Non-Conviction-Based Confiscation (NCBC) – A Reform Option for German Asset Recovery Law

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ABSTRACT

Cross-border, asset-related crime exploits a persistent enforcement gap in Germany's confiscation regime. Existing tools — conviction-based forfeiture under §§ 73 ff. German Criminal Code (StGB) and the narrowly framed conviction-independent procedure of § 76a StGB — fail whenever offenders abscond, die, or hide behind complex offshore structures. This article addresses two research questions: (1) Can a non-conviction-based confiscation (NCBC) mechanism close this gap effectively? (2) Is such a mechanism compatible with the property guarantee of Art. 14 Basic Law and the fair-trial safeguards of Art. 6 European Convention on Human Rights?
Building on Directive (EU) 2024/1260 on asset recovery; comparative practice in Switzerland (SRVG 2015), Italy (confisca di prevenzione), and the United Kingdom (Proceeds of Crime Act 2002); and German constitutional jurisprudence, the author proposes a Vermögenseinziehungsgesetz (VEG, Asset Confiscation Act). The VEG is conceived as an in rem civil procedure before specialised chambers: the public prosecutor must demonstrate the "overwhelming probability" of illicit origin (i.e., an evidentiary standard lying between reasonable suspicion and proof beyond reasonable doubt, roughly 75% likelihood); only then does the owner assume a secondary burden to substantiate lawful provenance. Annual judicial review, hardship compensation, and a federal Asset Recovery Office would help safeguard due process. The proposal also recommends that data processing follow the principles of the General Data Protection Regulation, while cross-border enforcement interfaces with Regulation (EU) 2018/1805. The analysis demonstrates that the VEG model would satisfy Union minimum standards and the proportionality test of the German Federal Constitutional Court, thereby transforming the maxim "crime must not pay" into a legally and practically attainable objective.

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I. Introduction

Corruption, money-laundering, and organised-crime profits are moved rapidly across jurisdictions, concealed behind offshore vehicles and reinvested in opaque asset classes such as cryptocurrencies or high-value real estate. Whenever a criminal conviction cannot be secured — because the suspect dies, absconds, remains unidentified, or enjoys home-state immunity — conviction-based confiscation under §§ 73 ff. German Criminal Code (*Strafgesetzbuch*, StGB) and the auxiliary mechanisms of the German Code of Criminal Procedure (*Strafprozessordnung*, StPO) reach their limits. A measurable enforcement gap arises in which illicit assets remain untouched and continue to fuel criminal markets.[1]

The 2017 overhaul introduced (limited) conviction-independent confiscation in § 76a StGB, yet even this procedure still hinges on (i) a specific unlawful act and (ii) at least reasonable suspicion of a criminal offence (§ 152(2) StPO). Consequently, Germany does not yet meet the minimum standard laid down in Art. 12 et seq. Directive (EU) 2024/1260, which expressly calls for genuine non-conviction-based confiscation (NCBC).[2] Against this background, this article will present a reform proposal for the German legislator.

The analysis employs a three-pillar approach: doctrinal analysis of current German law; comparative evaluation of Swiss, Italian, and UK confiscation models; and legal-policy assessment against Directive (EU) 2024/1260 and FATF Recommendation no 4.

The following roadmap will guide the reader through the lines of argument towards an own proposal that seeks to remedy Germany's enforcement gap in the future.

II. Enforcement Issues under German Law

The 2017 Act on the Reform of Criminal Asset Forfeiture established three statutory avenues of confiscation in Germany: (i) conviction-dependent substantive confiscation under §§ 73 ff. StGB, (ii) extended confiscation under § 73a StGB, and (iii) a conviction-independent confiscation procedure in § 76a StGB read in conjunction with §§ 435 ff. StPO**.** While the reform harmonised terminology and strengthened tracing powers, each pillar remains tethered to elements that can collapse once a criminal trial is no longer feasible. Substantive and extended confiscation presuppose a final conviction, thereby excluding cases in which defendants die, abscond, or enjoy immunity. Even the supposedly independent route of § 76a StGB is conditioned on the identification of a specific unlawful act *and* at least an initial suspicion of a criminal offence pursuant to § 152(2) StPO; this means that neither a pure *in rem* approach nor proceedings against assets of unknown provenance are legally possible in Germany.

Empirical practice exposes the resulting enforcement deficit. Assets parked in multi-layered offshore structures — the "Panama Papers" typology — cannot be accessed because the beneficial owner and the predicate offence remain opaque.[3] The death or permanent flight of key suspects likewise extinguishes the possibility of a conviction-based order, and politically exposed persons in non-cooperative jurisdictions often benefit from *de facto* immunity. Transparency deficits regarding beneficial ownership mean that investigations frequently stall at the straw men, while the true profiteers keep control of illicit gains, perpetuating criminogenic incentives.

Directive (EU) 2024/1260 consciously addresses these very scenarios by obliging EU Member States to introduce a genuine non-conviction-based confiscation mechanism.[4] Germany, however, still binds confiscation to an offence- or offender-related nexus and therefore falls short of the Directive's minimum standard. The material and procedural lacuna thus identified underscore the necessity of an autonomous *in rem* frame-

work — one that can operate on the "overwhelming probability" of illicit origin (albeit remaining anchored in due process guarantees).

Against this backdrop, the analysis set out below turns to the international and Union law parameters shaping any German reform initiative. This analysis paves the way for a comparative evaluation of existing NCBC models and, ultimately, for the proposed *Vermögenseinziehungsgesetz* that seeks to close the enforcement gap without eroding constitutional safeguards.

III. International and Union-Law Framework

The normative groundwork for any German non-conviction-based confiscation (NCBC) regime is laid by a concentric set of obligations that begin at the global level and culminate in binding Union law, in particular the United Nations Convention against Corruption (UNCAC).[5] The Financial Action Task Force (FATF) refined this UNCAC provision mandate in its 2023 best-practice note to Recommendation 4, calling for "effective NCBC instruments" that incorporate judicial control, safeguards for bona-fide third parties, and rapid international cooperation.[6]

Within Europe, Directive (EU) 2024/1260[7] constitutes the most stringent legal framework. It obliges EU Member States to establish a tiered confiscation system that includes — alongside traditional conviction-based measures (Arts. 12-14) — a genuine NCBC option for cases of illness, death, flight, or prescription of the accused (Art. 15).[8] It further introduces "Unexplained Wealth Orders", empowering courts to confiscate assets grossly disproportionate to declared income if lawful origin cannot be substantiated (Art. 16), and mandates the creation of specialised asset-recovery and management authorities (Arts. 6–9).[9]

Complementing the Directive, Regulation (EU) 2018/1805 on mutual recognition of freezing and confiscation orders ensures that NCBC decisions will circulate seamlessly once issued.[10] The Regulation obliges every Member State to recognise foreign orders "without further formalities" and confines refusal grounds to narrowly drawn exceptions such as *ne bis in idem*. Consequently, any German reform must furnish courts with interfaces — standardised certificates and expedited enforcement channels — that align with this automatised recognition architecture.

Taken together, UNCAC, FATF standards, Directive (EU) 2024/1260, and Regulation (EU) 2018/1805 form a multilayered matrix requiring compliance. They compel Germany to close its enforcement gap while leaving calibrated discretion regarding proof standards, procedural design, and asset-management structures. A newly developed law must therefore translate these external imperatives into a constitutionally coherent domestic framework that balances the effectiveness of confiscation with the property guarantee of Art. 14 Basic Law (*Grundgesetz, GG*) and the fair-trial safeguards of Art. 6 ECHR.[11]

IV. Comparative Analysis of Existing NCBC Regimes

The ensuing comparative analysis is not intended as a mere descriptive exercise. Rather, it distils the decisive design choices of three mature NCBC regimes — Switzerland, Italy, and the United Kingdom — in order to extract "lessons learnt" that inform the subsequent drafting of a German "*Vermögenseinziehungsgesetz*". Each jurisdiction is examined with a view to (i) evidentiary thresholds, (ii) procedural safeguards, and (iii) asset-management architecture. The findings are then used as benchmarks for the VEG proposal in Part V.

The Swiss Federal Act on the Freezing and Restitution of Illicitly Acquired Assets of Foreign Politically Exposed Persons of 2015 (hereinafter: *SRVG*)[12] empowers the Federal Council (*Bundesrat*) to impose a sum-

mary freeze for an initial four-year period — extendable up to twenty years where mutual legal assistance fails — whenever a country of origin displays systemic corruption or has undergone a regime change. The core mechanism lies in Art. 15 SRVG: a sudden, inordinate increase in a politically exposed person's assets triggers a presumption of illicit origin, shifting the burden onto the individual to rebut that presumption on the "overwhelming of probability". While this facilitates swift intervention, Swiss scholars have voiced concern about intrusions on the constitutional property guarantee (Art. 26 *Bundesverfassung*) and potential tensions with the presumption of innocence and reasonable time safeguards under Art. 6 ECHR.[13]

Italy's *confisca di prevenzione*, introduced by the Rognoni-La Torre Law 646/1982 and refined through subsequent reforms, targets individuals who are suspected of belonging to a mafia type organization and individuals who, on account of their behaviour and lifestyle and on the basis of factual evidence, may be regarded as habitually living, even in part, on the proceeds of crime.[14] The measure is ordered by specialised *misure di prevenzione* courts in autonomous proceedings; proof may rest on a circumstantial bundle amounting to "overwhelming probability" that the assets cannot be reconciled with lawful income. The European Court of Human Rights has generally upheld this preventive model, provided that strict proportionality and full judicial review are observed.[15]

In the United Kingdom, Part 5 of the Proceeds of Crime Act 2002[16] establishes a civil recovery procedure administered by the National Crime Agency before the High Court.[17] The State must prove, on the ordinary "balance of probabilities", that property represents the proceeds of unlawful conduct; no criminal conviction is required. The 2018 amendment introduced Unexplained Wealth Orders (UWOs), compelling respondents to account for assets whose value appears disproportionate to their known income and enabling interim freezing orders pending explanation. British practice records high settlement rates but also significant litigation and administrative costs, leading to calls for tighter cost-benefit controls.[18]

Taken together, these three jurisdictions illustrate a spectrum of NCBC techniques: Switzerland prioritises asset preservation through extended freezes and reversed burdens; Italy embeds confiscation in a preventive-justice framework focused on mafia-type/organised crime, and the UK deploys a fully civil law, asset-centred recovery model coupled with disclosure obligations. Despite divergent legal traditions, each system combines lower evidentiary thresholds with robust judicial oversight, thereby offering workable blueprints for a German *Vermögenseinziehungsgesetz* while underscoring the constitutional need for proportionality, due process, and third-party protection.

V. Core Elements of a *Vermögenseinziehungsgesetz* (VEG)

The following outlines a proposal for a *Vermögenseinziehungsgesetz* (VEG). While it engages with the academic model proposed by *Wegner/Ladwig/Zimmermann/El-Ghazi*,[19] it departs notably from that draft in several material respects: adopting an "overwhelming probability" evidentiary standard (rather than mere plausibility), relocating the proceedings to specialised chambers of civil courts instead of criminal courts, and centralising asset management in a federal office.[20]

- The VEG rests on the federal annex competence for criminal law under Art. 74(1) No. 1 GG. Confiscation is framed as a repressive measure that eliminates unjust enrichment rather than a police-law intervention, meaning that the German *Bundesrat's* consent is unnecessary; nevertheless, a cooperative federal-state model is envisaged to manage implementation costs.

- Proceedings are conceived as a strictly *in rem* civil action before a three-judge chamber following the principles of the German Code of Civil Procedure (*Zivilprozessordnung, ZPO*).[21] The public prosecutor,

acting as plaintiff, must substantiate the illicit origin of the asset; only then does the owner assume a secondary burden to demonstrate lawful provenance. The chamber has an enhanced duty of clarification under § 139 ZPO, ensuring that a lowered evidentiary threshold does not jeopardise factual accuracy.

- That threshold is set at "overwhelming probability" (≈ 75%), situated between mere reasonable suspicion and full criminal proof. Once this standard is met, the owner's cooperation duty is limited and never punitive; silence may permit — but does not compel — adverse inference.

- Interim protection relies on familiar Code of Civil Procedure (ZPO) instruments: attachments, security mortgages, and account seizures can be ordered on the same evidentiary threshold, subject to annual judicial review and a maximum duration of four plus four years ("4 + 4 model") in order to avoid excessive durations of these measures. A three-tier appeal chain (analogous to § 567 ZPO, German Federal Court of Justice, German Federal Constitutional Court) guarantees layered oversight and compliance with the "reasonable time" requirement of Art. 6 ECHR.

- Asset management is centralised in a Federal Asset Recovery Office (ARO). Real estate vests *ex lege* in the federation and is first screened for interim public use by the Federal Agency for Real Estate (*Bundesanstalt für Immobilienaufgaben, BImA*) before public sales; crypto-assets move to a joint ARO/Deutsche Bundesbank[22] multi-sig wallet[23] with a ±20 % volatility buffer.[24] Net proceeds, after costs and hardship compensation, are split 50:50 between the federation and federal states (*Länder*), and an annual public report ensures transparency.[25]

- Data processing draws its legality from Art. 6 (1)(c) GDPR; where necessary for law-enforcement aims, data subject rights may be proportionately restricted under Art. 23 GDPR. A five-year automated storage review and a two-stage judicial remedy for access requests embed purpose limitation and minimisation principles.

- Retroactivity is limited to a permissible *unechte Rückwirkung*: assets generated before 1 January 2027 fall within the scope of the VEG, but criminal liability remains unaffected. A hardship-cum-compensation clause[26] and the moderate proof standard prevent excessive encroachment on Art. 14 GG property guarantees while meeting EU minima criteria.

VI. Evaluation and Outstanding Issues

Pre-legislative modelling suggests that an NCBC mechanism framed along the lines of the VEG (as proposed in Section V.) could raise Germany's annual asset-recovery yield by up to one third, mirroring the empirical uptick observed after introduction of civil recovery in the United Kingdom and the *confisca di prevenzione* in Italy.[27] Yet comparative evidence also shows diminishing marginal returns once the "low-hanging fruit" of readily traceable real estate and bank deposits have been harvested; complex crypto-assets and art portfolios remain resistant to seizure, despite lowered proof standards.[28] Budgetary analyses by the Swiss Federal Audit Office have indicated that every Swiss franc spent on asset management under the SRVG generates roughly 4.6 francs in realised value, but only where a specialised recovery office ensures professional stewardship and rapid disposal; *ad hoc* local administration, by contrast, erodes net proceeds through storage and litigation costs.[29]

The German Federal Constitutional Court accepts preventive confiscation if (i) the measure pursues a weighty public interest, (ii) less intrusive alternatives are unavailable, and (iii) procedural design embeds robust judicial review.[30] The proposed VEG meets these criteria by tying definitive deprivation to an "overwhelming probability" threshold, by granting owners a secondary — but never punitive — burden of explana-

tion, and by anchoring the entire procedure in the ordinary civil courts with a full appellate chain. Nevertheless, two grey zones persist.[31] First, the compatibility of adverse inference from silence with the *nemo tenetur* principle has not yet been conclusively tested by the German Federal Constitutional Court; second, the retroactive inclusion of assets accrued before 2027, though limited to *unechte Rückwirkung*, may provoke scrutiny under the Constitutional Court's doctrine of legitimate expectations.[32]

Regulation (EU) 2018/1805 promises frictionless recognition of NCBC orders, yet practice under the predecessor Framework Decision shows persistent delays because dual criminality is disputed or third-party rights are invoked.[33] The VEG therefore incorporates standardised certificates and a 15-day execution timeline, but real-world compliance depends on adequate staffing of both the Asset Recovery Office and the judicial network of contact points.

Finally, socio-economic externalities merit systematic monitoring. While confiscation curtails criminal capital flows, abrupt disposal of large real-estate portfolios can depress local property markets, and forced liquidation of shareholdings may disrupt corporate governance.[34] The VEG mandates an *ex-ante* macro-impact assessment for seizures exceeding €50 million and empowers the German Ministry of Finance to stagger public sales to mitigate market shock. Yet, no mechanism presently compensates communities indirectly harmed by asset freezes — an issue flagged in the FATF 2023 best-practice note but left unresolved by Directive 2024/1260.

In sum, the proposed framework is both feasible and constitutionally defensible, but its ultimate success turns on practical resourcing, judicial capacity, and continuous evaluation of collateral effects. These open issues constitute the agenda for mid-term legislative review and empirical research once the VEG has been in force for five years.

VII. Conclusion

Germany's current confiscation architecture leaves a demonstrable enforcement gap whenever a criminal conviction is unattainable. A look at the United Kingdom's civil recovery scheme and Italy's *confisca di prevenzione* confirms that a genuine non-conviction-based confiscation instrument measurably increases asset-recovery yields without undermining due process, provided that judicial oversight and proportionality safeguards are in place. Directive (EU) 2024/1260 now obliges all Member States to adopt such an instrument, and Germany would be exposed to infringement proceedings should implementation lag.

The *Vermögenseinziehungsgesetz* (VEG) proposed here would fulfil these supranational requirements and remain within the constitutional corridor set by the German Federal Constitutional Court: it ties definitive deprivation to an "overwhelming probability" evidentiary standard, embeds a full appellate chain and annual judicial review, and tempers the evidentiary burden-shifting with a non-punitive inference rule. In this way, the VEG would respect both the right to property (Art. 14 GG) and fair trial requirements of Art. 6 ECHR, in particular the requirement to reach a court decision within reasonable time.

Legislative priority should now focus on the following:

- Enacting the VEG ahead of the Directive's transposition deadline;
- Allocating stable funding for the Federal Asset Recovery Office and its counterparts in the *Länder*;
- Mandating a five-year empirical review to monitor effectiveness, market impact, and constitutional practice.

By doing so, the German legislature can transform the normative maxim "crime must not pay" into a practically attainable goal, closing the enforcement gap while simultaneously upholding rule-of-law guarantees for property owners and *bona fide* third parties alike.

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2. Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation, OJ L, 2024/1260, 2.5.2024.↩
3. OECD (2024), Beneficial Ownership and Tax Transparency – Implementation and Remaining Chalanges, p.10.↩
4. H. Matt,"Criminal law principles should be applied in all asset recovery cases throughout the EU", (2024) 15(4) *New Journal of European Criminal Law*, 373-374.↩
5. , The 2004 United Nations Convention against Corruption can be retrieved here: <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf?utm_source=.com>.↩
6. FATF (2025), Best Practices on Confiscation Recommendations 4 and 38 and a Framework for Ongoing Work on Asset Recovery, retrievable at <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf>.↩
7. *Op. cit.* (n. 2).↩
8. See also F. Meyer, "Recognizing the unknown–the new confiscation regulation", (2020) *10*(2) *European Criminal* Law *Review*, 141-144; S. Oliveira e Silva, "Regulation (EU) 2018/1805 on the mutual recognition of freezing and confiscation orders: A headlong rush into Europe-wide harmonisation?" (2022) 13(2), *New Journal of European Criminal Law*, 202-214.↩
9. For the key points of the Directive, see European Union, Proceedings in criminal matters – asset recovery and confiscation, 2024, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum%3A4757305&utm_source=.com>; T. Wahl, "New Directive on Asset Recovery and Confiscation", *eucrim* 1/2024, 37-38.↩
10. Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14.11.2018 on the mutual recognition of freezing orders and confiscation orders, O.J. L 303, 28.11.2018, 1; C.M. King and V. Schlösser, "A 'continuous' battle against organized crime and illicit enrichment through the new proposal for a Directive for the confiscation of assets", (2024). 3 *Yearbook of International & European Criminal and Procedural Law* 517-663, 531. For a summary of the Regulation, see T. Wahl, "Regulation on Freezing and Confiscation Orders", *eucrim* 4/2018, 201-202.↩
11. See further, on the latter point, ECtHR, Decision of 5 July 2005, *Van Offeren v. Netherlands*, Appl. No. 19581/04 and the following ECtHR judgments: ECtHR, 5 July 2001, *Phillips v. United Kingdom*, Appl. no. 41087/98, § 44 and ECtHR, 23 September2008, *Grayson and Barnham v. United Kingdom*, Appl. nos. 19955/95 and 15085/96, § 47.↩
12. Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte ausländischer politisch exponierter Personen (SRVG) vom 18. Dezember 2015, SR 196.1. The law is available in English, German, French, and Italian at: <https://www.fedlex.admin.ch/eli/cc/2016/322/de>.↩
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15. See ECtHR, 21.1.2025, *Claudia Garofalo against Italy*, Appl. no. 47269/18.↩
16. The Act is available at: <https://www.legislation.gov.uk/ukpga/2002/29/contents>.↩
17. This applies for England and Wales, but procedure is different in Scotland and Northern Ireland.↩
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20. Therefore, the proposal by Wegner et. al. (*op. cit.* (n. 19)) serves as a comparative foil, not as the normative basis of the author's VEG.↩
21. § 75 *Gerichtsverfassungsgesetz* (Court Constitution Act); § 348 Abs. 1 ZPO.↩
22. The Deutsche Bundesbank is the central bank of the Federal Republic of Germany.↩
23. A multisig wallet is a crypto wallet that requires two or more signature to confirm and send a transaction, unlike traditional wallets, which require only one signature. For further understanding, see: bitpay (2025), "Using Multisig Wallets to Secure Your Crypto Assets", <https://www.bitpay.com/blog/multisig-wallet-security>.↩
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25. § 15 II VEG-E, analogue §§ 2 ff. StrEG.↩

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30. Cf. Bundesverfassungsgericht [Federal Constitutional Court] BVerfG, 14 January 2004, 2 BvR 564/95; Official Case Reports E 110, 1, also available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2004/01/rs20040114_2bvr056495.html>; N. Nestler, "Zur Reichweite von §73d StGB: Der erweiterte Verfall vor neuen Legitimationsdefiziten?", (2011) HRRS, 519 < https://www.hrr-strafrecht.de/hrr/archiv/11-12/index.php?sz=8>.↩
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32. Cf. BVerfG, 7 December 2022, 2 BvR 988/16, Official Case Reports E 164, 347, para. 159 ff., also available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/12/rs20221207_2bvr098816.html>.↩
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