

Civil Asset Confiscation Law – New Criminal Policy or Restrictions Out Bounding Criminal Procedure?

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In order to talk about any restrictions related to property, we must start with basic principles. In criminal procedure, such restrictions are often necessary to implement the goals of criminal procedure.² Most common restrictions related to property in pre-trial investigation are search, seizure and temporarily limitation of property rights. These coercive measures are strictly established in the criminal procedure code (Lietuvos Respublikos baudžiamojo proceso kodeksas, 2002). Such measures can be applied only when necessary and must be clear and concrete, efficient, proportional, legitimate and within the scope. As well as such regulation is harmonised with the EU law and international law acts.

At the time, Lithuania's criminal procedure code was changed to satisfy not only the EU law but also decisions of the European Court of Human Rights³. The overall purpose of coercive measures is to limit the human rights and freedoms to the preconditions for a normal, unhindered process to achieve the objectives of criminal proceedings. The objectives are oriented to 1) ensure sanction and the process itself, 2) cognitive function, gathering evidence, 3) prevention. So, when choosing measures which interfere suspect's personal

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² Referring to criminal procedure in the Republic of Lithuania.

³ The Criminal Procedure Code adopted articles regarding fair trial, right to access to court, terms of investigation were established, etc.

life, especially property, subjects of pre-trial investigation should pay attention to the purpose (objective) of such proceeding.

It is very important that a person against whom such measures are used has the right to check the lawfulness and proportionality of those measures. Therefore, as a person has the right to appeal the officer's decision, the right to access to court remains implemented. Besides that, the presumption of innocence is being respected.

But what happens when the criminal procedure is over (e.g., terminated pre-trial investigation or acquittal decision or release on bail)? Can a person expect peace? The answer is not satisfying as Lithuania has recently adopted Law on civil asset confiscation which allows to confiscate the asset gained since 2010 (hereinafter – the Law) (Lietuvos Respublikos civilinio turto konfiskavimo įstatymas, 2020).

Article 2 of the Law declares that *“The property and the property benefit received from it (hereinafter - property) may be confiscated on the grounds and in accordance with the procedure established by this Law, when there is reason to believe that the property was not obtained lawfully and the total value of the property does not correspond to the person or persons referred to in paragraph 2. legal income and this difference exceed the amount of 2,000 basic fines and penalties”*.⁴

This new Law act was adopted in favour to satisfy requirements of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders.

Some Member States allow the confiscation of property without a prior criminal conviction by a criminal or a civil court decision. There are no common EU rules, and substantial differences exist in this respect between EU Member States.

Even though there were several proposals to make changes in the Law, the adopted version declares possibility to confiscate asset which was gained since 2010 and not necessarily related to organised crimes or criminal activity at all.

The origin of the need to find a way to confiscate unlawful asset was related to organised crime, money laundering and illegal enrichment. Therefore, in some countries like Italy, UK and Ireland, the asset which might be confiscated

⁴ This is 100.000 euro.

is related to such crimes. In Lithuania's version of the Law – it is enough just to suspect that property was gained unlawfully.

Even though this seems like a perfect fit to the criminal procedure code (as the origin is to fight organised crimes), the procedure is under the Civil Procedure Code of the Republic of Lithuania. Therefore, some essential questions arise. First of all, the question of the presumption of innocence. Secondly, the burden of proof. Thirdly, the opinion on double punishment.

In 2013, the Council of Europe made an impact study on civil forfeiture⁵. The emphasised note was that “civil forfeiture should never be seen as an alternative or substitute for the institution of criminal proceedings when there is sufficient evidence to support such proceedings and where such proceedings would otherwise be justified.”

So, now we have unclear boundaries on the presumption of innocence as it is presumed in criminal procedure. Civil procedure is based on adversarial principle, which leads us to the burden of proof to the defendant. According to the principle of the presumption of innocence, the burden of proof lies with the accuser, and any doubt must be interpreted in favour of the accused. The presumption of innocence is therefore infringed if the burden of proof is shifted from the charge to the defence (*Barberà, v. Spain (1998)*, *Telfner v. Austria (2001)*, *Allen v. The United Kingdom (2013)*).⁶

The defendant in civil procedure must prove each statement. Proportionality of possibilities to prepare a case of pre-trial investigation officers and a defendant is uneven especially when the Law declares that “*data collected during criminal proceedings can be used as evidence in civil confiscation proceedings*”. It is very possible that a person acquitted in criminal procedure has to face the proceeding one more time, just without the appropriate defence mechanism, especially when the Law is valid 10 years backwards. Boundaries between criminal and

⁵ Impact study on civil forfeiture was made by the Council of Europe in 2013. It discusses some countries examples and is very useful to see different regulation and different definitions on what kind of asset can be confiscated. Here is a link to electronic document: <https://rm.coe.int/impact-study-on-civil-forfeiture-en/1680782955>.

⁶ The Plenary Session of the Supreme Court of Lithuania discussed the presumption of innocence in accordance with illegal enrichment (Lietuvos Aukščiausiojo Teismo Baudžiamųjų bylų skyriaus plenarinės sesijos 2015 m. lapkričio 10 d. nutartis byloje Nr.2K-P-100-222/2015).

civil procedures with this Law became unclear. Nevertheless, it is important to ensure the general principles (such as the right to access to court, presumption of innocence, proportionality) to every person in the proceedings.

It may look as if, in Lithuania, the civil asset confiscation by civil process was a continuous process after “failed”⁷ criminal procedure. In civil procedure, there is no necessity to prove the crime was committed.

It is also possible that this new Law may affect behaviour of the suspect in criminal procedure. For example, in criminal procedure, there is a possibility to be released from criminal liability if a person actively assists in detecting the criminal acts committed by members of the organised group or the criminal association. Therefore, a suspect is willing to testify in order to be released from criminal liability. Now knowing that after a deal with the prosecutor, the suspect is not “safe” due to possible civil confiscation law, would there still be a willingness to testify?

I have no doubt that, in ideal world, we would not have doubts that Law is implemented by honestly respecting principles of proportionality, where the goal is to confiscate the asset which was gained from criminal activity or used as a tool. Civil asset confiscation law enables the prosecutor to have help from all the institutions in the investigation, but the person (the defendant) is all alone in the process. Today’s reality is that civil confiscation of property is sought to be legalised in Lithuania without establishing that a person has committed a criminal offence and without the legal mechanism established by the Criminal Procedure Code but only by limiting a few laconic provisions of the draft Law on Prevention of Organised Crime, but also threatens to unduly restrict the property rights of individuals (Drakšas, 2019).

The ECtHR emphasised that restrictions on ownership were justified by an overriding reason relating to the public interest and proportionate to the objectives pursued. In all cases, the ECtHR rejected claims that the confiscation of property on the grounds that it had been obtained from illegal activities or that such property was intended to be used for illegal activities violated the presumption of innocence. The ECtHR based its position on the fact that the

⁷ I use “failed” ironically, because the process can be terminated due to different reasons – lack of evidence, question of guilt, etc. Nevertheless, the commitment of crime is not proved in such cases.

confiscation of property was used as a preventive measure rather than a punitive one and that the fault of the defendants was not raised in the confiscation proceedings (Bikelis *et al*, 2018).

Even though Lithuania has all tools to confiscate asset in criminal procedure (possibility to confiscate asset which was gained from unlawful activity or illegal enrichment, which was used as a tool, even extended confiscation of property is possible) it is questionable why the state needs a law act to confiscate property without relating it to criminal activity. Especially when the origin of the need to use civil confiscation came in order to fight specifically organised crimes.

To conclude, I can only hope for two outcomes. First, the Parliament will make amendments, relating the property which may be confiscated by the Law to criminal activity. Second, the Supreme Court will create precedent clarifying application of the Law in respect of its origin, proportionality and protection of the property rights.

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