.P., art. 35 and 37.). "The individual subject to the freezing is not required to sign the minutes, but by signing, they confirm that the enumeration recorded in the minutes corresponds to what has been frozen"[90].

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[88] The Royal Decree of 28 December 2006 has been confirmed by Article 115 of the Law of 25 April 2007 on various provisions (IV).

[89] Fr. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 131.

[90] *Ibidem*.

In the event of freezing of receivables (in particular on a bank account), it must be made by written notification to the debtor in the forms provided for by law. From the date of receipt of the notification of the minutes of the freezing, the debtor can no longer alienate the sums or things that are the subject of the freezing (C.C.P., art. 37, §§ 2 and 4).

If it is a question of proceeding to the provisional freezing of immovable property, the public prosecutor or the investigating judge must make a prosecutor's request, and the freezing must be done by bailiff's writ, notified to the owner. On pain of nullity, the bailiff's writ must contain a copy of the indictment and certain mentions (C.C.P., art. 35-*bis*).

If the freezing is carried out by equivalent, the public prosecutor or the investigating judge must mention, in their decision, the estimate of the amount of the alleged pecuniary benefit of the offense – which is not easy for the magistrate[91]. They must also indicate the serious and concrete indicators justifying the freezing. In the case of third-party freezing, the magistrates must indicate "serious and concrete indicators which show that the suspect wishes to exempt the property from the execution of a possible special confiscation, as well as the preliminary investigation whereby it appears or may be deduced that the third-party has knowledge of this". All these elements must appear in the minutes of freezing (C.C.P., art. 35-*ter*, §§ 1 and 4).

2.1.5. *Time limits for the issuing of a freezing order*

There is no time limit to carry out freezing ordered by the judicial authorities.

2.1.6. *Duration of the freezing order*

Freezing is not limited in time, subject to the prescription of public action. However, the conservatory freezing of real estate is only valid for five years from the date of its transcription.

2.1.7. *Rights and legal remedies of the person addressed by a freezing order*

As the Court of Cassation pointed out, "the consequences for the injured party notwithstanding, a freezing constitutes a precautionary measure which does not have the character of a penalty". It follows that the guarantees attached to Articles 6 and 7 of the European Convention on Human Rights must not apply to them. Thus, the right of every ac-

[91] *Ibidem*, 148: "It is not always easy to determine with precision the amount of the proceeds of the offense at this stage of the proceedings, the magistrate being often forced to make a simple estimate".

cused person to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them "shall not apply to measures concerning assets undertaken in the course of preliminary investigation or investigation"[92]. In the same vein, the Liege Court of Appeal found that "the decision to freeze property as a precautionary measure pursuant to Article 28-*sexies* of the C.C.P. does not in any way infringe the presumption of innocence of the person recognized as owner of said property. Such a decision can only take place under certain precise and specific conditions imposed by law and, in particular, after taking into account the principle of proportionality"[93].

As we saw in point 2.1.4., freezing is subject to certain formalities. Thus, the person subject to freezing receives a free copy of the report of freezing, which contains the inventory of the items frozen and which is given to them immediately or which is sent to them within forty-eight hours (C.C.P., art. 37, § 3). The Court of Cassation considers that "the freezing provided for in Articles 35 and 35-*ter* of the C.C.P, the formalities of which are specified in Article 37 of the C.C.P., is in conformity with Article 1 [of Additional Protocol n° 1 of the European Convention on Human Rights]. These provisions also satisfy the principle of legality and the rule of law". The Court nevertheless specifies that "the respect of the procedural safeguards provided for by the law at the time of the freezing is neither prescribed on penalty of nullity, nor substantial"[94].

In addition, the freezing carried out at a person's holding a professional secret must be surrounded by a number of guarantees in order to comply with Article 8 of the European Convention on Human Rights[95].

The public prosecutor or the investigating judge may at any time of the procedure lift the freezing operated on a property, if they consider "that the frozen assets do not fall under the application of the Article 42 of the P.C. or that their freezing is no longer necessary to ascertain the truth"[96]. Nothing prevents these authorities, then, from returning the property belonging to the victim[97].

Any person aggrieved by an act of investigation relative to their property may, by reasoned request, ask the lifting of freezing respectively to the public prosecutor or the investigating judge. The procedure, so-called "référé pénal", must be introduced by reasoned request, the ap-

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[92] Cass. 22 June 2005, *Pas.*, 2005, n° 365.
[93] Liège, 2 September 2014, *Revue de Droit pénal de l'entreprise*, 2014, 323.
[94] Cass., 17 October 2006, *Pas.*, 2006, n° 403.
[95] For more precisions, see Fr. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 119 to 123.
[96] *Ibidem*, 173.
[97] *Ibidem*, 100.

plicant having to had elected residence in Belgium. The public prosecutor or the investigating judge must decide on this request for the lifting of the measure at the latest within fifteen days of the inscription of the request in the register. They may reject the application in the following cases: when they consider that the necessities of the investigation require it; when the lifting of the act compromises the safeguarding of the rights of the parties or third-parties; when the lifting of the act poses a threat to persons or property; and in cases where the law provides for the restitution to a third-party or the confiscation of said property. The magistrate may order a partial or total lifting of the measure. They may also impose conditions (C.C.P., art. 28-*sexies* and 61-*quater*).

Challenging the freezing order can be done at all stages of the criminal proceeding (preliminary investigation, investigation and judgment) by the person whose property is affected. In case of judgment, the tribunal or the court will rule on the petition.

Moreover, pursuant to Articles 21-*bis* and 61-*ter* of the C.C.P., as amended by the Law of 18 March 2018 amending various provisions of criminal law, criminal proceeding and judicial law, the "directly interested party" may request the public prosecutor or the investigating judge to consult the preliminary investigation or investigation file related to a crime or offense[98] and to obtain a copy thereof. The persons have the faculty to seize the chamber of indictments in the event of refusal of the public prosecutor or the investigating judge.

The refusal of lifting the freezing or the absence of response of the public prosecutor or investigating judge may be appealed before the indictment chamber in fifteen days of the communication or notification of the decision. The indictments division must rule within 15 days after hearing the general attorney, the applicant and his counsel (C.C.P., art. 28-*sexies*, § 4 and 61-*quater*, § 5). On the occasion of this appeal, the applicant may raise the irregularity of the freezing. Similarly, the indictments division may dismiss evidence gathered as a result of an unlawful freezing, either because the irregularity is prescribed on pain of nullity, or because it considers, pursuant to Article 32 of the P.T.C.C.P., that this irregularity taints the reliability of the evidence or that the use of the evidence is contrary to fair trial. The Court of Cassation, however, considers that the damage suffered by the applicant, "the absence of any notification of the measures of freezing carried out does not in itself consti-

[98] For offenses falling within the jurisdiction of the police court, this possibility applies only in respect of the offenses referred to in Article 138, 6-*bis* and 6-*ter*, and offenses for which the prescription is three years in application of Article 68 of the Law of 16 March 1968 relating to the traffic police (C.C.P., art. 21-*bis*, § 2).

tute a violation of the rights of the defense," to the extent that this absence can be amended[99]. During the examination of the request, the indictments chamber does not have to "definitively and irremediably replace the trial court which will rule on the substance of all aspects of the case, including the confiscation of the vehicle"[100]. The applicant cannot introduce a new application for the same purpose before the expiry of a period of three months from the last decision on the same subject (C.C.P., art. 28-*sexies*, § 7 and 61-*quater*, § 8). The judgment of the indictments chamber cannot be the object of an immediate appeal as he's not being considered definitive[101].

2.1.8. Legal remedies against unlawful freezing orders

In addition to the criminal appeal, the person whose assets are frozen can always challenge the liability of the Belgian State and claim damages (see point 4.1.4.).

2.2. *Freezing of third-parties' assets*

Under Article 42 of the P.C., confiscation – and thus freezing on the basis of Article 35 of the C.C.P. – may relate to items that have been produced by the offense (P.C., art. 42, 2°), as well as on the property benefits derived directly from the offense, the property and securities substituted for them and the income from these invested benefits (P.C., art. 42, 3°), even if they belong to third-parties.

As we have seen, the economic benefits derived directly from concealment or money laundering offense, as well as the assets and securities that were substituted for them and the income from these invested benefits, represent, under Article 35-*ter*, § 1 of the C.C.P., the object of the offense, so that they must be confiscated and therefore frozen, even if the property does not belong to the convict.

The Law of 1 February 2014 extends freezing by equivalent to third-parties of bad faith, on two conditions: it is first necessary that there exist "serious and concrete indicators that the suspect transferred the goods to a third-party or financially allowed them to acquire it for the express purpose of preventing or complicating severely the execution of any special confiscation involving a sum of money"; second, that the third-party knows or ought reasonably to know "that the property was transferred to them directly or indirectly by the suspect, or that they

[99] Cass., 17 October 2006, *Pas.*, 2006, n° 403.
[100] Ghent, 27 September 2005, *Tijdschrift voor Strafrecht*, 2006, 99.
[101] Cass. 20 April 2010, *Tijdschrift voor Strafrecht*, 2010, 6, 335 and note J. VAN GAEVER.

could have acquired it with the financial assistance of the suspect in order to avoid the execution of the possible special confiscation of a sum of money" (C.C.P., art. 35-*ter*, § 4). Some do, however, question the effectiveness of extended freezing by equivalent at the expense of the third-party, "to the extent that the legislator did not foresee what would happen to the property frozen at the time of the judgment"[102].

Third-parties, who claim to have rights over the items frozen and liable to be confiscated, must be allowed to appear before the court in order to defend themselves and possibly to recover their belongings (P.C., art. 43-*bis*, § 4; Preliminary Title of the Code of Criminal Procedure, art. 5-*ter*). The third-party concerned may also introduce criminal proceedings which are open to "any person aggrieved by an act of preliminary investigation or investigation relating to their property". The concept of "any person" must be understood to mean any third-party who is aggrieved in their property, without it being required that they be a party to the trial process (civil party or accused). The third-party must nevertheless have an interest in undertaking action and having been harmed by the measure of freezing[103].

The Court of Cassation considers that "neither a criminal freezing practiced on immovable property, nor its confiscation can, in principle, affect the rights of creditors whose mortgage has been registered in the Mortgage Office before the date of the transcription of the input. These creditors may therefore, notwithstanding the criminal freezing, exercise their enforcement rights over the immovable property"[104].

Finally, we have seen that any "directly interested person" can ask the public prosecutor or the investigating judge to consult the preliminary investigation or investigation file and obtain a copy thereof. Is considered a "person directly interested" any of the following: the accused, the person in respect of whom the prosecution is engaged within the frame of the investigation, the suspect, the liable civil party, the civil party, the person who made a declaration of aggrieved person, as well as those who are subrogated in their rights or the persons who represent them as ad hoc agent, curator, temporary administrator, guardian or guardian ad hoc. Persons who are not considered as "directly interested" may nevertheless request permission to consult the file or obtain a copy thereof. In this case, the decision is taken by the public prosecutor, even during the investigation phase (C.C.P., art. 21-*bis*, § 1).

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[102] Fr. Lugentz, D. Vandermeersch, *op. cit.*, 110.

[103] Brussels, 24 June 1999, quoted by M.-A. Beernaert, H. Bosly, D. Vandermeersch, *op. cit.*, 486.

[104] Cass., 5 September 2014, *Nullen Crimen*, 2014, 6, 506.

2.3. *Confiscation*

2.3.1. *Procedures for the confiscation of assets*

In Belgian criminal law, the general system of confiscation is envisaged in Articles 42 to 43-*quater* of the P.C. Specific provisions are provided for in special criminal law. The penalty of criminal confiscation is included in Article 7 of the P.C., which enumerates penalties for natural persons and Article 7-*bis* for legal persons.

2.3.2. *Competent authorities for the request of a confiscation order*

Only the public prosecutor can ask the judge to confiscate property. The civil party may, however, request that the confiscated property be returned, or even attributed, to them. Similarly, any person who can claim a right over the confiscated thing can assert this right (P.C., art. 43-*bis*)[105].

The requisition of the public prosecutor prior to the confiscation, however, is mandatory only in the cases expressly provided by law and when the confiscation is optional: "The law does not provide for the obligation for the public prosecutor to make written requisitions when confiscation is compulsory, since, in this case, the judge has no discretion in the matter"[106]. This is the case with the confiscation of "economic benefits derived directly from the offense, the property and values that have been substituted for them and the income from these invested benefits" referred to in Article 42, 3°[107], "additional economic benefits". Referred to in Article 43-*quater* and the confiscation of unmovable assets under Article 43-*bis* of the P.C. In these last two hypotheses, in order to be pronounced, the confiscation must have necessarily been required, in writing[108], by the public prosecutor.

2.3.3. *Competent authorities to impose a confiscation order*

Special confiscation, sanctioning an offense, is a sentence to be pronounced by a court of law. It may also be pronounced by the investigating courts when they decide as courts of judgment on a suspension of the pronouncement of the sentence (Law of 29 June 1964 on suspension,

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105 "In the absence of requisition of the public prosecutor, the plaintiff cannot substitute for the public prosecutor to solicit a particular inquiry on the patrimonial advantages", Fr. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 71.

106 *Ibidem*, 61.

107 The rule also applies to freezing by equivalent of patrimonial advantages.

108 Even though Article 43-*quater* of the C.C.P. does not expressly provide for it, D. BERNARD, B. DEJEMEPPE, C. GUILLAIN, *op. cit.*, 28.

suspended sentence and probation, art. 6, § 2) or internment (Law of 5 May 2014 on internment, art. 16).

2.3.4. *Standard of proof for the imposition of a confiscation order*

As an *accessory penalty*, confiscation may only be ordered in the case of guilt and conviction of the accused to a principal sentence. It is sometimes compulsory, sometimes optional. In the context of the hypotheses referred to in Article 42, 1° and 2° of the P.C. (purpose and instruments of the offense), confiscation is compulsory for crimes and misdemeanors. The judge who finds that the legal conditions are met must pronounce the penalty of confiscation and "must not and cannot subject the imposition of this penalty to balancing the interests of the property in relation to the necessities of public utility"[109]. We have nevertheless seen that the confiscation provided for in Article 43-*quater* of the P.C., concerning extended confiscation of additional benefits, raises a question since it allows the judge to confiscate property in the possession of the convict, property that is not directly related to the sanctioned offense (see above, point 1.2.)[110].

As a safety measure, confiscation may be ordered in the absence of a principal sentence. This is the case, for example, as we have just seen, in a suspension of the pronouncement of the sentence or in matters of internment, but also in the event of acquittal, extinction of the public action, simple conviction on the ground of having extended a reasonable delay (Preliminary Title of the Code of Criminal Procedure,, art. 21-*ter*, 2°)[111] and concurrence of offenses (P.C., art. 65, 2°). Lastly, if the juvenile court is not authorized to pronounce sentences, it can decide the confiscation of the property, when the fact qualified as offense is declared established (Law of 8 April 1965 on the protection of the youth, art. 61). It is justified by the need to avoid the circulation of substances or objects that are dangerous or harmful to health and public safety[112]. Such objects may thus be weapons, explosives, narcotics, toxic products, child pornography material… (see, point 1.1.3.)[113].

Since the Law of 11 February 2014, the judge can no longer suspend the execution of the sentence of confiscation (Law of 29 June 1964, art. 8, § 1). In order to compensate for this deletion, the law now allows the judge to reduce the amount of the patrimonial benefits or monetary

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[109] Cass., 3 May 2006, *Pas.*, 2006, n° 254.
[110] D. Bernard, B. Dejemeppe, C. Guillain, *op. cit.*, 29.
[111] Cass., 12 February 2008, *Pas.*, n° 105; Cass., 1st April 2008, *Pas.*, n° 199.
[112] P.E. Trousse, *op. cit.*, n° 842.
[113] B. Dejemeppe, *op. cit.*, 101.

valuation in order not to subject the convict to an unreasonably harsh penalty.

2.3.5. *Time limits for the issuing of a confiscation order*

There is no time limit for confiscation, subject to compliance with the reasonable delay (European Convention on Human Rights, art. 6).

2.3.6. *Rights and legal remedies of the person addressed by a confiscation order*

Confiscation as a penalty must respect several fundamental rules relating to the rights of individuals. It must respect the principle of legality, be pronounced individually and be motivated. It cannot be retroactive and is subject to prescription. It cannot prejudice the rights of the victim. Furthermore, a confiscation order can be appealed.

a) *The penalty is a sanction established by law*. In accordance with the principle of legality in criminal matters enshrined in Articles 12 and 14 of the Constitution, confiscation as a penalty must be established by law. From this arises the obligation of the judge to respect the legal terms and to order the sentence of confiscation only if they find that the legal conditions are met[114]. Thus, a decision is vitiated by illegality if it is not found that the objects are the property of the convict, when such a condition is required[115].

The judicial decision must clearly identify the convicted persons[116]. It must also clearly identify the confiscated items. On several occasions, the Court of Cassation has considered that the sentence of confiscation is illegal when the confiscated item was insufficiently identified[117]. In the context of confiscation by equivalent on the basis of Article 43-*bis*, § 2 of the P.C., confiscation can relate to a sum of money equivalent to the benefits that have vanished. In this case, the Court of Cassation admits an assessment *ex aequo et bono*, in the absence of precise elements of assessment[118].

Under Article 64 of the P.C., sentences of confiscation imposed for several offenses are always cumulated[119].

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[114] Cass., 27 March 1990, *Pas.*, 1990, 879; Cass., 1 April 2008, *Pas.*, n° 199.

[115] Cass., 11 September 1990, *Pas.*, 1991, 36.

[116] Cass., 14 January 2004, *Pas.*, n° 20.

[117] Cass., 15 January 1990, *Pas.*, 1990, 580; Cass., 24 June 1998, *Pas.*, 1998, 798.

[118] Cass., 14 December 1994, *Recueil Cassation*, 1995, 98 to 100 and note by P. Van Caenegem.

[119] Cass., 27 January 2009, *Pas.*, 2009, n° 66.

b) *The sentence must be motivated.* To the extent that the sentence can only be imposed if the legal conditions are met, the judge must justify his decision on the confiscation and must therefore motivate it[120].

The motivation of the reasons for the choice of sentence is imposed by Article 195, § 2 of the C.C.P. That reasoning applies, however, only to the accessory penalty of confiscation, where that sanction is optional. The obligation to motivate is imposed on the judge only insofar as he has the choice of a sentence which he's not obliged to impose[121]. When he applies Articles 42, 1° and 2° of the P.C., it must not indicate the reasons for the choice of sentence from the point of view of its necessity or usefulness, nor the reasons for its degree, nor meet the elements relating to the social situation of the convict[122].

c) *The punishment is individual.* Every sentence must be pronounced individually and separately, for each convicted person. A sentence cannot be pronounced collectively or severally for several convicts in the same case[123]. Exceptions may, however, be provided for by the legislator as in Article 505, § 6 and 7 of the P.C. which stipulate that the things referred to in § 1, 2° to 4° of said article, including the equivalent sums of money, are confiscated in respect of each of the perpetrators, co-perpetrators or accomplices of the offense.

d) *A sentence cannot be retroactive.* As with any other sentence, amendments to the rules on confiscation cannot be retroactive if they are unfavorable to the defendant (P.C., art. 2, § 2). However, in order to determine the lesser sentence, main penalty is taken into account before additional penalty[124].

e) *The sentence is subject to prescription.* Confiscation is subject to prescription in accordance with Article 94 of the P.C., within the time limits set for the offenses for which it is pronounced. However, in the case of blocked or frozen amounts of money in a bank account, it is considered that since the amount is already frozen at the time when it is confiscated, no enforcement action is necessary to attribute these sums of money to the State, so that this confiscation is not subject to prescrip-

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120 Cass., 27 March 1990, *Pas.*, 1990, 879; Cass., 1st April 2008, *Pas.*, 2008, n° 199.

121 Cass., 1 March 2000, *Pas.*, 2000, 498.

122 Voy. S. Van Overbeke, «De motivering van de verbeurdverklaring van vermogensvoordelen», obs. under Cass., 21 mai 2002, *Rechtskundig Weekblad*, 2002-2003, 343.

123 Cass., 27 May 2009, *Revue de droit pénal et de criminologie*, 2010, 1, 71; Cass., 20 January 2015, *Pas.*, 2015, 150.

124 Cass. 22 December 2009, *Pas.*, 2009, n° 775.

tion. In this hypothesis, conviction and execution merge and the State becomes the owner of the property as soon as the confiscation is pronounced[125].

f) The rights of the victim. The sentence of confiscation cannot prejudicially affect the rights of the victim of the offense. Under Article 43-*bis*, § 3 of the P.C., the judge must order the restitution of the confiscated items belonging to the victim[126]. In this case, the confiscation takes on a reparatory dimension[127]. The same article states that the confiscated items will be attributed to the victim "when the judge has pronounced confiscation on the grounds that they constitute property or values substituted by the convict to items belonging to the civil party or because they constitute the equivalent of such items".

Article 44 of the P.C. stipulates that "the sentence imposed by law shall always be pronounced without prejudice to restitution and damages which may be due to the parties". Nothing therefore prevents the judge from ordering the defendant to confiscate the pecuniary privileges while ordering him to pay to the civil party damages equivalent to these pecuniary benefits, without this entailing the violation of property law or the imposition of an unreasonably harsh penalty[128].

The request of the victim is not subject to any particular form[129]. However, if the court realizes that the rights of the defense may be jeopardized by the sentence of confiscation that it is considering, it is necessary to order the reopening of the proceedings in order to allow the public prosecutor to take position and the parties to explain themselves in the matte[130].

g) The remedies. Sentences of confiscation may be challenged by ordinary (appeal and opposition) and extraordinary (cassation) remedies.

The appeal judge is seized within the limits of the notice of appeal. He can therefore in principle, on the sole appeal of the accused, pronounce a confiscation that the first judge would have wrongly failed to

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125 Cass., 9 May 2007, *Pas.*, 2007, n° 239.

126 Cass., 9 May 2007, *Pas.*, 2007, n° 239.

127 Cass. 23 March 1982, *Pas.*, 1982, 865. There is restitution within the meaning of Article 44 of the P.C. only if it repairs the harm caused by the crime or offense, restitution being a restorative measure of civil character (J. CONSTANT, *Manuel de droit pénal*, Liege, 1956, 727, n° 665).

128 Cass., 10 juin 2014, *Nullum Crimen*, 2014, 503 and note by L. HUYBRECHT.

129 See A. VANDEPLAS, "Teruggave", *Strafrecht en Strafvordering*, 1998, n° 37.

130 C. CALIMAN, «La loi du 19 décembre 2002 portant extension des possibilités de saisie et de confiscation en matière pénale», *Custodes*, 2003, 70.

pronounce[131]. If confiscation has not been imposed in the first instance and in case of appeal by the prosecutor, the appeal court may pronounce it only if it is unanimous[132]; the same unanimity is required on appeal for the decision ordering a confiscation having the character of a safety measure while declaring the public action prescribed[133]. However, this case-law must be qualified according to the main sentence: the Court of Cassation considers that unanimity is not required if the main sentence of imprisonment is reduced on appeal, the accessory penalty of confiscation not aggravating the sentence pronounced against the accused[134].

When the public prosecutor must make requisitions prior to confiscation, he is not obliged to reiterate his requisition on appeal[135]. In addition, the requisition may be filed for the first time on appeal[136]. The requisitions of the public prosecutor to carry out a particular investigation on the patrimonial benefits can however never be introduced for the first time on appeal (C.C.P., art. 524-*bis*, §§ 1 to 3).

Confiscation is correlated to facts beyond the control of the Court of Cassation[137]. As a rule, the trial judge holds that a thing is the object of the offense, has served or was intended to commit the offense or has been produced by the offense (proceeds of an offense). In the case of confiscation, the Court of Cassation thus holds that "the trial judge determines supremely, within the limits of the law, the penalties which they consider to be related to the seriousness of the offenses declared established and to the accused's individual culpability"[138].

2.4. *Third-party confiscation*

By virtue of the principle of the individual nature of penalties, confiscation can in principle affect only the offender who has been convicted.

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[131] Liège, 20 October 1938, *Pas.*, 1939, 78.

[132] Cass., 10 October 1972, *Pas.*, 1973, 150; Cass., 19 November 1998, *Pas.*, 1999, 1144.

[133] Cass., 23 December 1986, *Pas.*, 1987, 518.

[134] Cass., May 13, 1980, *Pas.*, 1980, 1137; Cass., 9 July 2002, *Pas.*, 2002, n° 396. According to the Court of Cassation, the relative gravity of two sentences is measured not only in relation to their duration or rate, but also according to their nature, their character, species or purpose (Cass., 8 January 2003, *Revue de droit pénal et de criminologie*, 2003, 534, note A. JACOBS).

[135] Cass., 17 June 2003, *Pas.*, 2003, n° 357.

[136] Cass., 27 May 2008, *Pas.*, n° 319; Cass., 16 December 2008, *Pas.*, n° 735.

[137] See Cass., 22 October 2003, *Pas.*, 2003, n° 516, with conclusions by general attorney J. SPREUTELS.

[138] Cass. 16 September 2009, *Pas.*, 2009, 1923.

As we have seen (see above point 1.2.), there are, however, many exceptions to the principle. In case of third-party confiscation, the punishment does not have a personal, but real character, attached to the property.

Article 43-*bis* of the P.C. provides that any third-party claiming to have rights over the confiscated property "may assert that right within a given time period and in a manner determined by the King". The third-party owner of an object liable to confiscation must therefore be allowed to appear in the proceedings in order to defend themselves against that measure, which would affect them indirectly[139].

The third-party may, for example, argue that a condition necessary for confiscation is lacking, that there are cases of force majeure[140] or invincible error[141]. Becoming party to the case by the sentence that affect them, the third-party may appeal in cassation on points of law[142]. The same applies if the object belonging to a third-party was confiscated by a judgment, without intervention of the third-party at the hearing. On the other hand, as soon as the conviction entailing the confiscation has become *res judicata*, the third-party can only assert their rights over a confiscated patrimonial benefit attributed to the civil party (in accordance with Article 43-*bis*, § 3 of the P.C.) by filing an application before the civil court[143].

As we have seen, the object of the offense of concealment and money laundering as well as the pecuniary benefits derived from these offenses must be confiscated, even if "the property does not belong to the convict, however, without being prejudicial to the rights of third-parties over property that may be subject to confiscation" (P.C., art. 505, §§ 5 to 7). In this case, it is accepted that "third-parties, namely persons who have not been convicted of the offense of money laundering or the underlying offense, can assert their rights in these matters under their lawful possession", which is left to the sovereign discretion of the judge[144]. The third-party cannot therefore merely invoke their right of ownership over the property, but must also demonstrate their good faith in order to claim recovery of the property[145].

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[139] Cass., 31 July 1995, *J.L.M.B.*, 1996, 578, observations O. KLEES, P. MONVILLE; Cass., 15 December 2012, *Droit pénal de l'entreprise*, 2013, 1, 51.

[140] Cass., 22 September 1947, *Pas.*, 1948, 368.

[141] Cass., 23 January 1950, *Pas.*, 1950, 348.

[142] Cass., 15 December 2012, *Droit pénal de l'entreprise*, 2013, 1, 51.

[143] Cass., 22 September 1998, *Pas.*, 1998, 971; Cass., 15 December 2012, *Droit pénal de l'entreprise*, 2013, 1, 51.

[144] Cass., 4 March 2014, *Pas.*, 2014, n° 170.

[145] Regarding the exercise of third-party rights, see Fr. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 92 to 95.

3. *Mutual recognition aspects*

3.1. *Freezing*

3.1.1. *National legal framework for the mutual recognition of freezing orders*

The question of freezing of evidence across Member States of the European Union is governed by the Law of 22 May 2017 on the European Investigation Order in criminal matters (Law of 22 May 2017, art. 3 and 40).

The question of freezing for confiscation across Member States of the European Union is regulated by the Law of 5 August 2006 on the application of the principle of mutual recognition of judicial decisions in criminal matters across Member States of the European Union. This law therefore transposes Framework Decision 2003/577/JAI. However, existing conventions on mutual assistance relating to freezing remain applicable (circular COL 4/2014, 8)[146].

These questions relating to freezing, when they concern non-EU member States, are regulated by the Law of 20 May 1997 on international co-operation with regard to carrying out freezing and confiscations.

3.1.2. *Competent authorities for the execution of freezing orders from another EU member State*

The judicial authority of the issuing State shall address its request (in Dutch, French, German or English) to the public prosecutor of the place where the property concerned, or the majority thereof, is located (Law of 5 August 2006, art. 12 and 3, §§ 3 and 4). If the certificate is sent to a public prosecutor who is not territorially competent, the latter shall transmit the certificate to the territorially competent public prosecutor (Law of 5 August 2006, art. §§ 3 and 4). If there is any doubt as to territorial jurisdiction, the law has unfortunately not provided for a mechanism that would solve the problem[147].

The public prosecutor must immediately seize the investigating judge (Law of 5 August 2006, art. 12, § 1/1). The latter's decision will re-

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[146] M.-A. Beernaert, H.-D. Bosly, D. Vandermeersch, *Droit de la procédure pénale*, Bruges: La Charte, 2017, 1944.

[147] G.-F. Raneri, «La circulation des décisions de saisie de biens ou d'éléments de preuve dans l'Union européenne. Présentation de la loi belge du 5 août 2006», *Revue de la Faculté de droit de l'Université de Liège*, 1, 2007, 60.

late "only to the conditions of form and substance of the recognition, but in no case on the grounds which underlie the foreign decision of freezing or its opportunity" (Law of 5 August 2006, art. 4, § 4)[148].

3.1.3. *Grounds for non-recognition and non-execution*

In principle, the execution of the decision by the competent judicial authority of the issuing State is mandatory and the substantive reasons for that decision cannot be challenged before a Belgian court (Law of 5 August 2006, art. 4, §§ 1 and 4).

Assumptions of refusal of execution exist however (Law of 5 August 2006, art. 2, 6, 7, 11 and 14):

a) *Requirement that the request arise from a decision taken by a competent judicial authority and in the context of criminal proceedings*: this assumption of compulsory refusal is provided for in Article 2, § 1 of the Law of 5 August 2006.

b) *Requirement of double criminality*: this assumption of compulsory refusal is provided for in Article 6, § 1 of the Law of 5 August 2006. The enforcement of the decision of freezing will be refused if the facts on which the freezing order is based do not constitute an offense under Belgian law. This double criminality requirement is assessed in relation to the facts and not to the qualification given by the law of the issuing State (circular COL 4/2014, 9). This requirement is not retained for the list of offenses envisaged in Article 6, § 2 of the Law of 5 August 2006 when they are punishable in the issuing State by a prison sentence of at least three years. This exception is rather "a presumption of double criminality [than] an abandonment of its requirement"[149]. Only the checking of conformity between the statement of facts (included in the certificate) and the generic acceptance of the behavior referred to in the list must be carried out. The Belgian legislator has stipulated that for facts of abortion and euthanasia, the double criminality control is maintained (Law of 5 August 2006, art. 6, § 4). This assumption of refusal does not apply either in matter of taxes, duty, customs and exchange (Law of 5 August 2006, art. 6, § 3).

c) *Existence of immunity*: this assumption of compulsory refusal is provided for in Article 7, § 1, 1° of the Law of 5 August 2006. Immunity

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[148] F. Lugentz, D. Vandermeersch, *Saisie et confiscation en matière pénale*, Bruxelles: Bruylant, 2015, 240.

[149] G.-F. Raneri, *op. cit.*, 64.

must be assessed *in concreto*, so if it can be waived, the request is not necessarily refused (circular COL 4/2014, 11).

d) *Principle "ne bis in idem"*: this hypothesis of compulsory refusal is provided for in Article 7, § 1, 2° of the Law of 5 August 2006. The execution will be refused if the decision of freezing is based on "facts for which a final decision has already been reached in Belgium or in another Member State of the European Union"[150]. A case-law decision interpreted this principle narrowly, by stating that a decision to dismiss the case, which was therefore not of a definitive nature, did not allow the claim of issuing State to be opposed[151]. This restrictive case law does not appear to be in line with the CJEU case law[152].

e) *Infringement of fundamental rights (recognized by Article 6 of the Treaty on the European Union):* this assumption of compulsory refusal is provided for in Article 7, § 1, 3° of the Law of 5 August 2006. This ground for refusal is not stated literally in the Framework Decision 2003/577/JHA. It must be interpreted restrictively because there is a "presumption of respect for human rights in favor of the issuing State"[153].

f) *Absence of sufficient information (in the certificate):* this optional refusal hypothesis is provided for in Article 7, § 2 of the Law of 5 August 2006. In this case, a time-limit is given to the issuing State to compensate for this insufficiency and it is only if the information is not given within this period that the request is refused.

g) *Requirement that Belgian law provide for a sentence of confiscation:* this assumption of compulsory refusal is provided for in Article 11 of the Law of 5 August 2006. If the Belgian law does not provide for confiscation for facts related to the request, this application for freezing with a view to subsequent confiscation is refused (e.g. if the facts are a contravention under Belgian law and the penalty of confiscation is not provided for such a contravention). This hypothesis of refusal is not possible for the list of offenses provided for in article 6, § 2 of the Law of 5 August 2006.

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150 *Ibidem*, 66.

151 Brussels (Acc.), 27 March 2014, unpublished, cited by F. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 229.

152 CJUE, 5 June 2014, ECLI: EU:C:2014/1057.

153 A. WEYEMBERGH, V. SANTAMARIA, «La reconnaissance mutuelle en matière pénale en Belgique», in G. VERNIMMEN-VAN TIGGELEN, L. SURANA, A. WEYEMBERGH (eds.), *L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne*, Bruxelles: Bruylant, 2009, 75.

h) *Practical impossibility*: this hypothesis refers to situations where the property has disappeared, has been destroyed, or cannot be found in the location indicated (Law of 5 August 2006, art. 14, § 3).

While Framework Decision 2003/577/JHA provides that refusal cases are always optional, the Law of 5 August 2006 provides for mandatory refusal causes.

3.1.4. *Grounds for postponement*

The assumptions for postponement of freezing are provided for in Article 13 of the Law of 5 August 2006:

– when it might damage an ongoing criminal investigation;

– when the property concerned has already been subjected to a conservatory freezing order in criminal proceedings.

The circular COL 4/2014 (p.4) refers to the situation where a translation of the decision is deemed necessary (in case of serious doubts about the reliability of the certificate).

3.1.5. *Time limits for the execution of freezing orders from another EU Member State*

The investigating judge, who must be immediately seized by the public prosecutor who has received the request from the issuing State, takes the decision if possible within 24 hours and at the latest within 5 days of his referral (Law of 5 August 2006, art. 12, § 1/1). Failure to comply with this deadline cannot be sanctioned (order period).

The decision of the investigating judge is immediately communicated to the public prosecutor who is responsible for executing the freezing (Law of 5 August 2006, art. 14). It will finally be "promptly communicated by the public prosecutor to the competent authority of the issuing State" (Law of 5 August 2006, art. 14).

3.1.6. *Rights and legal remedies of the person addressed by a freezing order from another EU Member State*

The grounds for the freezing can only be challenged in a court of the issuing State (Law of 5 August 2006, art. 15, § 2).

The decision of the investigating judge is taken in a unilateral procedure (circular COL 4/2014, 14) and is not subject to appeal (Law of 5 August 2006, art. 12, § 4).

Any "person aggrieved" by the freezing may request the investigating judge to lift it, pursuant to Article 61-*quater* of the C.C.P. (Law of 5 August 2006, art. 15, § 1). The Law of 5 August 2006 refers to the sys-

tem set up in domestic law, the "référé pénal" (see above point 2.1.7.). The public prosecutor informs the competent authority of the issuing State of such a request so that this authority can put forward its arguments (Law of 5 August 2006, art. 15, § 1).

This request for lifting has a suspensive effect on the execution of the request for confiscation but not on the freezing itself (Law of 5 August 2006, art. 15, § 1).

3.2. *Freezing of third-parties' assets*

If a thing is not likely to be confiscated and therefore not liable to be frozen (C. i.cr., art. 35 and P.C., art. 42) due to the fact that Belgian law requires that the thing belong to the accused or the condemned (see above point 1.1.), recognition of the freezing that relates to a third-party's property is refused on the basis of Article 11 of the Law of 5 August 2006. However this assumption of refusal does not apply to the list of offenses provided for in Article 6, § 2 of the Law of 5 August 2006. Thus, as regards this list of offenses, the "items forming the object of the offense and (…) those that have served to or are intended to commit it" (P.C., art. 42, 1°) may not be seized under Belgian law if they belong to a third-party, but there would be no possibility to refuse recognition of the foreign ruling. The practical dimension of this distinction does not seem significant to us.

The request to lift the freezing (see point 2.1.7.) is accessible to "any person aggrieved" by the freezing. This concept of "aggrieved person" includes the accused, the civil party and third-parties[154]. Third-parties may therefore request the lifting of the freezing but they must have a direct interest in taking action.

The request for the lifting (for example by the accused) may be refused if it jeopardizes the right of a third-party.

3.3. *Confiscation*

3.3.1. *National legal framework for the mutual recognition of confiscation orders*

In principle, the question of confiscation between Member States of the European Union is governed by the Law of 5 August 2006 on the ap-

[154] Brussels (Acc.), 24 June 1999, cited by M.-A. Beernaert, H.-D. Bosly, D. Vandermeersch, *op. cit.*, 523.

plication of the principle of mutual recognition of judicial decisions in criminal matters across Member States of the European Union. It therefore transposes Framework Decision 2006/783/JHA. However, the existing conventions on mutual assistance relating to confiscation remain applicable (circular COL 4/2014, 8)[155].

These questions relating to confiscations, when they concern non-EU States, are regulated by the Law of 20 May 1997 on international cooperation with regard to the execution of freezing and confiscations.

3.3.2. *Competent authorities for the execution of confiscation orders from another EU Member State*

The judicial authority of the issuing State shall address its request (in Dutch, French, German or English) to the public prosecutor of the place where the property concerned, or the majority thereof, is located (Law of 5 August 2006, art. 30 and 3, §§ 3 and 4). If the certificate is sent to a public prosecutor who is not territorially competent, the latter shall transmit the certificate to the territorially competent public prosecutor (Law of 5 August 2006, art. 3, § 4).

The public prosecutor must then seize the criminal court where the property, or majority thereof, is located (Law of 5 August 2006, art. 30). The concept of "majority" of goods must be interpreted according to the number of goods and/or the value thereof (circular COL 4/2014, 24, Doc., Ch., 2010-2011, n° 1703/1, 21).

If the public prosecutor intends to request the non-execution of the confiscation order, they must first consult the competent authorities of the issuing State (Law of 5 August 2006, art. 30, § 4).

The decision of the criminal court will deal with the formal and substantive conditions of the recognition and not with the reasons or the opportunity of the foreign decision (Law of 5 August 2006, art. 4, § 4).

3.3.3. *Grounds for non-recognition and non-execution*

In principle, enforcement of the decision from the issuing State is mandatory and the substantive reasons for that decision cannot be challenged in a Belgian court (Law of 5 August 2006, art. 12, § 1 and 4).

Assumptions of refusal of execution exist however (Law of 5 August 2006, art. 2, 6, 7, 7/1, 29 and 32):

a) *Requirement that the request arise from a decision taken by a competent judicial authority and in the context of criminal proceedings*: this as-

[155] M.-A. Beernaert, H.-D. Bosly, D. Vandermeersch, *op. cit.*, 1944.

sumption of compulsory refusal is provided for in Article 2, § 1 of the Law of 5 August 2006.

b) *Requirement of double criminality*: this assumption of compulsory refusal is provided for in Article 6, § 1 of the Law of 5 August 2006. This requirement of double criminality is assessed in relation to the facts and not however they are described under the law of the issuing State (circular COL 4/2014, 9). It is not retained for the list of offenses envisaged in Article 6, § 2 of the Law of 5 August 2006 when said offenses are punished in the issuing State by a custodial sentence of which the maximum is at least three years. The Belgian legislator has stipulated that for facts of abortion and euthanasia, double criminality control is maintained (Law of 5 August 2006, art. 6, § 4). This assumption of refusal does not apply either in matters of taxes, duty, customs and exchange (Law of 5 August 2006, art. 6, § 3).

c) *Existence of immunity*: this hypothesis of compulsory refusal is provided for in Article 7, § 1, 1° of the Law of 5 August 2006. The immunity must be assessed *in concreto*, so if it can be waived, the request is not necessarily refused (circular COL 4/2014, 11).

d) *Principle "ne bis in idem"*: this hypothesis of compulsory refusal is provided for in Article 7, § 1, 2° of the Law of 5 August 2006.

e) *Infringement of fundamental rights*: this assumption of compulsory refusal is provided for in Article 7, § 1, 3° of the Law of 5 August 2006.

f) *Absence of sufficient information (in the certificate)*: this optional refusal hypothesis is provided for in Article 7, § 2 of the Law of 5 August 2006. In this case, a time-limit is given to the issuing State to remedy this insufficiency and it is only if the information is not provided within this period that the request is refused.

g) *Prescription of the sentence of confiscation* (the execution of a confiscation order is barred by statutory time limitations in Belgium): this assumption of optional refusal is provided for in Article 7/1 of the Law of 5 August 2006 when the facts fall within the scope of the jurisdiction of the Belgian courts. This assumption of refusal concerns only confiscations by equivalent and confiscations of an amount of money which has not been previously frozen (circular COL 4/2014, 13)[156].

h) *Acts committed in Belgium (or outside the territory of the issuing State) and Belgian law does not permit legal proceedings to be taken in re-*

[156] Cass., 11 January 1990, *Pas.*, 1990, 561.

spect of such offenses where they are committed outside the Belgian territory (territoriality clause): this optional refusal hypothesis is provided for in Article 7/1 of the Law of 5 August 2006. It does not apply to cases of money laundering.

i) *The person did not appear in person at the trial*: this hypothesis of optional refusal is provided for in Article 7/1 of the Law of 5 August 2006. This assumption does not apply if certain guarantees are met (the convict was informed in due time that such a confiscation order may be handed down if they do not appear at the trial); he was indeed defended by his counsellor at the trial; and he did not challenge the decision.)

j) *Impossibility related to the respect of the rights of any interested party* (including bona fide third-parties): this assumption of optional refusal is provided for in Article 29 of the Law of 5 August 2006.

k) *Extended confiscation not provided for by Belgian law*: this assumption of optional refusal is provided for in Article 29 of the Law of 5 August 2006. The foreign decision will be executed within the limits authorized by Belgian law; i.e. within the limits set by Article 43-*quater* of the C.C.P.

l) *Practical impossibility*: this hypothesis refers to situations where the property has disappeared, been destroyed, or cannot be found (Law of 5 August 2006, art. 32, § 3).

3.3.4. *Grounds for non-recognition and non-execution*

The postponement assumptions are provided for in Article 31 of the Law of 5 August 2006:

– whether the total value of the confiscation may exceed the amount specified in the confiscation order because of the simultaneous execution of the confiscation order in more than one Member State;

– whether the execution may undermine an ongoing criminal investigation;

– whether the property is already the subject of confiscation proceedings;

– in the case of an action brought by a third-party.

The circular COL 4/2014 (p. 4) refers to the situation where a translation of the decision is deemed necessary (in case of serious doubts about the reliability of the certificate).

This postponement decision can be taken by both the criminal court and the public prosecutor. In the case of a postponement, the public

prosecutor can seize the property in order to avoid it being no longer available for possible future confiscation (Law of 5 August 2006, art. 31).

3.3.5. *Time limits for the execution of confiscation orders from another EU Member State*

The Law of 5 August 2006 does not specify the time within which the public prosecutor must seize the criminal court, but circular COL 4/2014 (p. 24) specifies that the public prosecutor must freeze it "at once".

There is no time limit for the decision of the criminal court. Once the decision is taken, it is communicated "at once" to the public prosecutor (circular COL 4/2014, 26). Finally, it will be "promptly communicated by the public prosecutor to the competent authority of the issuing State" (Law of 5 August 2006, art. 35).

3.3.6. *Rights and legal remedies of the person addressed by a confiscation order from another EU member State*

The grounds for confiscation cannot be challenged in a Belgian court (Law of 5 August 2006, art. 4, § 4).

The criminal court rules in an adversarial manner after hearing the public prosecutor, the convict and any interested third-party. Its decision is motivated. It is subject to lead to an appeal before the court of appeal. The latter's decision may be the subject of an appeal in cassation. The issuing State is informed of the possible appeal (Law of 5 August 2006, art. 30).

If the amount of the confiscation is to be converted, the exchange rate applicable at the time of the confiscation order has been pronounced in the issuing State (Law of 5 August 2006, art. 30, § 5). The correctional court takes into account amounts previously confiscated in other states (Law of 5 August 2006, art. 33).

In domestic law, the criminal court may reduce the amount of confiscation, "so as not to subject the convicted person to an unreasonably harsh penalty" (P.C., art. 43-*bis*, § 7)[157]. This faculty is not conceivable in the context of recognition of a foreign decision.

3.4. *Third-party confiscation*

If an item is not likely to be confiscated (P.C., art. 42) because Belgian law requires that the item belong to the convict (see point 1.1.) and

[157] F. Lugentz, D. Vandermeersch, *op. cit.*, 282.

that this property requirement is not provided for in the legislation of the issuing State, recognition of the foreign confiscation order cannot be refused. Thus, the "items forming the subject of the offense and (…) those that have served it or were intended to commit it" (P.C., art. 42, 1°) may not be confiscated under Belgian law if they belong to a third-party, but there would be no possibility to not recognize the foreign decision. The practical stake of this distinction does not seem significant to us.

Any interested third-party who is entitled to a rightful possession may defend his or her rights against the object of the confiscation before the competent court. They will be informed of the hearing before the competent court (Law of 5 August 2006, art. 30). If this third-party has not intervened, they may appeal and appeal in cassation[158].

Conclusion

No figures are available to quantify the extent of denial of recognition and enforcement of foreign decisions. The same is true of the grounds for refusal. In matters of confiscation, the reason for refusal relating to prescription appears to be the most frequently used[159]. The Article 5, § 1 of the Law of 5 August 2006 provided that "any judicial decision transmitted or received by a Belgian authority under this Law shall be transmitted to the Department of Justice". Research has shown that the judicial authorities did not effect this transmission[160]. This requirement was considered to be administratively burdensome and was therefore removed by the Law of 26 November 2011. It could have been useful for centralizing the case law in this area and drawing statistics thereof. The judicial authorities must always inform the Department of Justice when they refuse to execute a decision of freezing and confiscation but this requirement would not be followed in practice.

No figures are available to quantify the assumptions of postponement of the execution of the decision. However, these deferral assumptions would not be uncommon and would be primarily related to the risk of hampering an ongoing investigation.

The speed in handling the recognition of decisions seems variable from one judicial district to another. If the judicial district (Brussels, primarily) has at its disposition, because of its volume of cases, specialized

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158 Cass., 5 December 2012, *Pas.*, 2012, 2422.

159 The different findings presented in this report on current practices were derived from meetings with field actors.

160 A. Weyembergh, V. Santamaria, *op. cit.*, 61.

magistrates, the speed is increased. Pre-existing personal relationships with foreign colleagues also seem to play a role.

Be it as it may, it seems that the Law of 5 August 2006 is only very rarely applied. Weyembergh and Santamaria[161] and Lesuisse[162] explain this as follows: the law is little known to the magistrates; the magistrates who know it have a lack of will to apply it; other conventions (within the Council of Europe) exist; finally, the system put in place by this law is not simpler (on the contrary!) than the one provided for by the Law of 20 May 1997 on international cooperation. It would seem that the investigating judges use the Law of 20 May 1997 more often than the public prosecutor (they are more independent in their working relationships and are less constrained by a superior authority to adopt new models provided in the circulars of the College of Public Prosecutors). In general, we can question the opportunity to fragment legal instruments (e.g. an instrument for freezing only…) whereas the "criminal trial is a unit whose various elements (…) constitute a whole"[163].

4. *Management and disposal aspects*

4.1. *Freezing*

4.1.1. *Competent authorities for the management of frozen assets*

In the context of preliminary investigation, decisions relating to the management of frozen property are taken by the public prosecutor, on his own initiative or at the request of the Central Organ for freezing and confiscation (cf. Central Office for Seizure and Confiscation, hereinafter COSC, C.C.P., art. 28-*octies*). In the context of an investigation, these decisions are made by the investigating judge (C.C.P., art. 61-*sexies*). Even if the legislator does not provide that an application may be made by a litigant, there is nothing preventing that any interested person make a gracious claim to the competent magistrate[164].

The public prosecutor and the investigating judge notify the COSC "without delay" of their decisions of freezing as well as their decisions concerning the management of frozen property (Law of 4 February 2018,

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[161] *Ibidem*, 62.

[162] S. Lesuisse, «Reconnaissance mutuelle des décisions de saisies et de confiscations en matière pénale», in P. Fréteur, P. Tilliet (eds.), *Saisies et confiscations. Questions d'actualité*, Bruxelles: Larcier, 2011, 131.

[163] A. Weyembergh, V. Santamaria, *op. cit.*, 62 and 77.

[164] F. Lugentz, D. Vandermeersch, *op. cit.*, 162.

art. 19 and 10, § 2). In practice these notifications of freezing decisions are usually carried out by the police[165]. Circular COL 9/2018 provides for an e-mail notification within five working days of the freezing or final decision on the management of frozen property (p. 10 and 21, annex 2 of circular COL 9/2018, 1). This obligation to notify the COSC exists only when the freezing relates to the property assets that come under the jurisdiction of the COSC: buildings, motor vehicles, ships, aircrafts, securities, amounts of money, accounts with financial institutions, virtual currencies, live animals, real rights and claims and any other movable property that exceeds the threshold of 2,500 euros (Law of 4 February 2018, art. 18, Royal Decree of 17 May 2018, art. 2). The authority considers the patrimonial advantages by freezing, by frozen property or by lots of similar property (Royal Decree of 17 May 2018, art. 2).

The execution of these decisions involves various actors including the Registrar of the Tribunal, who is responsible for the preservation of frozen property kept in the Registry (Royal Decree n° 260 of 24 March 24 1936, art. 1) and the COSC (Law of 4 February 2018). The COSC[166] is a component of the Public Prosecutor's Office, which carries out its tasks under the authority of the Minister of Justice (Law of 4 February 2018, art. 4 and 6). It represents the "Asset Management Office" within the meaning of art. 10 of Directive 2014/42/EU (Law of 4 February 2018, art. 5 and 31).

4.1.2. *Power of the competent authorities on the frozen assets*

Frozen assets may be subject to a series of decisions, which are listed below.

a) *Conservation and management.* The Law of 4 February 2018 refers to three types of "management": constant-value management, compulsory management and optional management (art. 3). The COSC must manage frozen property entrusted to it "with due diligence" and "in accordance with the principles of prudent and passive management" (Law of 4 February 2018, art. 8). Thus, the OCSC is not allowed to speculate on the market of investments at risk. It will pay the proceeds of the managed securities (e.g. coupons, dividends) without re-use (Doc., Ch.,

[165] *Ibidem*, 158.

[166] The COSC is currently composed of about thirty people. There are, of course, public prosecutors (4) but also seconded officials from the Department of Finance (4), liaison officers from the Federal Police (2) and administrative staff.

2017-2018, n° 2732/1, 12). Management fees are considered legal costs (Law of 4 February 2018, art. 8).

Mandatory management concerns frozen cash, the credit balances of frozen accounts, the sums of money which have been substituted for the frozen goods (following a disposal or a restitution in exchange for payments, see below), and the frozen virtual values (Law of 4 February 2018, art. 3 and 15). The public prosecutor or the investigating judge must transfer to the COSC the frozen cash and the credit balances of the frozen accounts within three months of the freezing (Law of 4 February 2018, art. 15). This systematic transfer to the COSC makes it possible, among other things, to transfer money more quickly to the Department of Finance in case of confiscation (Doc., Ch., 2017-2018, n° 2732/1, 18). Foreign currencies that may be managed by the COSC are the US Dollar, Australian Dollar, Canadian Dollar, British Pound, Japanese Yen, Swiss Franc, Swedish Krona, Norwegian Krone, Danish Krone, and the South African Rand (Law of 4 February 2018, art. 8, Royal Decree of 17 May 2018, art. 1). Other currencies are, in principle, deposited with the registry (circular COL 9/2018, 15).

Optional management is the management of securities and assets that require specialized management. This is the case for some virtual values (e.g. bitcoins), live animals, diamonds, works of art, securities, gold bars, and so on. (Doc., Ch., 2017-2018, n° 2732/1, 9 and 19). If the public prosecutor or the investigating judge assigns to the COSC any patrimonial asset that falls under such discretionary management, the COSC may refuse. The case will then be decided (arbitration procedure) by the Attorney General in charge of economic, financial and fiscal crime (Law of 4 February 2018, art. 16). If the COSC accepts the mission (or if it is forced by the Attorney General to accept it), the property will be deposited in its safes. If this option is not possible due to the nature of the property, the COSC may call upon an intermediary or an agent whose intervention it deems necessary (Law of 4 February 2018, art. 16). The COSC may even enter into "framework agreements" with third-parties for the management of certain properties (e.g., an agreement with a museum for the management of works of art; Doc., Ch., 2017-2018, n° 2732/1, 19). Regarding the management of dematerialized securities, the current good practice is to not necessarily transfer these securities to an account opened with the COSC but to continue to have them be managed by the financial institution from which these securities are frozen. The garnishee continues to be informed by their financial institution and to be liable for management fees, which reduces the legal costs (Doc., Ch., 2017-2018, n° 2732/1, 10; circular COL 9/2018, 18). Bearer securi-

ties that are not available in electronic form are deposited in the registry or in the safes of the COSC (circular COL 9/2018, 19).

Constant value management consists either in the sale or disposal of the property (see below), or in the restitution in exchange for payments (see below) or in the conservation in kind of frozen property with or without bond. In the latter case, the public prosecutor or the investigating judge entrusts the management of the property to the registry, to a third-party or to the garnishee (Law of 4 February 2018, art. 14). This magistrate sets independently the bond which must be paid by the frozen party or a third-party. The management of the bond is entrusted to the COSC. It seems that this guarantee measure is not applied in practice (circular COL 9/2018, 7). Conservation in kind will be preferred if the frozen property constitutes evidence (restitution or sale does not seem relevant in this case, see below) or if there is a possibility for the person to challenge the ongoing freezing order (postponement of the decision is preferable). But the legislator wishes that "the usual method of treatment of frozen property becomes sale and restitution in exchange for payments", and not the conservation in kind, and this to limit the legal costs and the deterioration of the frozen item (Doc., Ch., 2006-2007, n° 2761, 8 and 14)[167].

b) *Restitution in exchange for payments.* The public prosecutor and the investigating judge may decide to return the property to the garnishee in exchange for a payment of a sum of money (C.C.P., art. 28-*octies* and 61-*sexies*). The freezing will then relate to the sum of money resulting from the restitution (subrogation). These magistrates sovereignly determine the amount of this sum of money. However, in order to make an objective assessment of the property's value, the magistrate can ask the COSC or the police to make an estimate of the property (circular COL 9/2018, 7). This possibility of restitution is not often used because some magistrates fear that the restitution of the property will enable the accused to perpetrate a similar offense or to launder money from illicit activities[168]. The circular COL 9/2018, however, makes restitution a priority measure (even with regard to sale or disposal, 7). For example, it recommends that the police immediately ask the garnishee if they are willing to pay a sum of money to recover the frozen property (p. 7). If, within 20 calendar days, the garnishee has not paid the amount provided

[167] A. Fokan, «La gestion à valeur constante des avoirs saisis: principes et aspects pratiques», in P. Fréteur, P. Tilliet (eds.), *Saisies et confiscations. Questions d'actualité*, Bruxelles: Larcier, 2011, 17 and 22.

[168] *Ibidem*, 24.

on the account of the COSC, the alternative measure will automatically be sale or disposal. These precisions are given by circular COL 9/2018 (p. 8) alone.

When the frozen property is a motor vehicle, a boat or a plane, the magistrates have the obligation to rule on the fate of this property (by choosing between restitution or sale or disposal) within three months following freezing (Law of 4 February 2018, art. 10). This rule is justified by the rapid decrease in value of these goods and the high costs of conservation in kind.

c) Sale or disposal. The public prosecutor and the investigating judge may authorize the COSC to sell or dispose of the frozen property. The freezing will then relate to the sum of money resulting from the sale or disposal (subrogation). This sum of money will be managed by the COSC. Sale of frozen assets is enjoying increasing popularity in Belgium[169]. Practice shows that the execution of confiscation is facilitated in case of prior sale of the frozen property[170].

Only replaceable assets of easily determinable value whose conservation in nature may result in depreciation, damage or costs that are disproportionate to their value may be alienated (C.C.P., art. 28-*octies* and 61-*sexies*). Thus, some "oldtimers" cars, or works of art cannot be sold because they are not replaceable (Doc., Ch., 2017-2018, n° 2732/1, 15; circular COL 9/2018, 7). Property may be sold even if its owner cannot be identified[171]. Except in the case of investigation, parliamentary proceedings (Doc., Ch., 2017-2018, n° 2732/1, 14) and the circular COL 9/2018 (p. 6) specify that the public prosecutor is liable to make constant value management decisions (and thus take a disposal/sale decision) until the final decision of the criminal judge. Such competence in the judgment phase does not appear explicitly in the Law of 4 February 2018 or in the C.C.P.[172]. Jurisprudence prior to the Law of 4 February 2018 specifies that the public prosecutor cannot proceed to disposal/sale during the judgment phase[173]. It has been held that if the owner of the frozen property has made a request to terminate the freezing (C.C.P., art 61-*quater*), the sale of the property is premature (Doc., Ch., 2017-2018, n° 2732/1, 16)[174]. If the frozen property is an exhibit, the sale may not be timely.

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[169] *Ibidem*, 25.

[170] *Ibidem*, 22.

[171] Cass., 17 October 2007, *Pas.*, 2007, 1815.

[172] A field actor confirms this competence of the public prosecutor during the judgment phase, but points out that it is rarely encountered in practice.

[173] Ghent (acc.), 11 August 2015, *T. Strafr.*, 2016, 253.

[174] Brussels (acc.), 29 June 2004, *T. Strafr.*, 2004, 303.

For movable property, the COSC has the sale carried out by the Department of Finance. When the frozen property is a motor vehicle, a boat or an airplane, the decision (restitution or sale) must be taken within three months of the freezing. In practice, more than 90% of frozen assets to be disposed of by the COSC are vehicles[175]. The COSC may request the police services to transfer the vehicle to the place of sale (Law of 4 February 2018, art. 12).

For real estate, the COSC entrusts the sales mandate to a notary (Law of 4 February 2018, art. 11 and 13). The Belgian State is deemed to be the seller (Law of 4 February 2018, art. 13). The notary pays the mortgagees and transfers the balance to the COSC (circular COL 9/2018, 11). However, buildings should be less frequently and less quickly disposed of than movable properties because the risk of depreciation is lower and the legal obstacles are more numerous (circular COL 9/2018, 8).

Except in special circumstances, a public auction is organised (the Finshop of the Department of Finance organize public sales online). The costs of the sale are borne by the buyer. For example, over-the-counter selling is preferable in the case of a time-sensitive requirement (e.g. perishable goods), in the case of market niches (e.g. aircraft, circus animals), in the event of a risk of disturbance to the public order at the time of the public sale, or in the event of risk that the goods sold in public sale may return towards the criminal environment (Doc., Ch., 2017-2018, n° 2732/1, 17).

d) *Making property available to the Federal Police.* When the public prosecutor or the investigating judge has made the decision to dispose of the frozen property, this decision may be suspended if the COSC decides to make the property available to the police (Law 4 February 2018, art. 17). This decision is optional and the COSC will not provide for it if it may interfere with the prosecution's or defense's evidence (Doc., Ch., 2017-2018, n° 2732/1, 20). The director of the COSC determines the duration of the availability, which in practice generally is between one and two year-long.

Such availability is possible (principle of proportionality) only if the property concerns acts committed within the framework of a criminal organization or in the context of the facts referred to in the list of Article 90-*ter*, §§ 2 to 4 from the C.C.P. Such provision is possible even if the owner of the property cannot be identified (Law of 4 February 2018, art. 17). The frozen property must be useful (principle of purpose) to the fight

[175] A. Fokan, *op. cit.*, 16.

against or the prevention of acts committed within the framework of a criminal organization, or in the context of facts referred to in the list of Articles 90-*ter*, § 2 to 4 of the C.C.P. It is also necessary (subsidiarity principle) that the police not already have similar assets in sufficient numbers.

At first glance, these limitations may seem convoluted and counterproductive (e.g., why can the police use a frozen car solely for the purpose of combating certain offenses?). But in fact, the legislator did not want this availability to be used as an argument to justify a reduction of the public endowments of the police. Assets frozen are not usable on a "daily" basis, but only for specific "operations".

The police must use these goods wisely. The availability can in theory concern all the frozen assets but in practice it concerns mostly vehicles and, to a lesser extent, computer tools. The money frozen cannot be used by the police for operational purposes (as part of an infiltration for example, circular COL 9/2018, 20).

e) *Destruction*. The public prosecutor may decide on the destruction of frozen property liable to be confiscated (C.C.P., art 28-*novies*). When he wishes to make such a decision during the investigation, the prior authorization of the investigating judge is required. The public prosecutor can request the assistance of the COSC as part of this destruction (Law of 4 February 2018, art. 27). If the administering of the evidence so requires, the taking of samples, or a photographic or video recording of the property will take place before the destruction.

Such destruction is motivated by reasons of cost (the conservation of the property has a disproportionate cost compared to the value of the property) or for security reasons (the property constitutes a serious danger to the security or public health, the re-use of assets would violate public order, good morals or legal provision).

f) *Use by the police or a scientific institution for didactic or scientific reasons (property liable to destruction).* With respect to property that may be destroyed and is not likely to be re-circulated, the public prosecutor may decide to make it available to the police or a scientific institution, free of charge, for didactical or scientific reasons or for the study of relevant criminal phenomena (C.C.P., art 28-*novies*). It may also make the property available to the police when it is useful for the purposes of combating offenses referred to in Article 90-*ter* §§ 2 to 4 of the C.C.P. The preparatory work of the law illustrates this point with illegal narcotics (Doc., Ch., 2017-2018, n° 2732/1, 42). An actor in the field mentions another case: (illegal) blockers of electronic devices ("jammers") which are of great interest to the police to carry out certain operations. When the

public prosecutor wishes to make such a decision during the investigation, the authorization of the investigating judge is required.

g) Restitution (linked to the end of the freezing). The frozen property kept in the registry is returned by the Registrar of the Tribunal. In the case of frozen property managed by the COSC, the enforceable decision providing for restitution must be executed by the COSC within two months (Law of 4 February 2018, art. 23). No penalty is provided for exceeding this deadline (circular COL 9/2018, 24).

If the case is closed without further action, the public prosecutor specifies to the COSC, within the month of the decision to close the investigation, the destination of the frozen property[176]. If the director of the COSC finds the decision to close the investigation without the public prosecutor specifying the destination of the frozen property, he decides himself of this destination, after written notice to the public prosecutor (Law of 4 February 2018, art. 19). This is a situation that will often result in restitution. The director of the COSC also decides on the destination of the frozen property when the court has not pronounced, in the judgment, the destination of the frozen property (here again restitution is possible, Law of 4 February 2018, art. 19).

Prior to restitution, the COSC informs the institutions responsible for the recovery of tax or social security debts in Belgium and the other Member States of the European Union (Law of 4 February 2018, art. 32, Royal Decree of 12 July 2009, art. 1). The COSC may also directly apply the sums to be returned to the payment of these debts (Law of 4 February 2018, art. 32). An actor in the field fears that the new legal deadline of two months imposed on the COSC to carry out the restitution is too short to effectively implement the legal compensation of the debts of the garnishee.

4.1.3. *Costs for the management or disposal of the frozen assets*

Costs related to the management of seized property are legal costs that are taxed by the COSC (Law of 4 February 2018, art. 8, Program Law (II) of 27 December 2006, art. 2).

In the event of the freezing being lifted, the frozen sums returned shall be increased by interest (Law of 4 February 2018, art. 9, Royal Decree n° 150 of 18 March 1935, art. 18 and 19). The interest rate is the one chosen by the financial institution designated by the COSC to manage the sums of money (Doc., Ch., 2017-2018, n° 2732/1, 14).

[176] The Law of 4 February 2018 only envisages sums of money, but circular COL 9/2018 wisely extends the scope of the decision of the director of the COSC to all the assets frozen (p. 22).

4.1.4. *Legal remedies against wrongful management of frozen assets*

In the face of a decision concerning the management of the frozen property taken by the public prosecutor or the investigating judge, it is possible on the one hand to challenge them and on the other hand to seek compensation for the damage suffered.

Decisions relating to constant value management (disposal and sale, restitution in exchange for payments, conservation in kind) are notified to the dependents in whose hands the freezing was made, to persons who according to the data of the file were manifested as injured by the act[177] and, in case of freezing of immovable assets, to the mortgage creditors (C.C.P., art. 28-*octies* and 61-*sexies*). These persons may appeal to the indictments chamber within fifteen days of notification. This period is extended by fifteen days if the person resides outside the Kingdom. The procedure is the same as for a "référé penal" (see point 2.1.7.). There is no appeal in cassation possible. The petitioner may not address or file a petition for the same purpose before the expiry of a period of three months from the last decision on the same subject (C.C.P., art. 28-*sexies* and 61-*quater*).

Decisions of the COSC to make available the frozen property to the police are notified to the magistrate who authorized the sale of the property (Law of 4 February 2018, art. 17). It is not intended that this decision of the COSC be notified to other persons, however as this decision can only concern the property for which a sale was authorized, a series of persons (see above) have been notified of this sale decision. The drafting of Article 17 of the Law of 4 February 2018 is problematic because it could be interpreted as giving to the garnishee two recourses: a first against the decision of sale and a second against the decision of making the frozen asset available to the police. One actor in the field states that the intention of the legislator is to provide only one remedy (against the sale decision).

Decisions relative to destruction are notified by the public prosecutor within eight days to the dependents from whom freezing was practiced and persons who appear entitled to assert rights over the property to be destroyed (C.C.P., art. 28-*novies*). These persons may appeal to the indictments chamber within fifteen days of notification. This period is extended by fifteen days if the person resides outside the Kingdom. The procedure is the same as for a "référé penal" (see point 2.1.7.). There is no appeal in cassation possible.

[177] Are concerned here third-parties who have made a "référé penal", the third-parties who have challenged the freezing in accordance with Royal Decree n° 260 of 24 March 1936, and third-parties who have sent a letter to the competent magistrate (circular 9/2018, 9).

The decision of the public prosecutor to allow the police or a scientific institution to use for educational purposes the property to be destroyed (C.C.P., art. 28-*novies*, § 9) cannot be as such challenged by those to whom the destruction decision was notified. Besides, this decision of the public prosecutor of provision to the police is not notified to these people.

These differences in the remedies available depending on the type of decision taken in the context of the management of frozen property are not justified by the legislator (were they intended by the latter?).

In addition to these different remedies to oppose the decisions made in the management of seized property, there is the possibility to claim compensation for damages related to these decisions.

In Belgium, since the cases *Anca* I and II, it is clearly recognized that the State is liable for the mistakes made by judges in the performance of their duties[178]. It is not the personal responsibility of the magistrate that will be considered but the responsibility of the Belgian State directly (on the basis of art. 1382 and 1383 of the Civil Code).

In the constant value management of frozen property, the magistrate is guided by the desire to avoid a loss of value of the property frozen. The magistrate has an obligation of means and not an obligation of result (Doc., Ch., 2017-2018, n° 2732/1, 14)[179]. The Law of 4 February 2018 explicitly provides that conservation in kind (one of the possible decisions in the context of constant-value management) is done "according to the means available" (art. 3). It can nevertheless be considered that the Law of 4 February 2018 provides for an obligation of result when it requires the public prosecutor or the investigating judge to choose, in the case of motor vehicles, boats and aircrafts, within three months of the freezing between the sale and restitution in exchange for payments (art. 10). The absence of a decision within the prescribed period could constitute a fault (without having to pass through the criterion of the diligent and careful magistrate placed under the same conditions)[180].

In the event of compulsory or optional management by the COSC, the responsibility of the State could be engaged if the seized assets are not managed "wisely and reasonably" and according to a "careful and passive management" (Law of 4 February 2018, art. 8).

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178 Cass., 19 December 1991, *Pas.*, 1992, 316; Cass., 8 December 1994, *Pas.*, 1994, 1063.

179 H. Lurkin, «La responsabilité du pouvoir judiciaire en matière de gestion de biens saisis: obligation de moyen ou de résultat?», *Revue de la Faculté de droit de l'Université de Liège*, 2, 2013, 286.

180 If the magistrate does not make their decision within this period, a reminder email is sent by the COSC (circular COL 9/2018, 13).

If the frozen property has been made available to the police and must be returned to its rightful owner, it will be necessary to compensate the potential loss (linked to the use) by compensation (Law of 4 February 2018, art. 17, § 7). Proof of this loss is facilitated by the obligation to make a description of the condition and an estimate of the value of the property before and after use (Law of 4 February 2018, art. 17, § 4).

If the property destroyed could have been put back into circulation on a regular basis, and if the file ends with a dismissal, an acquittal or a non-suit, then the rightful owner of the destroyed property can claim damages. The amount of the indemnity corresponds to the value of the property destroyed at the moment of the destruction (C.C.P., art. 28-*novies*, § 8).

4.1.5. *National practices on the management of frozen assets in a different EU Member State*

If the property to be frozen is abroad, the public prosecutor, the investigating judge or the competent criminal court shall transmit a certified copy of the freezing decision as well as the certificate to the competent authority of the executing State (Law of 5 August 2006, art. 3 and 18 and Annex 1). The assistance of the COSC may be requested by these competent authorities (Law of 4 February 2018, art. 7 and 26). The competent authority may request the transfer of the property only if the freezing is provided for the purpose of establishing evidence. Where freezing is provided for the purposes of confiscation, the frozen asset must be maintained in the executing State.

The certificate listed in Annex 1 of the Law of 5 August 2006 does not provide that the Belgian authority may ask the enforcement authority for the various measures available under Belgian law (sale, restitution in exchange for payments…). Quite logically, frozen property will be managed as permitted by the law of the executing State. An actor in the field considers it crucial that a maximum of national legislation allows the sale of frozen goods.

In the event of the lifting of the freezing, the executing authority is informed (Law of 5 August 2006, art. 18).

4.1.6. *National practices on the management of frozen assets in execution of a freezing order from a different EU Member State*

The management (at constant value) of frozen property is provided by the COSC (circular COL 4/2014, 9). The COSC is the "centralized office" within the meaning of art. 10 of Directive 2014/42/EU of 3 April

2014, and is therefore responsible for facilitating the application of the Law of 5 August 2006 on the application of the principle mutual recognition (Law of 4 February 2018, art. 5 and 7).

Article 15, § 3 of the Law of 5 August 2006 refers to the system set up in domestic law by Article 61-*sexies* of C. i. cr. specifying that the investigating judge can therefore authorize the COSC to alienate the frozen property or to return it for a sum of money.

The Law of 5 August 2006 has not been modified to take into account the third option now provided by Article 61-*sexies* of the C.C.P., namely conservation in kind. This is all the more surprising since the commentary on the articles of the draft law that led to the Law of 4 February 2018 specifies that the "proposed regulation is inspired by the constant value management of property frozen on the basis of a freezing certificate [provided by] Article 15, § 3 of the Law of 5 August 2006" (Doc., Ch., 2017-2018, n° 2732/1, 15). Prior to his decision, the investigating judge must consult the competent authority of the issuing State. The public prosecutor informs the issuing State of the decision taken by the investigating judge (Law of 5 August 2006, art. 15, §§ 3 and 4).

Other measures provided by Belgian law (destruction, provision to the police…) are not explicitly provided for by the Law of 5 August 2006. Nevertheless, it would seem logical that the Belgian law be applicable to the management of these frozen assets since it is the law of the country of execution (*lex fori*).

The freezing decision is maintained until the lifting of the measure following a "référé pénal" or until the lifting of the decision of the judicial authority of the issuing State or until the final decision on confiscation (Law of 5 August 2006, art. 16)[181].

4.2. *Freezing of third-parties' assets*

If property belonging to a third-party can be frozen, the management of this property will be *a priori* similar to what has just been described.

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[181] The Law of February 4, 2018 (art. 10) provides that the management with constant value is possible for assets frozen in Belgium on the basis of the Law of May 20, 1997, but does not explicitly provide for assets frozen on the basis of the Law of 5 August 2006. There is no doubt, however, that the legislator did not want to override the Law of 5 August 2006. Thus, circular COL 9/2018 states that "this regulation is inspired by the European freeze certificate and is also valid for the constant value management of property seized in this context "(14). The models provided for in Annex 5 of the circular COL 9/2018 remove the differences between the procedures provided for in Article 15 of the Law of 5 August 2006 and Article 10 of the Law of 4 February 2018 (generalizing the procedure provided by the Law of 4 February 2018). Thus, both in the framework of international cooperation and in the

As an "aggrieved person", the third-party may request the lifting of the freezing ("référé pénal") (C.C.P., art. 61-*quater*).

When a lifting decision is taken, it is important to know to whom the frozen property must be returned. In principle, the restitution is made to the person in whose hands the freezing has been made, unless otherwise decided by the judge (Royal Decree n° 260 of 24 March 1936, art. 2). The competent magistrate (public prosecutor, investigating judge, trial court) must determine to whom the frozen item must be returned (Royal Decree n° 260 of 24 March 1936, art. 2). When the judge does not rule on the fate of a frozen item, the decision in this respect is a measure of execution of judgments and decisions that the public prosecutor has the power and the duty to order for the subsequent restitution of the property[182].

If a third-party (or a creditor of the garnishee) claims to hold a right to the frozen item and the magistrate has ordered the restitution to another person, that third-party (or the creditor of the garnishee) may object to the restitution before the civil judge (Royal Decree n° 260 of 24 March 1936, art. 3 to 5). The third-party must then seize the judge before the expiry of the time limit set by the public prosecutor, which is of at least fifteen days. The decision on restitution will not be enforced until the decision of the civil judge is enforceable[183]. Royal Decree n° 260 of 24 March 1936 only concerns frozen items which have been deposited in the registry. For frozen items that have not been deposited in the registry, legal doctrine suggests that a similar procedure for protecting the rights of third-parties be followed[184]. The parliamentary proceedings of the Law of 4 February 2018 specify that the COSC must wait for the decision of the civil judge in the dispute between the garnishee and the third-party or the creditor before restituting the item (Doc., Ch., 2017- 2018, n° 2732/1, 30). The Law of 4 February 2018 is less explicit on this last point.

4-3. *Confiscation*

4.3.1. *Competent authorities for the disposal of confiscated assets*

The registrar of the court who pronounced the confiscation shall transmit an extract of this judgment which has become res judicata to the

framework of the "European freeze", it is planned to suspend the execution of the decision on constant management for a period of three months to allow the requesting State to communicate these remarks (which is not provided for by the Law of 5 August 2006).

[182] Cass., 6 October 2010, *Pas.*, 2010, 2496, with conclusions by attorney general D. VANDERMEERSCH.

[183] Cass., 13 June 2001, *Pas.*, 2001, 1120.

[184] F. LUGENTZ, D. VANDERMEERSCH, *op. cit.*, 193.

receiver of the Department of Finance within three days (Royal Decree of 28 December 1950, art. 121). The registrar must also inform the COSC, but this legal obligation has not entered into force (Royal Decree of 28 December 1950, art. 121).

Article 19 of the Law of 4 February 2018 does not explicitly provide that confiscation orders must be notified to the COSC. This lack of clarity may be a substantial problem. Thus, while the parliamentary proceedings specify that the public prosecutor must notify the COSC without delay of the confiscation orders (Doc., Ch., 2017-2018, n° 2732/1, 23), annex 2 of circular COL 9/2018 considers that it is the registry of the court's role to make this notification by e-mail within five working days of the conviction having become res judicata.

Prosecutions for the recovery of confiscated property are carried out by the Department of Finance on behalf of the Public Prosecutor and according to the indications of the COSC[185] (C.C.P., art. 197-*bis*). The public prosecutor considers the property benefits by judgment or order, by confiscated items or by lots of similar property (Royal Decree of 17 May 2018, art. 2).

To assess the feasibility of an effective execution of confiscation, the COSC may conduct a solvency investigation of the sentenced person (Law of 4 February 2018, art. 21). This survey seeks to collect information allowing the Department of Finance to ensure the effective execution of a confiscation order. It therefore seeks to "identify any type of property of which the convicted person is the owner but which have not been frozen [or identified] during the criminal investigation"[186]. When a financial institution or a company registered with the Crossroads Bank for Enterprises refuses to communicate information relating to the solvency of the convicted person (list of bank accounts, bank safes, banking transactions, identification of the holders and agents of the person sentenced) it risks a criminal fine (Law of 4 February 2018, art. 21 and 22). As part of this solvency investigation, the COSC may decide on a temporary freeze (a sort of a posteriori freezing for a maximum of five working days) of the property of the person concerned (Law of 4 February 2018, art. 22)[187].

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[185] The COSC is the Asset Recovery Office for the purposes of Decision 2007/845/JHA. It is a member of the European Union's Asset Recovery Office Platform (ARO) and the CARIN network (Camden Asset Recovery Interagency Network; Doc., Ch., 2017-2018, n° 2732/1, 34). It plays a key role in finding the assets of a convicted person abroad.

[186] P. Tilliet, «Nouveautés en matière d'exécution des confiscations prononcées par le juge pénal », in P. Fréteur, P. Tilliet (eds.), *Saisies et confiscations. Questions d'actualité*, Bruxelles: Larcier, 2011, 53.

[187] *Ibidem*, 54.

The public prosecutor may also perform or instruct the COSC to carry out a criminal execution investigation in order to search, identify and seize the assets on which confiscation may be executed (C.C.P., art. 464/1; Law of 4 February 2018, art. 24). Such an investigation is only possible if the convicted person has been convicted of an offense punishable by a minimum term of imprisonment of one year and the amount owed (we cumulate the amount of confiscation, criminal fines and court costs) is of at least 10,000 euros (Royal Decree of 25 April 2014, art. 1). The means of investigation are more extensive than in the case of solvency investigation. Interrogations, searches, searches in a computer system, deep searches, observations, use of indicators, wiretapping, etc., are authorized in this case. A measure of deprivation of freedom is however not allowed (C.C.P., art. 464/5). The frozen items in the framework of a criminal execution investigation can be returned in exchange for payments fixed by the magistrate in charge of this investigation (C.C.P., art. 464/35). They can also be alienated (C.C.P., art. 464/37). The person aggrieved by a freezing can request the public prosecutor to lift this act of execution. Since a final judgment has already been pronounced, the appeal against the decision of the public prosecutor will be brought before the judge of the enforcement of sentences (C.C.P., art. 464/36).

4.3.2. *Modalities of disposal of confiscated assets*

In the case of a prior freezing, the Department of Finance official proceeds to the execution of frozen items in accordance with the instructions of the public prosecutor or the COSC (C.C.P., art. 197-*bis*). When the decision of confiscation order is cast as res judicata, the earlier frozen item becomes the property of the State.

In the absence of a prior freezing, the Department of Finance official invites the convicted person "to voluntarily make themselves available within one month"[188]. Without prior freezing, a claim on the confiscated item is created, with the State as its beneficiary[189].

4.3.3. *Other possible destinations of confiscated assets*

The judgment pronouncing a confiscation assigns, in principle, the property of confiscated items to the State[190]. But in certain cases, the

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[188] *Ibidem*, 52. There is no legal basis for this delay. It comes from practice and seems to be of sufficient duration.

[189] A. Masset, «Confiscation en matière pénale», in *Postal Mémorialis*, C 302/17.

[190] Cass., 4 April 2008, *Pas.*, 2008, 814.

confiscated items are returned or attributed to the civil party (P.C., art. 43-*bis*, § 3 and art. 44).

When confiscated items belong to the civil party, they are returned to them (P.C., art. 43-*bis*). The confiscation then has "the character of a civil compensation of the damage resulting from the offense"[191]. For those items to be returned to the civil party, they must be owned by the latter, whether they were found in kind in the patrimony of the condemned and were confiscated[192]. The civil party is preferred over the creditors (non-mortgage) of the convicted person[193].

These confiscated items are attributed to the civil party if these goods constitute property or values substituted by the condemned to things belonging to the civil party or a sum of money which is equivalent to them (P.C., art. 43-*bis*). On the other hand, confiscated items that do not belong to the civil party cannot be attributed to them[194]. Confiscation is a prerequisite for the assignment of property to the civil party[195].

The circular COL 9/2018 specifies that Article 32 of the Law of 4 February 2018 is applicable here and that public debts can therefore be compensated before restitution or attribution (p. 25).

If restitution or attribution of confiscated property does not allow for full compensation, the victim may request compensatory compensation on the basis of Article 1382 of the Civil Code.

For the situation of third-parties who did not bring civil action, see below point 4.4.

4.3.4. *National practices on the disposal of confiscated assets in a different EU Member State*

If the confiscated items are abroad, the public prosecutor transmits a certified copy of the confiscation order and the translated certificate to the competent authority of the State (Law of 5 August 2006, art. 3 and 39 and Annex 3). The Minister of Justice and the COSC receive a copy of these documents (C.C.P., art. 197-*bis*, § 3). The public prosecutor may request the COSC to assist them or to undertake these steps themselves with the executing State (C.C.P., art. 197-*bis*, § 3; Law of 4 February

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[191] F. Kuty, «Les droits de l'État, de la victime de l'infraction et des tiers sur les avantages patrimoniaux confisqués sur la base de l'Article 43-*bis* du Code pénal», in F. Deruyck, M. Rozie (eds.), *Liber Amicorum Alain De Nauw. Het strafrecht bedreven*, Brugge: Die Keure, 2011, 531; Cass., 9 May 2007, *Pas.*, 2007, 882.

[192] *Ibidem*, 531 and 532.

[193] Civ. Brussels, 29 November 2004, *J.L.M.B.*, 2005, 835.

[194] Cass., 18 April 2006, *Pas.*, 2006, 857.

[195] Cass., 9 May 2007, *Pas.*, 2007, 883.

2018, art. 7 and 26). Article 39 of the Law of 5 August 2006 determines to which state(s) the certificate must be transmitted (criteria of the place of income, the registered seat of the legal person, the place where the property is found…).

The transmission of a confiscation order to a executing State does not restrict the right of the Belgian's authorities to execute the confiscation themselves (Law of 5 August 2006, art. 39, § 5). The executing State must be informed by the public prosecutor of this execution (Law of 5 August 2006, art. 40).

4.3.5. *National practices on the management of confiscated assets in execution of a confiscation order from a different EU Member State*

The destination of the confiscated items is determined by the public prosecutor (and not by the criminal court) according to the rules set out in Article 38 of the Law of 5 August 2006:

– sums of less than EUR 10,000 are paid to the (Belgian) State Treasury;

– sums of money equal to or greater than EUR 10,000 are divided equally between the (Belgian) State Treasury and the issuing State;

– for goods that are not an amount of money, the public prosecutor decides to transfer them to the issuing State (circular COL 4/2014, 30) indicates that this situation is exceptional) or to sell them, the proceeds of the sale being distributed as indicated above. If neither of these two hypotheses is possible, the property will be disposed of in accordance with Belgian law (e.g. destruction of drugs or weapons).

Cultural objects belonging to the Belgian cultural heritage may not be sold or returned.

Such rules relating to the destination of confiscated items are highly problematic in that they do not take into account the interests of victims and bona fide third-parties[196]. The fate of the Belgian victim in domestic law is more favorable (P.C., art. 43-*bis*, par 3). Fortunately, it is envisaged that the Minister of Justice may derogate to these rules with the agreement of the issuing State (Law of 5 August 2006, art. 38, § 3). In addition, international agreements (e.g. C.B.I.F.T., art. 25.2) may provide for other distribution keys that are more favorable to the issuing State, to victims and to bona fide third-parties[197].

The execution of confiscation is terminated if the issuing State withdrew its application (Law of 5 August 2006, art. 36) and in case of

[196] F. Lugentz, D. Vandermeersch, *op. cit.*, 280.
[197] *Ibidem*, 264.

amnesty or pardon granted by Belgium (Law of 5 August 2006, art. 37). These last hypotheses are surprising since it is a foreign conviction.

4.4. *Third-Party Confiscation*

In some cases (see point 1.1.), property may be confiscated even if the convicted person is not the owner. We have seen that confiscation implies in principle a transfer of ownership to the State or to the civil party. However, it is stipulated that the sentence of confiscation cannot prejudice the rights of third-parties over confiscated items (P.C., art. 43-*bis*, par 4)[198]. This absence of prejudices for third-parties is related to the principle of the individual nature of penalties, which also applies to ancillary penalties[199]. The rights of bona fide third-parties must be privileged in relation to the rights of the State[200].

Third-parties may claim their rights either during the judgment phase, since they will be informed of the setting of the hearing before the criminal court (Preliminary Title of the Code of Criminal Procedure, art. 5-*ter*), or after the judgment (Royal Decree of 9 August 1991).

If one is still in the judgment phase, the third-party by virtue of their lawful possession is informed of the case setting by the prosecution services and may indicate their intention to intervene (Preliminary Title of the Code of Criminal Procedure, art. 5-*ter*; Judicial Code, art. 812). To speak of "lawful possession" within the meaning of Article 5-*ter*, it is necessary that this third-party has not committed any offense and that they have no knowledge of the unlawful origin of the property[201]. A non bona fide third-party will not prevent the pronouncement of confiscation in favor of the State.

If a judgment providing for confiscation in accordance with Article 43-*bis* of the P.C. has already been pronounced, it cannot be executed before the expiry of a period of ninety days from the day when the sentence will become res judicata (Royal Decree of 9 August 1991, art. 1). Once the decision has become final, the Registrar of the Tribunal shall, within thirty days, notify third-parties who claim to have a claim against an item and who have opposed the return of the item in accordance with

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198 F. Discepoli, «Réflexions en matière de saisies et de confiscations à la suite de l'arrêt de la Cour constitutionnelle du 3 avril 2014», *Pli juridique*, 32, 2015, 20.

199 C.C., 3 April 2004, n° 65/2014; D. Bernard, C. Guillain, B. Dejemeppe, «La confiscation pénale: une peine finalement pas si accessoire», in C. Guillain, P. Jadoul, J.-F. Germain (eds.), *Questions spéciales en droit pénal*, Bruxelles: Larcier, 2011, 5.

200 F. Kuty, *op. cit.*, 558.

201 Cass., 12 December 1921, *Pas.*, 1922, 98.

Article 3 of Royal Decree n° 260 of 24 March 1936 and all other persons indicated to it by the Public Prosecutor as being entitled to claim rights in confiscated property. Third-parties must then apply to the civil court within ninety days from the day on which the judgment becomes res judicata (Royal Decree of 9 August 1991, art. 3). The decision on confiscation will not be enforced until the decision of the civil judge[202] has become res judicata (Royal Decree of 9 August 1991, art. 4). This protection of third-parties provided for in Article 43-*bis* of the P.C. does not apply to confiscation related to money laundering (P.C., art. 505)[203].

It is not enough for the third-party to show that they have a real right to the item, but also to distinguish between the non-bona fide and bona fide third-party[204]. If the third-party knew or ought to know the origin of the property, they cannot claim the restitution of the property. They could even be prosecuted for money laundering or receiving. The good faith of the third-party "is attested if the third-party can trust the regularity of the nature and origin of the goods"[205]. The bona fide third-party believes that "the person whose property they hold is the latter's owner. (…) This belief must be reasonable and seriously founded"[206]. The legal doctrine stipulates that it is very rare for a third-party to succeed in successfully claiming its rights over an item that is liable to confiscation[207]. Some authors believe that a distinction should be made between a bona fide third-party who "upon acquiring property benefit, provided or offered compensation (…) and those who received the property free of charge or without genuine compensation"[208]. In the first case, the third-party must remain in possession of the pecuniary benefit and the confiscation (per equivalent) will relate to the property and securities which have been substituted for them (P.C., art. 42, 3°). In the second case, the bona fide third-party can no longer ignore the criminal origin of the property and "any transaction that (they) would perform (…) would be considered money laundering"[209]. They therefore become bad faith third-party, and cannot claim possession of the item.

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[202] Cass. 22 September 1998, *Pas.*, 1998, 971.

[203] O. Klees, «La bonne foi du légitime propriétaire d'une chose confisquée par le juge pénal», in F. Deruyck, M. Rozie (eds.), *Liber Amicorum Alain De Nauw. Het strafrecht bedreven*, Brugge: Die Keure, 2011, 501.

[204] Cass., 4 March 2014, *Pas.*, 2014, 580; F. Lugentz, D. Vandermeersch, *op. cit.*, 93.

[205] Cass, 4 March 2014, *Pas.*, 2014, 582.

[206] O. Klees, *op. cit.*, 517.

[207] *Ibidem*, 503.

[208] F. Lugentz, D. Vandermeersch, *op. cit.*, 95.

[209] *Ibidem*, 95.

There may be a conflict of interest between the victim and the bona fide third-party. The victim, deprived of possession of the property of which they are the owner, is protected by Articles 43-*bis*, § 3 and art. 44 of the P.C., while the bona fide third-party who acquired possession is protected by Article 43-*bis*, al. 4 of the P.C. The legitimate possession of the bona fide third-party takes precedence over the right of the victim dispossessed by the offense[210]. The victim will obviously be able to demand compensation for the damage caused to the perpetrator of the offense on the basis of Article 1382 of the Civil Code. However, in the event of loss or theft, the victim may claim the movable property stolen or lost for a duration of three years (C. civ, art. 2279, § 2). In this case, the victim will have to reimburse the bona fide third-party owner the price that this movable property cost them (C. civ., art. 2280). The victim will then be able to claim compensation from the offender, on the basis of Article 1382 of the Civil Code, for the price that they had to pay in order to recover their possession[211].

Finally, the criminal execution investigation may concern the property of the convicted person but also that of non bona fide third-parties. Non bona fide third-parties are defined as third-parties who conspire knowingly and voluntarily with the convicted person in order to exempt the latter's assets from the execution of the enforceable sentences (C.C.P., art 464/1). The magistrate in charge of the criminal execution investigation can freeze the goods of a third-party if there are serious and concrete indications that the convict transferred the goods to the third-party (even before the sentence is passed res judicata), in order to avoid the recovery of confiscation, and that the third-party knew or ought to have known that the property had been assigned to them in order to avoid confiscation (C.C.P., art. 464 /30).

Conclusion

The Court of Audit considers that "the execution of confiscation is entrusted to numerous, highly decentralized actors who report to independent hierarchical authorities". This creates a certain "confusion of roles" and the inability of the COSC to "fully exercise its coordination role"[212]. The Court of Audit also notes shortcomings at different points

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[210] Cass., 11 January 2005, *Pas.*, 2005, 58.

[211] Cass., 31 October 2003, *Pas.*, 2003, 1744; F. Kuty, *op. cit.*, 560.

[212] Cour des comptes, *L'exécution des peines patrimoniales. Les amendes pénales et les confiscations spéciales*, Bruxelles: 2007, 47 and 51.

in the process: the registries do not transmit the decisions perfectly to the (competent) actors of the Department of Finance, the COSC does not receive all the decisions carrying out confiscations; the actors responsible for the Department of Finance are not always able to execute the confiscations because the judgments do not always make it possible to clearly identify the confiscated items; no actor is able to verify whether a confiscation has been executed[213].

These difficulties are reflected in a lack of quantitative data: "There is no reliable and complete information on the total number of sentences of confiscation of patrimonial assets pronounced for the benefit of the State, nor on the confiscated items entered into possession of the State"[214]. These difficulties are translated into a certain number of risks: "that confiscated items do not enter the State's heritage late or late; that confiscated items be diverted"[215].

Ten years after this audit, some things have not improved (there are still no reliable statistics available) but the current situation is however better overall. The new Law of 4 February 2018 is certainly more suitable than the previous legislation, and there has been progress in the implementation of a new computerized database of statistics[216].

5. *Final conclusions*

Several elements can be highlighted to conclude this national report.

In regards to substantive aspects, Belgian legislation on freezing and confiscation is very complex, in particular due to the many recent legal changes in Belgium. These legal changes have been imposed by European obligations and the case law of the Belgian Constitutional Court. The classification established by the Belgian law about confiscation (article 43 of the Penal Code) and freezing (art. 35 of the Code of Criminal Procedure) mobilizes concepts ("object of the offence", "instruments of the offence", "proceeds of the offence", "profits derived from or generated by the offence") which do not cover those traditionally used by in-

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213 *Ibidem*, 54.

214 *Ibidem*, 5 and 59.

215 *Ibidem*, 70.

216 This database is built to also collect goods frozen in Belgium by foreign authorities, as well as goods confiscated in Belgium by foreign judges (Doc., Ch., 2017-2018, n° 2732/1, 21).

217 It is important to be very careful in the terminology used because the notion of "proceeds of a criminal offence" used in international and European texts corresponds to the notion of "profits derived from or generated by the offence" in Belgian law (and not to the notion of "proceeds of a criminal offence": F. Lugentz, D. Vandermeersch, *op. cit.*, 211).

ternational provisions, and by European law ("proceeds of a criminal offence", "instrumentalities of a criminal offence"; Directive 2014/42/EU and Regulation (EU) 2018/1805)[217]. Some confiscations are mandatory and others are optional (freezing is always optional) and no convincing logic can be easily found. The question of third-party freezing or confiscation is neither explicitly nor systematically regulated by the legislator, which creates legal uncertainty. Extended freezing or confiscation exists but is rarely applied. The non-based confiscation, in the restricted sense of Directive 2014/42/EU (art. 4, § 2), is provided for Belgian law. An ambitious reform of the Penal Code is in progress in Belgium[218]. If this project is successful, the criminal confiscation will be mandatory (but with guaranties against an unreasonably harsh penalty) and the "extended" confiscation will be abolished (with a potential problem of compliance with European legislation)[219].

In regards to procedural aspects, Belgian law provides a number of guarantees for persons involved in the freezing or confiscation. So, the law allows the suspect and any person aggrieved by a freezing to ask the lifting of freezing. This procedure, so-called "référé penal", is very helpful for the protection of the rights of third parties. Confiscation, sanctioning an offense, may only be ordered, by a court of law, in the case of guilt and conviction of the accused to a principal sentence. As a penalty, confiscation must respect several fundamental rules relating to the rights of individuals. It must respect the principle of legality, be pronounced individually and be motivated. It cannot be retroactive and is subject to prescription. It cannot prejudice the rights of the victim. Furthermore, a confiscation order can be appealed.

In regards to mutual recognition aspects, the question of freezing for confiscation and the question of confiscation between Member States of the European Union are governed by the Law of 5 August 2006. This Law is rarely applied and is considered too complicated by practitioners. In addition, this law provides for numerous and sometimes mandatory assumptions of refusal of execution of the freezing or confiscation decisions. The implementation of Framework Decision 2003/577/JHA and Framework Decision 2006/783/JHA are thus subject to criticism.

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218 Commission de réforme du droit pénal, *op. cit*.

219 The authors of the draft new Belgian Penal Code no longer retain extended confiscation for three reasons: it does not respect the principle of the presumption of innocence; this mechanism is very complicated and rarely applied in practice and its disappearance is compensated by the creation of a new penalty: the pecuniary penalty fixed according to the expected or obtained profit from the offence (J. Rozie et D. Vandermeersch, *op. cit.*, 139).

In regards to management and disposal aspects, Belgium has, as provided for the Directive 2014/42/EU, an Asset Management Office. Indeed, the COSC must play this role of centralizing management. However, this centralization is not easy as the number of different actors involved in this stage of management is so large (the public prosecutor, the Ministry of Finance, the police, the Registrar of the Tribunal, the notary, the private administrator). To avoid a deterioration of the seized property and disproportionate conservation costs, Belgian law gives priority to sales, generally public auctions. A website under the responsibility of the Ministry of Finance centralizes these sales. Even if the re-uses of the assets are not very frequent, Belgian law allows them to take place relatively early in the procedure. Indeed, these re-uses may concern frozen assets (it is therefore not necessary to wait for a confiscation order). On the other hand, these re-uses are "institutional" re-uses, and not "social" re-uses, because the main beneficiary is the police. In the face of a decision concerning the management of the frozen property, it is generally possible on the one hand to challenge them and on the other hand to seek compensation for the damage suffered (the latter possibility is rare in practice and the chances of success are low). The execution of the confiscation decisions is complicated in practice by communication problems between the multitude of actors involved. However, in the legislation there are tools to ensure the feasibility of enforcing confiscation: the solvency investigation (Law of 4 February 2018, art. 21) and the criminal execution investigation (Code of Criminal Procedure, art. 464/1; Law of 4 February 2018, art. 24).