

CONFISCATION OF THE PROCEEDS OF CRIME IN THE CROATIAN CRIMINAL LAW LEGISLATION¹

1. INTRODUCTION OF DOMESTIC FRAMEWORK REGULATING SEIZURE AND CONFISCATION OF PROCEEDS OF CRIME (Art 12 of the United Nations Convention against Transnational Organized Crime)

From the point of view of legal theory, the rules and the principles involved in the confiscation of the proceeds of crime are expressed in their totality in Article 82 paragraph 1 of the Penal Code of the Republic of Croatia, which reads that „no one shall retain the financial or other material benefit obtained through the commission of a crime“. The principle has found its concrete application in the criminal proceedings institute of confiscation of financial benefit obtained through the commission of a crime.

In the Croatian criminal legislation, the institute of confiscation of the proceeds of crime is regulated by the following Acts of Parliament: The Penal Code (Official Gazette, Nos. 110/1997., 27/1998., 50/2000., 51/2001., 111/2003., 190/2003., 105/2004., 84/2005., 71/2006., 110/2007., 152/08), The Act on Criminal Liability of Legal Persons (Official Gazette, No. 151/1993), The Criminal Procedure Act (Official Gazette, Nos. 110/1997., 27/1998., 58/1999., 112/1999., 58/2002., 143/2002., 62/2003. – revised version, 115/2006.) respectively The Criminal Procedure Act (Official Gazette, Nos.152/2008., 76/2009.)², The Act on State Attorney (Official Gazette, Nos. 51/2001., 16/2007., 20/2007.) respectively The Act on State Attorney (Official Gazette, No. 76/2009.)³, The Act on the Office for the Suppression of Corruption and Organized Crime (Official Gazette, No. 76/2009.) and the Act on Policing and Police Powers (Official Gazette, No.76/2009.). Enforcement of the decision to confiscate proceeds of crime made in criminal proceedings is regulated by provisions of the Enforcement Act (Official Gazette, Nos. 57/1996., 29/1999., 42/2000., 173/2003., 194/2003., 151/2004., 88/2005., 121/2005., 6and 7/2008.).

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² The new Criminal Procedure Act was passed on December 15, 2008 (Official Gazette No. 152/2008) and was subsequently amended by the Act on Amendments to the Act on Criminal Procedure passed on June 30, 2009 (Official Gazette No. 76/2009.). The new Criminal Procedure Act has a complex *vacatio legis* under which its different parts come into effect on three different dates: (1) on January 1, 2009, only the parts of the Act providing for the confidentiality of pre-trial proceedings (Article 231) and for criminal re-trial (Articles 497 through 508) became effective, (2) on July 1, 2009, it became effective in the part that regulates procedure with respect to criminal offences as per Article 21 of the Act on the Office for the Suppression of Corruption and Organized Crime, and (3) on September 1, 2011, it should become effective in its entirety and should fully overrule the Criminal Procedure Act 1997.

³ The new Act on State Attorney was passed on June 30, 2009 (Official Gazette No. 76/2009.) as part of the reform of criminal legislation flowing primarily from enactment of the new Criminal Procedure Act. It also has a complex *vacatio legis* under which: (1) on July 1, 2009, it became effective except for the part regulating the powers and duties of the State Attorney in criminal proceedings (Articles 57 through 86), the structure related to the procedure under the new Criminal Procedure Act (Article 16 paragraph 2) and the powers and duties of the State Attorney in enforcing the decision to confiscate the proceeds of crime (Article 33 paragraph 2), (2) on July 1, 2009 it became fully effective with respect to the procedure applicable to crimes as per Article 21 of the Act on the Office for the Suppression of Corruption and Organized Crime, except for the provisions regulating the appointment of officials and civil servants to the State Attorney associated with the setting up of the State School for Judicial Office Holders (Articles 109, 110, 124 paragraphs 3 and 4, Articles 156 through 161 and Article 185) and (3) on January 1, 2014, when it is due to become effective in its entirety including the provisions regulating the appointment for officials and servants to the State Attorney associated with the setting up of the State School for Judicial Office Holders.

The requirements the substantive law sets for the confiscation of proceeds of crime are established under Article 82 of The Penal Code. The Article provides that nobody may retain the financial or other material benefit obtained through the commission of a crime and that such benefit shall be confiscated under the judicial decision establishing that such offence has been committed. For criminal offences under Article 21⁴ of The Act on the Office for the Suppression of Corruption and Organized Crime, the provision contained in Article 82 paragraph 2 introduces a rebuttable presumption of illegal origin of the entire assets owned by the perpetrator of such crime, and paragraph 3 provides that such assets shall also be confiscated from a perpetrator's relative⁵ if it is made likely that they have been transferred to the relative on any legal basis. Paragraph 4 provides that such assets shall also be confiscated where they have been transferred to a third person who did not acquire them in good faith. In accordance with paragraph 5, the immediate proceeds are confiscated, while the confiscation of a suitable monetary equivalent of the proceeds may be ruled only after legal or actual barriers to such a confiscation have been found.⁶

The confiscation of the proceeds of crime committed by a legal person is regulated under Article 20 of the Act on the Criminal Liability of Legal Persons. The Act defines the proceeds as any increase in or prevention of reduction in a legal person's assets due to the commission of a criminal offence. The same Act provides that the confiscation is carried out based on the decision of the court; it provides for the confiscation from an inadvertent third party and confiscation of the immediate proceeds as a rule.

The Act on Criminal Procedure 2008 sets forth the procedure for confiscating the proceeds as a special procedure under a separate chapter (Chapter XXVIII) in an almost identical way as does the Act on Criminal Procedure 1997 under Chapter XXVIII.a. The novelty of the former Act lies in that it elaborates on of the principle of subsidiarity of confiscation of the proceeds in relation to the injured party's relief claim. (Article 557 paragraph 3). The court establishes the proceeds of crime *ex officio* in criminal proceedings and rules that they shall be confiscated. In doing so, the court and the State Attorney's Office are obliged to, in the course of the proceedings, collect evidence and investigate the circumstances relevant for the confiscation of the proceeds. The value of the proceeds is determined on the basis of the data yielded by the investigation; in case this should be associated with insurmountable difficulties or cause a major delay in the proceedings, the

⁴ This particular Article of the Act on the Office for the Suppression of Corruption and Organized Crime determines three focal categories of criminal offence the Office for the Suppression of Corruption and Organized Crime, as part of the State Attorney's Office, focuses on: (1) corruption crime (2) criminal offences that involve conspiracy to commit a crime as well as all criminal offences that involve setting up an organized criminal group (the only exception being group or organized crime committed against the Republic of Croatia or its military forces) and (3) criminal offences linked by way of a transnational element.

⁵ Specifically: spouse or extramarital partner, a relative in the direct line, a relative in the collateral line up to and including the third degree, and a relative by marriage up to and including the second degree, as well as an adoptive parent and an adoptive child.

⁶ The proceeds of crime in the Croatian criminal Code are defined under the article 89 paragraph 37 which is in compliance with the terms of the provisions of the Convention that the Republic of Croatia transposed into its national legislation by ratifying the Convention and with terms of some other pieces of legislation. However, the issue of proceeds is defined primarily by way of statutory terminology and the legal nature of the concept of proceeds. In the Croatian criminal law theory and practice they are determined by way of the net principle method, under which an offender may not be dispossessed of anything beyond what represents his or her actual enrichment. This means that deductions are made for all the expenditures and costs incurred by the defendant; if it was done differently, it would mean crossing the boundary of actual enrichment i.e. imposing on the defendant a covert, indirect penalty.

amount is determined at the court's discretion. The court's decision on the confiscation must clearly identify the object of the confiscation or its monetary equivalent.

The Act on State Attorney's Office 2009 provides for an exceptionally active role of state attorneys within the new criminal procedure system⁷ including their active role in the confiscation of proceeds of crime. An important novelty is brought by Article 33 paragraph 2 of the Act, under which the state attorney is designated as the authority vested with the right and duty to commence proceedings for the enforcement of the confiscation decision and to participate in those proceedings in the capacity of judgment creditor. Under the previous law, such enforcement proceedings were instituted and conducted *ex officio* by the court, which caused major practical difficulties. Similarly, the Act on Law Enforcement and Police Powers has made the police responsible for, among other things, tracing the proceeds of crime (Article 3 paragraph 1 section 5).

Part IV of the Act on the Office for the Suppression of Corruption and Organized Crime provides for the issuance of a freezing injunction and the confiscation of proceeds of criminal offences to which the Act applies. The rules for issuing an injunction and confiscating the proceeds of crime are elaborated under special provisions on injunctions in the proceedings governed by the rules of civil enforcement. The Office is obliged *ex officio* to propose that the court rule that such an injunction be made and enforced. The court is obliged to decide on the proposal within 12 hours and to follow it by holding a hearing for the purpose of affirming the proposed solution in its entirety or in part. Injunctions are made for a period of six months and the total extension of time may not exceed one year. The conditions for making an injunction require that: (1) there is a probable cause that a criminal offence as per Article 21 of the Act has been committed, (2) there is a probable cause that the accused's total assets were obtained through the commission of a crime, (3) the value of the proceeds exceeds KN100,000 and (4) there are grounds to believe that the person may make it impossible or difficult to carry out the confiscation of the proceeds. Indemnity in case there were no grounds for an injunction is provided under the general rules of indemnity in proceedings against the Republic of Croatia.

1.1. PROTECTION OF *BONA FIDE* THIRD PARTIES (Art 12 p 8 of the United Nations Convention Against Transnational Organized Crime)

The proceeds of crime may be confiscated from a physical or legal-person third party to whom the proceeds have been transferred on any legal basis, if the proceeds were not acquired by the third party in good faith. The proceeds of crime may be acquired by the third party through any legal or factual transaction. The third party shall not be deemed to have acted in good faith if under the circumstances the assets were obtained he or she knew or could or should have known that the assets ensued from a criminal offence. In the most likely scenario, the third party will have gained the financial or other material benefit without any consideration or with a consideration that is not in proportion with the actual value of the obtained assets. The third person may be a physical or a legal person. The indicated safeguards provide relief for *bona fide* third parties.

⁷ As part of a thorough overhaul of the criminal legislation of the Republic of Croatia currently under way, a new Criminal Procedure Act has been passed and a new Criminal Code is in the pipeline. A number of corresponding secondary regulations have been passed or are in the pipeline. The outstanding feature of the new system is overcoming the accusatory principle in the procedure by emphasizing the equality of the State Attorney and the defendant as parties to the proceedings, and transferring the investigatory function from the court to the State Attorney.

The other element involves procedural protections. The physical person, respectively the responsible person of the legal person, is entitled to participate in the criminal proceedings and to be interrogated. The Act on Criminal Procedure provides for a mandatory suspension or adjournment of the trial and the summoning of the third party to whom the proceeds have been transferred, in case the confiscation from the third person is made likely only in the course of the trial. Should the third party duly summonsed by the court fail to appear, the trial may proceed without his or her presence and the confiscation shall be carried out without interrogation provided that the party has been duly cautioned in the summons. The third party that may be subject to the confiscation of proceeds shall normally be examined at the beginning of the evidence taking procedure. The third party may propose evidence and may, upon permission from the court, question the defendant, the witnesses and expert witnesses about all the circumstances with respect to the confiscation he or she may face. The party shall be served with a certified copy of the decision under which the confiscation is to proceed and shall have the right to appeal against the decision.

Finally, the *bona fide* third party may also protect his or her rights in enforcement proceedings by filing a third-party defense and by taking other actions in compliance with the Enforcement Act for the purpose of contesting the admissibility of execution against a given object.

1.2. BURDEN OF PROOF APPORTIONMENT (Art 12 p 7 of the United Nations Convention Against Transnational Organized Crime)

Under Article 82 paragraph 2, 3 and 4 of the Criminal Code, a rebuttable presumption of illegality of the offender's entire assets provided the offence committed by him or her is found to be linked with the unlawfully obtained financial or other material benefit. However, this applies only to the criminal offences established under Article 21 of the Act on the Office for the Suppression of Corruption and Organized Crime.

At the same time, the above-mentioned Article does not prejudice the presumption of the defendant's innocence as the basic principle of contemporary criminal procedure. Namely, the court will not order confiscation unless it is satisfied that (1) a criminal offence established under Article 21 of the Act on the Office for the Suppression of Corruption and Organized Crime has been committed, (2) illicit financial benefit has been gained through the offence, (3) the criminal offence was committed by the defendant, (4) the financial or other material benefit is part of the defendant's assets or the assets of his or her relatives to whom it was transferred, or third parties who did not act in good faith. The burden of proving those facts is on the prosecutor. The defendant may in the course of the first-instance proceedings submit in the case brief evidence seeking to disprove that the assets referred to in the facts of the criminal case were illegally obtained, and may challenge the court's ruling on the amount of the illegally obtained assets by bringing an appeal on points of fact corroborated by evidence.

In conclusion, the introduction and application of the legal presumptions of substantive criminal law transfers the burden of proof on the defendant, while the burden of proving guilt still remains on the prosecutor and the rights of the defense are not prejudiced since the defense may provide evidence to rebut the legal presumption of illicit origin of the assets.

1.3. BANK SECRECY (Art 12 p 6 of the United Nations Convention Against Transnational Organized Crime)

Bank secrecy is regulated by Articles 168 through 170 of the Act on Credit Institutions (Official Gazette, Nos. 117/2008., 74/2009.). A credit institution is any legal person licensed by the competent body to operate and whose business involves taking deposits and other returnable assets and granting loans as well as issuing payment instruments in the form of electronic money. Bank secrecy is defined as all information that has come to the credit institution's knowledge by way of and in connection with its transactions with an individual client and which the institution is obliged to keep confidential. The bank secrecy provision does not apply where the competent court has ordered in criminal proceedings or in proceedings prior to it that the information be provided and if such information is requested by the Office for the Suppression of Corruption and Organized Crime as part of its mandate. The Office for the Suppression of Corruption and Organized Crime has the power to request such information if it has been made likely that a given person has deposited in his or her account an income derived from a criminal offence or that the person in any other way deals with such an income, the income being of critical importance in terms of investigation or confiscation. However, this power of the Office is restricted to information about such accounts. Since bank secrecy covers a wider range of information than those about banking accounts, other information may be obtained only through the competent court.

2. DATA ON USE OF SEIZURE AND CONFISCATION OF PROCEEDS OF CRIME (2008 and 2009)

The Office for Suppression of Corruption and Organized Crime has carried out a survey looking into the implementation of the measure of confiscation of proceeds of crime in the period between January 1, 2009 and September 1, 2009. In the 25 cases which involved the confiscation of proceeds of crime in that period, 153 persons were convicted, out of whom 105 had the proceeds of crime confiscated.

The total value of confiscated assets amounted to HRK15,736,217, €329,85 and US\$100. The bulk of it were proceeds of organized crime (HRK15,036,153 and €67.254), while corruption crime accounted for HRK700,064,52 and €262,600 worth of obtained and confiscated proceeds.

Confiscated proceeds obtained through the criminal offence of taking and giving bribes totalled HRK502,250 and €262,600, and the confiscated financial benefit illegally obtained through abuse of position and power totalled HRK197.814,52. In organized crime, abuse of substances accounted for the bulk of the confiscated proceeds (HRK13,407,710, €45,564 and US\$100).

Among the proceedings currently under way, a judgment that stands out is the non-final judgment of the second-instance court in Zagreb County Court which found three persons guilty of bribe-taking under Article 347 paragraph 1 of the Criminal Code in proceedings initiated by the Office for the Suppression of Corruption and Organized Crime. Proceeds worth HRK593,558,40 were confiscated from one person and HRK3,076,518,30 million were confiscated from his mother pursuant to the statutory provision on the confiscation from relatives.⁸

⁸ This is the first judgment under which a corruption crime resulted in an expanded confiscation in which indirectly obtained proceeds were taken away from the offender's relatives. Namely, prior to the Criminal Code

Another proceeding worth pointing out is a case currently at the trial stage, in which €8,742,385.70, HRK95,550 and US\$14,500 deposited in bank accounts in Croatia, Bosnia and Herzegovina, Slovenia and Switzerland have been frozen at the motion of the Office for the Suppression of Corruption and Organized Crime, as well as three apartments and a family home worth at least €724,00, a car worth €149,000 and a yacht worth €230,832. The proceedings commenced on information the Zagreb Interpol Office received from the Interpol Office in Wiesbaden, Germany, that a person in Croatia is hiding illicit money obtained through illegal drug trade and that the person owns considerable assets in the Republic of Croatia. Liaison established between German, Dutch and Croatian authorities allowed for an exchange of data whereby the suspect was found to have indirectly obtained a valuable mansion. The mansion was then registered as share capital of a trading company specifically set up for the purpose; the share capital was then increased by the value of the mansion and sold for the amount of €5.000.000,00 which was transferred to the bank in Ljubljana. Data were gathered on the person's total assets and, upon application for mutual legal assistance, the competent authority in Slovenia issued a freezing injunction. The same measures were applied to the assets held in Croatia.

The enforcement of the decision to confiscate proceeds of crime is associated with some difficulties. This is demonstrated by the fact that in the year 2008, 155 proceedings were initiated at the Civil Division of the Municipal Court in Zagreb – the largest court in the Republic of Croatia – to enforce a decision on the confiscation of proceeds of crime. In 22 cases the judgment was successfully enforced, 14 cases were discontinued, and in 117 cases enforcement is still under way. Of the remaining three cases some were referred to the competent court and some were dismissed. In 2009, 149 proceedings were instituted, six decisions were enforced, five cases were discontinued and 163 cases are still pending.

3. LEGAL FRAMEWORK OF INTERNATIONAL COOPERATION IN SEIZURE AND CONFISCATION OF PROCEEDS OF CRIME (Art 13 of the United Nations Convention against Transnational Organized Crime)

International co-operation in seizure and confiscation of the proceeds of crime is primarily regulated by the Act on Mutual Legal Assistance in Criminal Matters (Official Gazette, No. 178/2004). Some relevant provisions are brought by the Act on the Office for the Suppression of Corruption and Organized Crime. For instance, Article 61 of the said Act provides that a freezing injunction and confiscation of the proceeds of corruption crime and organized crime shall proceed in accordance with the conditions established under international agreements and in conformity with the provisions of the aforementioned Act. Applications for assistance submitted by foreign courts, i.e. for providing data relevant for the issuance of a freezing injunction and confiscation of the proceeds of crime, are dealt with by the court, and applications of other foreign state bodies are dealt with by the Head of the Office for the Suppression of Corruption and Organized Crime.

The entire national legislation and all its provisions regulating mutual legal assistance with respect to the confiscation of proceeds of crime are consistent with the provisions of the UN Convention Against Transnational Organized Crime (Official Gazette – International Agreements, No. 14/2002), with the enforcement component of the national legislation being

amendments passed on December 15, 2008 (Official Gazette, No. 152/2008) confiscation extended in a way to include indirectly obtained proceeds accompanied by a shifting of the burden of proof to the defendant was possible only with respect to organized crime. Under the said amendments, confiscation now applies to corruption crimes, too.

supplemented by the particular features of legal assistance in criminal matters brought by the Convention.

3.1. BILATERAL AND MULTILATERAL AGREEMENTS (Art 13 p 9 of the United Nations Convention Against Transnational Organized Crime)

Besides the UN Convention against Transnational Organized Crime, the Republic of Croatia has ratified the UN Convention against Corruption (Official Gazette – International Agreements, No. 2/2005) which provides for the confiscation of proceeds of corruption crime, as well as a number of other multilateral conventions regulating this area⁹. In addition, there are a number of bilateral agreements with respect to organized crime, which also regulate co-operation in the exchange of data and the taking of measures leading to the confiscation of proceeds of crime. For example, the State Attorney of the republic of Croatia has concluded a Memorandum of Co-operation with the following countries: Great Britain and Ireland, Montenegro, Bosnia and Herzegovina, Serbia, the Ukraine, Canada and China.

A Memorandum of Cooperation against money-laundering and the funding of terrorism has been signed with Bosnia and Herzegovina, Montenegro, Poland, Serbia and the Ukraine. A number of international bilateral agreements providing for cooperation between the countries' law enforcement bodies have been signed with Belgium, Chile, Egypt, Macedonia, Moldova, Sweden, Poland, Austria, Slovakia, Germany's federal states of Bavaria and Baden Württemberg, Montenegro, Bulgaria and China. The State Attorney of the Republic of Croatia has signed an agreement establishing a Network of Western Balkans Prosecutors primarily designed to facilitate the exchange of information within the network. Agreements on direct cooperation in the pre-investigation stage of the proceedings have been concluded with Bosnia and Herzegovina, Serbia, Montenegro, the Ukraine and Canada. A Memorandum of Agreement to cooperate in combating all types of serious crime has been concluded with Bosnia and Herzegovina and with Serbia.

3.2. DISPOSAL OF CONFISCATED PROCEEDS OF CRIME OR PROPERTY (Art 14 of the United Nations Convention against Transnational Organized Crime)

The proceeds of crime are credited to the benefit of the Republic of Croatia. In case of proceeds subject to confiscation in the strict sense, either the ownership right over the object is created in favor of the Republic of Croatia or the object is sold and the proceeds of sale are credited to the state budget or to individual beneficiaries funded from the state budget.

The relief claim of the injured party has priority over the confiscation of proceeds of crime (Article 557 paragraph 3 of the Act on Criminal Procedure). In case the proceeds have been confiscated, the injured party has three months from the date the decision in his or her favor becomes final to seek restitution of the said assets from the Republic of Croatia. This is achieved by bringing a civil action for relief within three months from the date the decision on the confiscation of proceeds rendered in the criminal proceedings became final (Article 82 paragraph 6 of the Criminal Code).

⁹ Some of the most important include: the European Convention on Mutual Assistance in Criminal Matters (Official Gazette – International Agreements, No. 4/1999.), The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Official Gazette – International Agreements, No. 14/1997.) and The Criminal Convention on Corruption (Official Gazette – International Agreements, No. 11/2000.).

Article 29 of the Act on Mutual Legal Assistance in Criminal Matters (Official Gazette, No. 178/2004.) provides that the proceeds, upon completion of mutual legal assistance and cooperation, may be referred to the foreign judicial body at its request for the purpose of their confiscation or restitution to the authorized person. The said proceeds may involve actual objects or their equivalent monetary value. Delivery may be carried out only upon the final and enforceable decision of the foreign judicial body. Contrary to the claim of the foreign country, the objects respectively the proceeds shall not be delivered if: (1) the relief claim has been filed by an injured person resident in the Republic of Croatia, (2) a state claims rights to the objects or proceeds, (3) a *bona fide* third person resident in the Republic of Croatia proves that he or she has acquired certain rights or interests in the objects or proceeds by acting in good faith, (4) the proceeds are to be confiscated for the benefit of the Republic of Croatia. In case of a dispute between an authorized person and a foreign country over the restitution of the objects or proceeds, these shall be retained until the legal dispute is settled. They may be delivered to the authorized person only upon prior consent of the foreign country or the court's acknowledgement of the right to file such a claim.

4. CONCLUSION

As regards confiscation of the proceeds of crime, we should primarily strive to streamline the methods used in the confiscation and make them as efficient as possible at the lowest possible cost. This involves: (1) simplifying the mechanisms of internal co-operation, (2) continuing to simplify international co-operation (3) further strengthening international co-operation and the exchange of information by creating a conducive formal and factual environment (4) centralizing data basis (5) a centrally operated set of specialized bodies set up to deal with the confiscation of proceeds (6) elaborating a system for the enforcement of the confiscation decision by creating a suitable formal and factual environment (7) looking into the possibility of transferring confiscation into civil proceedings, which would completely eliminate the problem of the burden of proof and would rid criminal proceedings of the subsidiary elements that stand in the way of their primary objectives.