



## Training course "Legal regulation on confiscation of property in Latvia and European Union; ensuring effective execution mechanism"

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### **PROPERTY CONFISCATION - procedural and substantive aspects.**

#### **Points**

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- confiscation in the criminal field is considered to be free of charge transfer of property in favour of the state
  - "criminal confiscation" in modern Latvian criminal law may be understood and manifests as 1) criminal penalty, 2) confiscation of property of crime, 3) confiscation of material evidence and documents as evidences
  - **Confiscation of property as a criminal penalty is characterized** by the following main aspects: 1) it may be a principal penalty or an additional penalty; 2) it may be intended for mandatory enforcement or potential enforcement, 3) this type of confiscation is applicable only to a person that was found guilty by a court, 4) regulated by substantive rules of criminal law (Criminal Law)
  - **Confiscation of property of crime is characterized** by the following significant aspects: 1) it is considered to be a criminal procedural solution of property issues, 2) it may refer to the property of the accused, as well as other persons, 3) regulated by rules of the criminal procedural law (Criminal Procedure Law)
  - **Confiscation of material evidence and documents is characterized** by the following significant features: 1) it is final handling of evidences, 2) it may refer to the property of the accused, as well as other persons, 3) regulated by rules of criminal procedural law (Criminal Procedure Law), while several aspects are also regulated by criminal law (Criminal Law)
- Types of confiscation of property in Latvia may be schematically depicted as follows

• Type of criminal confiscation	• Nature	• Referred to	• Imposed by
• Confiscation of property as a criminal penalty	• Principal penalty or additional penalty	• Property belonging to a person entitled to defence	• Court



<ul style="list-style-type: none"> <li>• <b>Confiscation of property of crime</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Solution of property issues</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Property belonging to a person entitled to defence or other persons</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Court</b></li> </ul>
<ul style="list-style-type: none"> <li>• <b>Confiscation of material evidence and documents</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Final handling of evidences</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Property belonging to a person entitled to defence or other persons</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Any driving force of the proceedings</b></li> </ul>

- **Confiscation of property as a type criminal penalty**, if looked at closer, it may be characterized by the following considerations: 1) it may be a principal penalty or an additional penalty, as well as it is envisaged as a coercion measure for a legal entity; 2) it may be imposed only if it is envisaged as penalty in a section of the law concerned; 3) it may be imposed by court only; 4) only property of the sentenced person (located at the person or other persons) may be subject to such confiscation), 5) it may be full (confiscation of all property) or partial. In case of partial confiscation of property the portion of property to be confiscated is determined by the court at its discretion. The Criminal Law provides only for such cases when the law specifically defines the scope of property to be partially confiscated. As main problem aspects of property confiscation as penalty the following may be specified: 1) in case of its mandatory application it is not considered to be fitting the offence, does not comply with proportionality requirements, etc., and ; 2) unclear scope of property to be confiscated.
- Deep insight into **confiscation of property of crime** may be outlined by the following points:
  - in respect of awareness of property of crime: 1) handling property of crime is one of property issues in criminal proceedings; 2) depending on the scope of required evidence and the onus of proof imposed to members of the proceedings, property of crime may be divided into three types: s.c. proven property of crime (Section 355(1) of the Criminal Procedure Law), i.e. the property regarding which evidences were obtained regarding its criminal origin; s.c. presumable property of crime, i.e. the property (Section 355(2) of the Criminal Procedure Law), regarding which no evidence regarding its criminal nature are required, but that is presumed to be such unless proven otherwise; and the property concerning which its owner or legal possessor has not reported loss of property and confirmed its property rights to it after it has been found, 3) property of crime may be property belonging to the person having right to defence (accused, sentenced, etc.) and property belonging to other persons the legal origin of which this person cannot prove. As main problems aspects of confiscation of property of crime the following may be indicated: 1) inaccurate use of terms by the Criminal Procedure Law, 2) the need to



- improve the range of cases to which presumption of property of crime is applicable, 3) presumption concerned, 4) determination of the content of property of crime only in procedural rules?
- in respect of recognition of property to be property of crime: 1) the recognition of property to be property of crime may take place simultaneously with making the final decision of proceedings, as well as during the pretrial process, when the proceedings are generally still continuing, 2) property may be recognized to be property of crime by a court of a prosecutor only, while during pretrial proceedings, during main proceedings, it may be done only by a court in the manner prescribed by Section 59 of the Criminal Procedure Law, as well as any driving force of the proceedings (i.e. both a prosecutor and an investigator) in the manner prescribed by Section 356(2)(2) of the Criminal Procedure Law. As main problem aspects of this issue the following may be indicated 1) in respect of the recognition of property to be property of crime by a final decision of proceedings, the legal regulation of the content of final decisions of proceedings, excluding judgments, is considered to be insufficient, and 2) in respect of the recognition of property to be property of crime during pretrial proceedings an insufficient level of procedural guarantees for persons involved and the need for extension of the possibility of application of this particular process is stated.
  - In respect of confiscation of property as one of the types of handling property of crime: 1) confiscation of property of crime adjacent to its return is considered to be one of two constant types of action with property of crime, 2) in accordance with the Criminal Procedure Law, property and proceeds of crime may be subject to confiscation; property of the accused not related to the crime, but subject to confiscation as a "replacement" for property of crime; property of other person, if the accused has neither property of crime nor property to be confiscated as a replacement for the property of crime; proceeds and property acquired as a result of sale or use of the property of crime. As problems aspects of property of crime the following may be indicated: 1) different definition of the "transfer" of property to the property of state (confiscation, transfer to the state budget); 2) insufficient clearness when and what may be confiscated, 3) too wide possibilities of confiscation of property belonging to third persons; 4) lack of procedural guarantees for third persons, in particular, if proceedings are not specific
  - **Confiscation of material evidence and documents** may be characterized by the following significant features: **1)** The handling of material evidence and documents as evidences in criminal proceedings may be characterized by several stages: recognition to be an evidence and attachment to the matter; storage and final handling, **2)** confiscation – one of final handling types, **3)** items of crime may be confiscated; CO instrumentalities belonging to the accused (..), including items that were used or were intended to be used to commit the CO; items belonging to other persons that were used or were intended to be used to commit the CO; other property of the accused in the value of CO instrumentality. **2)** this confiscation may be decided on in the final decision, as well as s.c. "conditionally" – based on the decision of the driving force of the proceedings that is made in continuing proceedings, regarding sale of material evidence. This type of confiscation is characterized by the following problem aspects: **1)** duplication with the institute of property of crime, **2)** exaggerated obligatoriness, **3)** use of the institute of material evidence for the purposes not characteristic to it



- **Securing of criminal confiscation** may currently be characterized by the following short considerations: 1) its only means is seizure of property; 2) the content of "seizure of property" is not regulated, that in fact means that this type of security is not clear, 3) sufficiently effective management of seized property ensuring non-reduction of value of the property is not defined.
- **Criminal confiscation abroad** may be generally characterized by the following main considerations: 1) criminal confiscation is mainly envisaged in Criminal Laws or special regulations dedicated to this particular issue; 2) criminal confiscation in the absolute majority of cases is related to the confiscation of property derived from crime, used to commit the crime or produced as a result of crime, it almost never refers to legally, i.e. lawfully derived property; 3) the only exceptions when lawful property may become subject to confiscation is when it is confiscated as an equivalent for wrongfully acquired or used property the confiscation of which due to some reasons is not possible; 4) in some countries confiscation of property is also possible, if due to any reasons a sentencing decision is not possible or it is decided to resolve the matter in other way (such as, if the guilty person is dead or the matter is resolved out of court, for instance, discontinuing it on non-rehabilitability grounds), 5) confiscation of property of third persons is possible in extremely rare cases, mainly relating its possibility to the fact that the third person obtained the property free of charge, knew about its criminal nature or use in a criminal offence, etc., 6) the rights of victims for compensation are especially protected either indicating that the property required for compensation may not be confiscated or also that compensation must be first covered from the confiscated property; 7) the need for proportionality and utility evaluation in cases of application of confiscation of property is highlighted
- **"International" requirements to criminal confiscation** are concisely reflected in the consideration that it is mainly required to ensure effective confiscation of property derived from or used for committing a criminal offence, including the possibility to confiscate the equivalent of this property, if the property itself is no more available. It is also required to ensure effective securing of confiscation of possible property, including effective management till the time when the issue of confiscation is finally decided.
- **In respect of criminal confiscation in ECHR case law** it may be indicated that one of the key issues in each individual case is the issue regarding the existence and compliance with these general interests, in opposition to the rights of the individual to property. In accordance with ECHR considerations property confiscation is possible, however, its legal grounds and application must match strict criteria. The most important of them are related to the fact that confiscation may take place only based on law that is sufficiently clear and specific. Respectively, the law must clearly define all the situations when property of a person may be transferred without compensation. The other is that the procedure of application of confiscation must be fair. It is furthermore firstly related to the fact that it must always be evaluated how much proportionate and appropriate confiscation of property may be in each particular case. Secondly, during the process of confiscation of property the persons to the property of which this confiscation may be turned, must be provided sufficient procedural guarantees to effectively protect his/her rights.
- **When summarizing the problem aspects of confiscation of criminal property, foreseeing its possible development in the future and trying to express propositions for a more effective process, the following initiatives may be proposed:** 1) it would be necessary to refuse from



confiscation of property as penalty. At the same time the legal regulation of confiscation of property of crime must be improved and mainly the scope of its practical application must be significantly expanded, 2) all types of criminal confiscation (confiscation of property as penalty, if the person refuses from it, confiscation of property of crime and confiscation of property used for for produced during crime) must be envisaged in substantive law, 3) all types of confiscation must be determined as possibly rather obligatorily applicable, 4) confiscation of property of crime, as well as criminal offence instrumentalities and other items used in a criminal offence, as well as confiscation of items produced during criminal offence must be envisaged as a penalty rather than other type of coercion measure, 5) the institute of property of crime would be referable to both property of crime and other property in the value of this property, if the property of crime itself cannot be confiscated. Proceeds from the use of property of crime may also be subject to confiscation. If property of crime is attached to lawful property, then lawfully acquired property might also be subject to confiscation in the amount of the property of crime and proceeds from it.