COMMENTARY ON SOME QUESTIONABLE FEATURES OF CONFISCATION PROCEEDINGS IN CROATIA

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1. INTRODUCTORY REMARKS

In the last fifteen years, the confiscation of pecuniary gain acquired through a criminal offence has been the focus of legislative efforts taken in order to comply with the international and European obligations of the Republic of Croatia, but also in order to make confiscation an effective criminal legal measure, one which would provide the restoration of the state of property prior to the commission of the criminal offence. Legislative amendments concerning substantive aspects of confiscation have been very frequent, particularly since 2006 when the measure of extended confiscation was first introduced into the Criminal Code. On the other hand, even though the provisions of the Criminal Procedure Act on confiscation proceedings might seem relatively constant, the truth is that amendments to procedural regulations have been just as dynamic as those to the substantive criminal law. In 2010, the Croatian Parliament adopted new special legislation on the procedure of confiscation of pecuniary gain – the Act on the procedure of confiscation of pecuniary gain acquired through a criminal offence or misdemeanour[1] (hereinafter: the Act on confiscation proceedings), with the intention to regulate completely and in detail the entire confiscation procedure, including provisional measures, the execution of a confiscation order, as well as some fundamental aspects of dealing with confiscated property.

The new Act on confiscation proceedings didn't cover any aspects of financial investigations as the first stage of confiscation proceedings *largo sensu*, so such inestigations remained regulated by the Criminal Procedure Act. But there is another important new law that the Act on confiscation proceedings introduced: the power to confiscate notwithstanding conviction. Besides extended confiscation, non-conviction based confiscation was supposed to make confiscation more effective. However, almost five years after the entry into

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1 Act on the procedure of confiscation of pecuniary gain acquired through a criminal offence or misdemeanour *(Zakon o postupku oduzimanja imovinske koristi ostvarene kaznenim djelom i prekršajem)*, Official Gazette 145/10.

force of the Act on confiscation proceedings, it seems that there is still no jurisprudence on non-conviction based confiscation and only one final decision on extended confiscation.

Without intending to analyse the entire confiscation regime in Croatia, this commentary will focus only on several basically procedural issues, which seem to be insufficiently regulated on the normative level, and are therefore sometimes questionable in practice. Some of these issues are expected to be addressed in the forthcoming amendment to the Criminal Procedure Act, either due to obligations imposed in the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union,[2] or as a response to problems that have arisen in Croatian judicial practice. This analysis will start with a brief look at the first stage of confiscation proceedings *largo sensu* – financial investigations, and will then move on to the non-conviction based confiscation regime, and will end with observations on extended confiscation. The concluding remarks will be dedicated to an as yet neglected issue in Croatian law – the disposal of confiscated property.

2. FINANCIAL INVESTIGATIONS

Effective financial investigation is *conditio sine qua non* of the effective confiscation of pecuniary gain acquired through criminal offences. Intense legislative efforts regarding the confiscation regime included, in 2013, the amendment to the Criminal Procedure Act,[3] which strengthened the "inquiries into property" as special inquiries in the service of financial investigations, and introduced the power to establish within the state attorney special departments for investigating pecuniary gain acquired through a criminal offence. The same amendment provided for specialised financial investigators in charge of inquiries and urgent investigatory actions of seizure. This does not mean that financial investigations have not been conducted before 2013, but only that they have been conducted on the basis of general criminal proceedings provisions on inquiries and investigation.[4] However, after the 2013 amendment, state attorneys will conduct inquiries not only to collect information needed to decide on reported criminal offences, but also to collect information needed to locate property acquired through reported criminal offences and the property's owners.[5]

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2 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJEU L 127, 29.4.2014.

3 Criminal Procedure Act *(Zakon o kaznenom postupku)*, Official Gazette 152/08, 76/09, 80/11, 91/12, 143/12, 56/13, 145/13, 152/14.

4 See Novosel, Dragan, *Financijske istrage i progon počinitelja gospodarskog kriminaliteta*, Hrvatski ljetopis za kazneno pravo i praksu 2(2007), p. 739 – 783.

5 See Novosel, Dragan, *Kazneni progon prema Noveli Zakona o kaznenom postupku*, Hrvatski ljetopis za kazneno pravo i praksu 2(2013), p. 498.

Financial investigations are usually understood to be part of the criminal investigation of offences resulting in pecuniary gain for the perpetrator and sometimes third parties, but sometimes they may also be understood to be a key part in the system of preventing money laundering. According to the Act on prevention of money laundering and financing of terrorism,[6] the Anti-money laundering office operates as a central financial intelligence unit in the Republic of Croatia. Still, its role and powers are proactive, and the link with criminal proceedings is only indirect: it is reflected in the obligation to report any suspicious transaction under the provisions of Criminal Procedure Act, and evidence of pecuniary gain is then collected within criminal proceedings. Effective financial investigation requires cooperation basically on two levels: first, between the Anti-money Laundering Office as a central financial intelligence unit and banks and other financial institutions, and second, between the Ant-money Laundering Office and the organs of criminal procedure: police, state attorneys and courts.

Being a part of criminal investigation, financial investigations are still basically regulated by general criminal procedure regulations on investigating powers and evidentiary actions, even though the efficacy of financial investigations within criminal proceedings primarily depends on the investigative tools at the disposal of the different organs. In Croatia, there is still a rather traditional set of investigative tools, such as search and seizure, secret surveillance, tracking and tracing, as well as freezing assets, etc. These investigative tools basically correspond with traditional investigative actions that are mostly used for collecting evidence needed for conviction, rather than locating the proceeds of crime and their owners. In other words, though in Croatian law confiscation is conceived as a measure *in rem* of a restorative nature, it is normally ordered as part of the conviction. And even where there is a power to confiscate notwithstanding conviction, the confiscation proceedings are always conducted according to the fundamental principles and rules of criminal procedure: before a criminal court, respecting fair trial guarantees and applying the same standard of evidence as in criminal proceedings - beyond reasonable doubt. The focus, therefore, is still on proving the criminal offence. Even comparative research has shown that in many European countries special means of investigation are primarily aimed at collecting evidence on the crime committed, and not at locating illicit gains, and therefore the benefit of such investigations for confiscation proceedings is only indirect.[7] This is why the legislative efforts taken in 2013 in order to enhance the efficacy of financial investigations may be seen as a first step in the direction of introducing more effective investigative tools and powers for locating the proceeds of crime.

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6 Act on prevention of money laundering and financing of terrorism *(Zakon o sprječavanju pranja novca i financiranju terorizma),* Official Gazette 87/08, 25/12.

7 Vettori, Barbara, *Tough on Criminal Wealth*, Springer, 2010, p. 111.

3. NON-CONVICTION BASED CONFISCATION MODEL

As stated, the non-conviction based confiscation model in Croatia is regulated within the criminal law regime. The special Act on confiscation proceedings was complemented with the provision of the Criminal Code stating that "pecuniary gain shall be confiscated on the basis of a court decision establishing the commission of an unlawful act",[8] and therefore allowing confiscation in cases when there has been no conviction. However, the unlawful act must always be established beyond reasonable doubt, according to the rules of criminal proceedings,[9] and before a criminal court, in order to confiscate pecuniary gain acquired through such an established unlawful act.

It is possible to point out two basic features of the Croatian regulation of non-conviction based confiscation. First, the specific provisions on non-conviction based confiscation proceedings are only few and they are of rather general content.[10] This is also a deficiency, given that non-conviction based confiscation regimes should be regulated in detail, especially with regard to rules on procedure and evidence,[11] in order to comply with fundamental principles of fair proceedings. Second, the grounds allowing for non-conviction based confiscation are defined very broadly. The death of the defendant is the only specified ground, while a general clause includes all the other possible factual and legal obstacles to criminal proceedings as possible grounds for non-conviction based confiscation.[12]

Moreover, the law makes no distinction between factual and legal grounds for allowing confiscation proceedings and confiscation in cases when there can be no conviction. For example, the United Nations Convention against Corruption prescribes that a state party should "consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases".[13] The Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union likewise imposes the obligation to provide for non-conviction based confiscation at least in the event of the illness or absconding of the accused.[14]

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8 Article 77 (1) of the Criminal Code *(Kazneni zakon)*, Official Gazette 125/11, 144/12, 56/15, 61/15.

9 Article 2 (1) of the Act on confiscation proceedings.

10 See Article 2 and Article 6 of the Act on confiscation proceedings.

11 See Greenberg, Theodore S.; Samuel, Linda M.; Grant, Wingate; Grey, Larissa, *Stolen Asset Recovery A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, The World Bank, Washington D.C., 2009, p. 33.

12 Article 2 (2) of the Act on confiscation proceedings.

13 Article 54 (1) of the United Nations Convention Against Corruption.

14 Article 4 (2) of the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

Therefore both documents provide for, at least explicitly and as a minimum, only reasons of fact that would allow for non-conviction based confiscation. This is probably so because legal grounds allowing for non-conviction based confiscation would require dealing with more complex issues.

Thus in Croatian legislation on non-conviction based confiscation, on one hand, there are factual grounds, such as the death of the defendant, which is the only reason expressly stated in the Act on confiscation proceedings, or illness that makes him or her incapable of standing trial, or the defendant's absence; on the other hand, there are legal obstacles for criminal prosecution, such as prohibition *non bis in idem*, immunity, amnesty, pardon etc. As has been emphasized, the Act on confiscation proceedings makes no distinction between these procedural obstacles when it comes to grounds allowing for non-conviction based confiscation. The only exception thus far is the statute of limitations, meaning when the prosecution of a criminal offence is already statute barred, there is no power to conduct confiscation proceedings or to confiscate notwithstanding conviction.[15] This is logical, if we keep in mind that, even though confiscation is conceived as an *in rem* measure *sui generis*, it is a criminal law measure and therefore has a certain punitive dimension which means the requirements of the legality principle must apply. Nevertheless, the prohibition *non bis in idem*, immunity, amnesty and pardon, as well as other legal grounds, due to their complexity do require explicit regulation of confiscation proceedings. Finally, the requirements of legal certainty imply the need to make regulation of non-conviction based confiscation clear, precise and predictable.

It can thus be concluded that, exactly because of the lack of precision, despite the relatively broad legal basis for non-conviction based confiscation, there is practically no relevant jurisprudence. This is why the latest initiative to amend the normative regulation of non-conviction based confiscation proceedings, this time within the provisions of the Criminal Procedure Act, and not in a special act, tries to regulate in detail not only the grounds, but also the proceedings of non-conviction based confiscation.[16] The amended legislation should provide adequate procedural safeguards of the rights of all involved persons – the defendant and third parties having an interest in the property concerned.[17]

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15 Article 6 (2) of the Act on confiscation proceedings.

16 See reasoning in the Draft Proposal of the Law amending Criminal Procedure Act, *Nacrt Prijedlog zakona o izmjenama i dopunama Zakona o kaznenom postupku*, Ministarstvo pravosuđa, Zagreb, srpanj 2015.

17 *Ibid.*

4. EXTENDED CONFISCATION

Extended confiscation was introduced into Croatian criminal law in 2006. The first extended confiscation regime was criticised in literature and the measure was never applied in practice, due to non-compliance with the basic requirements of the principle of legality.[18] However, the measure was amended on several occasions and currently may be applied if a perpetrator has been convicted of a criminal offence within the jurisdiction of the Office for the Prevention of Corruption and Organized Crime, or a criminal offence of sexual abuse and sexual exploitation of children, or a criminal offence against computer systems, programmes and data, and if the perpetrator owns or owned property that is incommensurate with his or her legitimate income. Under such conditions it is assumed that the entire property represents a pecuniary advantage gained from a criminal offence and is to be confiscated, unless the perpetrator provides evidence that the property has a legitimate origin. This means that, once the prosecutor has proved beyond reasonable doubt that the defendant committed a criminal offence, the onus of proof is shifted onto the defendant, who needs to prove on a balance of probabilities, not beyond reasonable doubt, that the property concerned was lawfully gained. The prosecutor, on the other side, is not obliged to present any proof of unlawful origin of the defendant's property to be confiscated through extended confiscation.

In Croatian law, the measure of extended confiscation is reserved primarily for the most severe criminal offences of corruption, organised crime and serious economic crime. Even if the scope of application is therefore rather narrow and shouldn't be expected to be applied in judicial practice very often, so far there seems to be only one final judgment ruling on it. The Rijeka County Court ordered extended confiscation of HRK15,500 and 1190 EUR, which were found in the closet of a defendant, a police officer convicted of taking a bribe and abuse of position and authority, since he failed to prove on a balance of probabilities that the said money was of legitimate origin.[19] The Supreme Court of the Republic of Croatia affirmed the first instance judgment, reasoning that the stated amounts were confiscated through extended confiscation, after the first instance court correctly established that the property in question was incommensurate with the defendant's legitimate income.[20] This judgment is probably not a perfect model of the extended confiscation measure, since the confiscated pecuniary gain was relatively small (in total a little over 3000 EUR).

In a further two cases the Supreme Court overruled the first instance county court judgments ordering extended confiscation, on the grounds of substan-

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[18] Ivičević Karas, Elizabeta, *Kaznenopravno oduzimanje nezakonito stečene imovinske koristi*, Hrvatski ljetopis za kazneno pravo i praksu 2(2007), p. 687 – 690.

[19] ŽS u Rijeci, K-Us-4/14, 9 June 2014.

[20] VSRH I Kž-Us 96/14-6, 10 September 2014.

tive violations of criminal procedure consisting of the inadequate reasoning of the sentences, and of inadequate fair trial guarantees for third parties having an interest in the confiscated property.[21] In other words, since the measure of confiscation and extended confiscation concerned a third party whose property was mixed with the defendant's property, the third party must be guaranteed adequate procedural rights, corresponding to a defendant's rights, regarding confiscation proceedings. Therefore, expected legislative amendments should regulate in detail the procedural rights of third parties.[22]

5. BY WAY OF CONCLUSION: THE DISPOSAL OF CONFISCATED PECUNIARY GAIN

It should be concluded that further amendments to confiscation measures and confiscation proceedings will be passed soon, all with the basic purpose to make confiscation more effective, while guaranteeing necessary procedural safeguards. However, in all legislative initiatives so far, the issue of disposing of and managing confiscated pecuniary gain has been neglected. It should be stressed that confiscation is applied as a subsidiary measure, as long as the pecuniary gain acquired through a criminal offence hasn't been the object of claims for indemnification. But there are cases when there are no victims, or the pecuniary gain exceeds the one adjudicated on the basis of claims for indemnification. The Act on confiscation proceedings contains provisions on the state organ in charge of disposing of the property, and this is the State Office for State Property Management *(Državni ured za upravljanje državnom imovinom)*, but there is no provision on the particular purposes that the confiscated property should be used for. For example, in Italy there is a special law allowing for the use of confiscated assets for social purposes.[23] Confiscated real property passes to the state, which may use it for judicial, public order or civil protection purposes, or to local authorities who may use it for institutional or social purposes, while money obtained from the sale of confiscated goods is placed in a special fund used to finance social programmes.[24] In Croatia, there is still no developed policy on this issue. For instance, the Act on compensation for victims of crime [25] prescribes that payments to the victims shall be provided from the state budget, and the idea of establishing a fund for compensation for crime victims which would be financed through confiscated pecuniary gain could be a first step to creating policy and law on the disposal of confiscated property.

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21 VSRH, I Kž-Us 106/10-8, 23 February 2012 and I Kž-Us 11/12-2, 23 January 2013.

22 See the *Draft Proposal of the Law amending Criminal Procedure Act*, *supra* n. 16.

23 Vettori, Barbara, *supra* n. 7, p. 80.

24 *Ibid*.

25 Law on compensation for crime victims *(Zakon o novčanoj naknadi žrtvama kaznenih djela),* Official Gazette 80/08, 27/11.