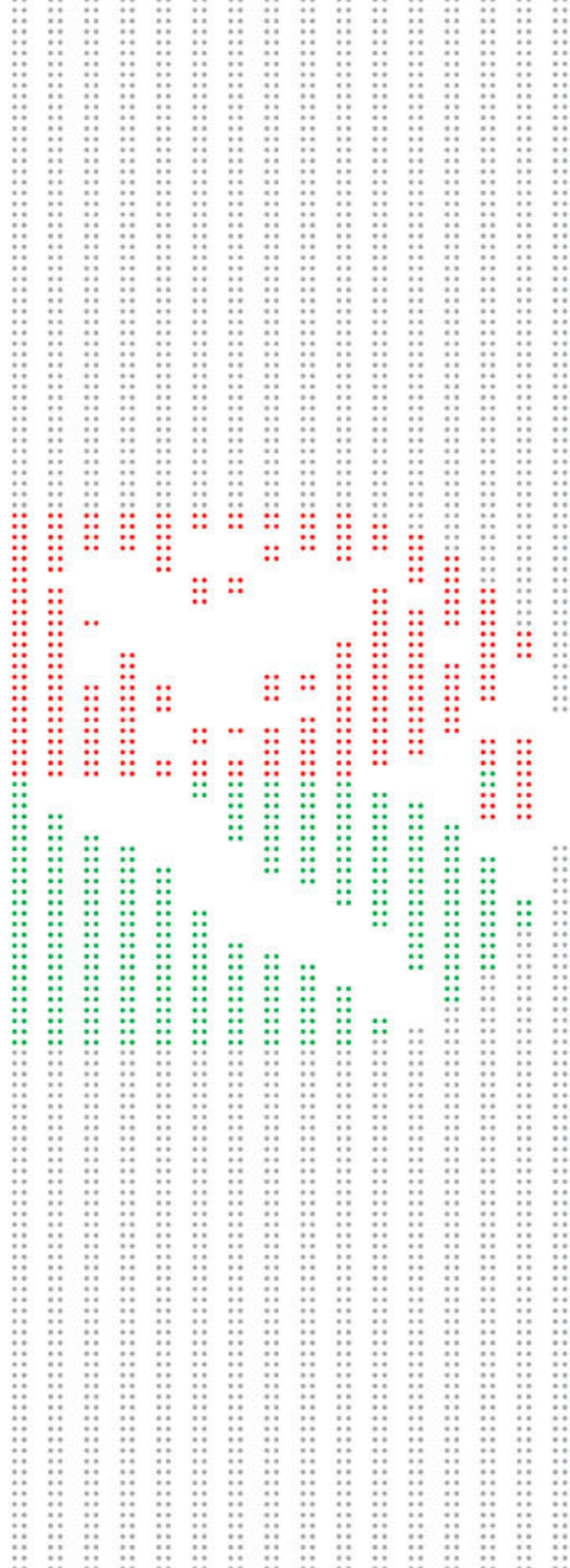


# Extended Forfeiture in the German Legislation



# Jörg Tinnes Detective Inspector

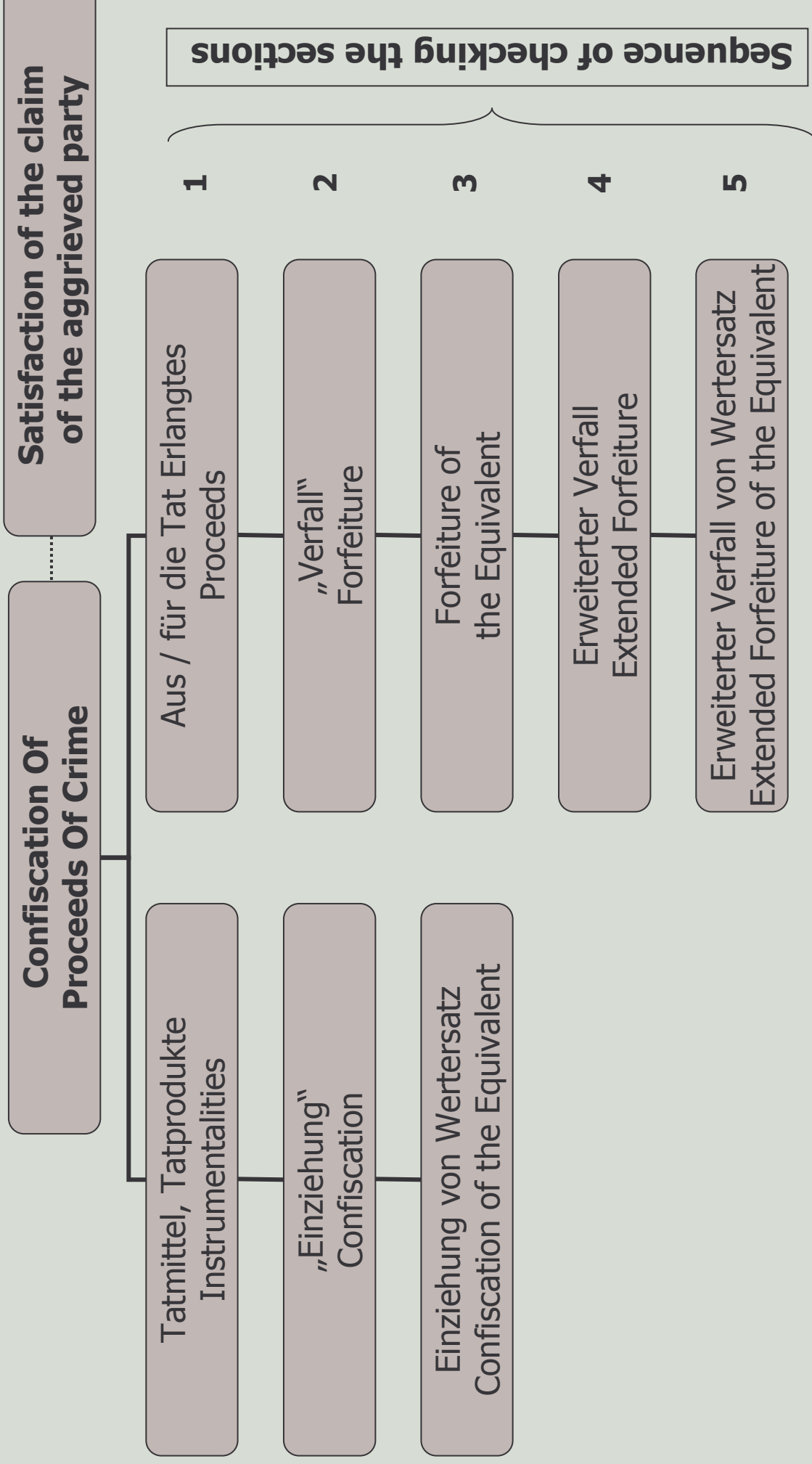
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## Definitions according to the European treaty No. 144 and referring framework decisions

Deutsch	Englisch
<b>Ertrag</b> jeder wirtschaftliche Vorteil, der durch Straftaten erlangt wird. Dieser Vorteil kann aus Vermögensgegenständen aller Art gemäß der folgenden Begriffsbestimmung bestehen	<b>proceeds</b> means any economic advantage from criminal offences. It may consist of any form of property as defined in the following
<b>Vermögensgegenstände</b> Vermögensgegenstände jeder Art, körperliche oder nichtkörperliche, bewegliche oder unbewegliche, sowie rechtserhebliche Schriftstücke oder Urkunden, die das Recht auf solche Vermögensgegenstände oder Rechte daran belegen	<b>property</b> includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property
<b>Tatwerkzeuge</b> alle Gegenstände, die in irgendeiner Weise ganz oder teilweise zur Begehung einer oder mehrerer Straftaten verwendet werden oder verwendet werden sollen	<b>instrumentalities</b> means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences
<b>Einziehung</b> eine Strafe oder Maßnahme, die von einem Gericht im Anschluss an ein Strafverfahren oder mehrere Straftaten betreffendes Verfahren angeordnet wurde und die zur endgültigen Einziehung von Vermögensgegenständen führt	<b>confiscation</b> means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property
<b>juristische Person</b> jedes Rechtssubjekt, das diesen Status nach dem jeweils geltenden innerstaatlichen Recht besitzt, mit Ausnahme von Staaten oder sonstigen Körperschaften des öffentlichen Rechts bei der Ausübung ihrer hoheitlichen Rechte und von öffentlich-rechtlichen internationalen Organisationen	<b>legal person</b> means any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations

## Extended forfeiture in the German legal scheme for confiscation of proceeds of crime



## Section 73d German Penal Code

“If an unlawful act has been committed pursuant to a law which refers to this provision, then the court shall also order the forfeiture of objects of the perpetrator or inciter or accessory if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts, or for the purpose of committing them...”

- there has to be an unlawful act, which refers to section 73d.
- the acts are classified by a particular gross element, namely: being committed as a member of a gang or on a commercial basis.
- if the offender committed an unlawful act like this, extended forfeiture is also declared on objects, that were not acquired as a result of unlawful acts including the gross element mentioned before.

## **Examples of unlawful acts including a gross element:**

- **setting-up a criminal organisation**
- **setting-up a terrorist organisation**
- **counterfeit**
- **aggravated pandering**
- **aggravated theft**
- **extortion**
- **money laundering**

The Court orders the extended forfeiture of objects of the perpetrator or inciter or accessory, if the circumstances justify the assumption, that these objects were acquired as a result of unlawful acts, or for the purpose of committing them.



According to section 73d's choice of words the objects have to be acquired as a result of unlawful acts, or for the purpose of committing them.

That also means that the virtual power of control, or the power of control in actual fact is adequate. So the extended forfeiture is only applicable against the perpetrator / inciter / accessory, but not against third parties.

Proceeds from an unlawful act could be confiscated before the implementation of section 73d. But in practice it did not work in those cases, where no coherence between the unlawful act and the object was provable.

In conformity with the constitution the injunction  
of the extended forfeiture is only applicable...

if the judge, after surveying all evidence, is absolutely convinced, that the objects were acquired as a result of unlawful acts, or for the purpose of committing them. The unlawful acts do not need to be ascertained in detail (-> detailed background about the objects -> forfeiture acc. to section 73).

## Indications for an unlawful background:

- low income does not allow the saving of a considerable amount
- obviously no other source of income
- no withdrawal of money from the account

## Indications for legal sources:

- regular salary
- person conducts a trade
- regular account movements
  - owned securities
  - a granted loan

From the point of view of a judge, the question is to be asked:

Is it –not only theoretically– possible, that the accused person gained the assets from a legal source?

no -> judicial persuasion

-> section 73d (+)

yes -> doubts about an unlawful background -> section 73d (-)

The extended forfeiture does not embrace those objects that come from unlawful acts, which were committed before the implementation in 1992 (legal prohibition of retroaction).



According to section 73d subs. 2 the provisions concerning the forfeiture of the replacement value and estimation are applicable, if the forfeiture of an object is impossible.

No multi access to the same object. The court is obligated to consider decrees that were made earlier.

The court has to consider the hardship clause according to section 73c.



# Finally

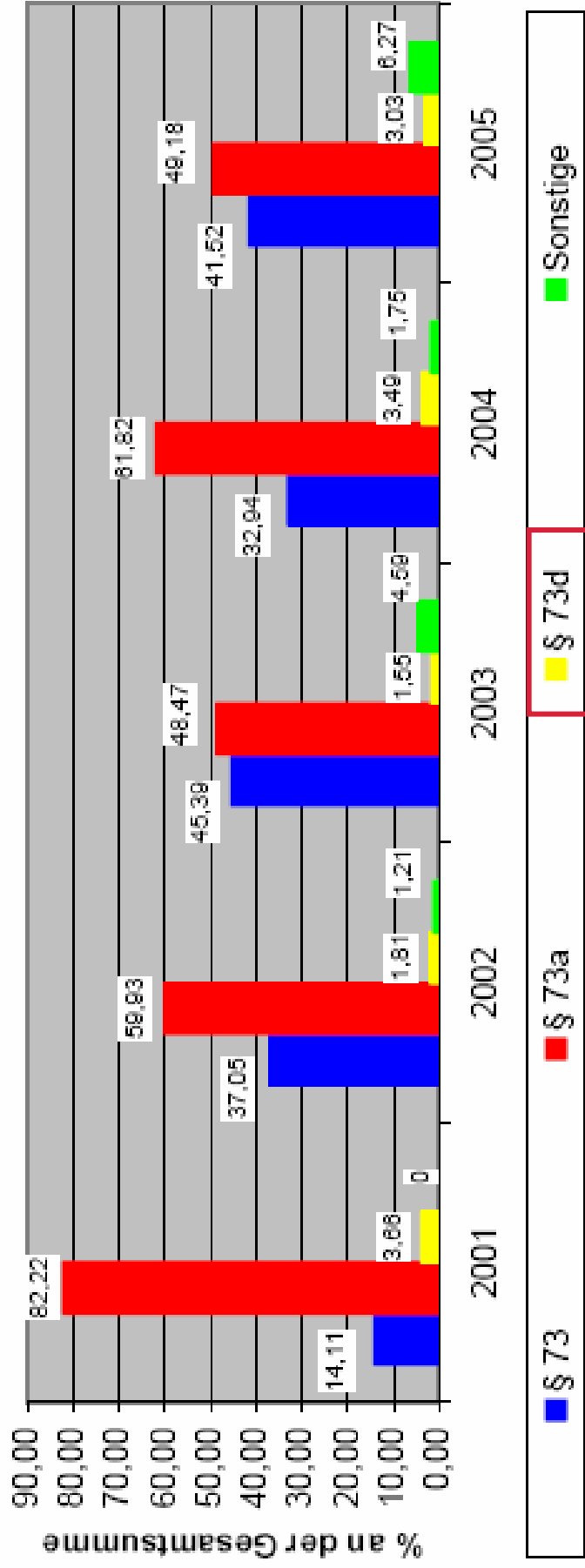


## Volume of seized assets in € in NRW and Germany in 2005

Section of criminal code	NRW	Germany
§ 73 StGB	18.967.652 €	80.067.606 €
§ 73a StGB	22.468.297 €	165.871.443 €
<b>§ 73d StGB</b>	1.756.956 €	8.094.935 €
§ 74 StGB	1.269.907 €	7.919.962 €
§ 74a StGB	137.348 €	195.548 €
§ 74c StGB	163.969 €	937.346 €
§ 261 VII StGB	900.907 €	54.404.306 €
OWiG	21.370 €	390.148 €
Polizeirecht	0 €	359.015 €
Steuerrecht	0 €	1.041.844 €
	<b>45.686.406 €</b>	<b>319.282.155 €</b>

## Allocation of confiscation of proceeds of crime tools in NRW from 2001 – 2005 in %

Anteile an der Gesamtsicherungssumme aufgeschlüsselt nach angewandten Rechtsvorschriften



Thank you very much!

Any questions?

Feel free to call me: 0049.211.939.1364