

## **EXTENDED PROPERTY CONFISCATION AS INFRINGEMENT OF THE PRINCIPLE OF THE PRESUMPTION OF INNOCENCE**

**Key words:** Extended property confiscation, the presumption of innocence.

On 24 February, 2005, European Union Council framework decision 2005/212/TVR „on Confiscation of Crime-Related Proceeds, Instrumentalities and Property“ indicated that each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.<sup>1</sup> Only in December, 2010, by initiative of the President of the Republic of Lithuania the decision on legitimation of extended property confiscation was enacted by the Seimas of the Republic of Lithuania and Criminal Code of the Republic of Lithuania was appended by article 72<sup>3</sup> “Extended Property Confiscation”<sup>2</sup>. After enactment concerning extended property confiscation there has been a lot of discussions related to the conformity of this provision with the principle of the presumption of innocence, moreover, there have been opinions that such regulation of extended property confiscation violates the fundamental principle of a juridical state. Due to these reasons a necessity has arisen to review and discuss the relation of extended property confiscation with the principle of the presumption of innocence and to decide if this means should be applied in Lithuania to the whole extend.

To begin with, it is necessary to review basic applying conditions of extended property confiscation, which are indicated in article 72<sup>3</sup> of Criminal Code of the Republic of Lithuania, in order to understand the relation of extended property confiscation and the principle of the presumption of innocence. There are pointed out three main conditions in the edit of this article: 1) a defendant is convicted of a rather heavy, heavy or very heavy intentional crime, from which he/she had or was able to have property benefit; 2) during the period of criminal offences of this Code, or after committing such criminal actions or during five years until committing such criminal actions a defendant has got obtained property, which value does not correspond with his/her legal proceeds, and this difference exceeds the amount of 250 MLL (Minimal Living Level), or during the period indicated in this clause he/she has transferred

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<sup>1</sup> European Union Council framework decision 2005/212/TVR „on Confiscation of Crime-Related Proceeds, Instrumentalities and Property“ from EUR-Lex.europa.eu, available at [<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:LT:PDF>] (last visited 19-02-2011 16.20)

<sup>2</sup> “Lietuvos respublikos baudžiamojo kodekso 3, 67, 72, 190 straipsnių pakeitimo ir papildymo ir kodekso papildymo 723, 1891 straipsniais įstatymas” from infolex search of legal acts, available at [<http://www.infolex.lt/ta/141170>] (last visited 19-02-2011 16.33)

such property; 3) during a criminal proceeding a defendant does not justify legitimacy of such obtained property.<sup>3</sup>

In addition, there is indicated a necessity in the first condition that in order to apply extended property confiscation to a person, he or she has to be convicted of committing a rather heavy, heavy or very heavy intentional crime, that is to say that without a decision of the court where it will be stated that a person has committed at least a rather heavy crime (a rather heavy crime is an intentional crime, for which the highest punishment, exceeding three years of imprisonment, but not exceeding six years of imprisonment is intended in the Criminal Code.<sup>4</sup>), otherwise the extended property confiscation cannot be applied. Also, in the first condition there is indicated that a crime of committing which a person is convicted, he or she must have property benefit from it, that is to say, that a person receives some property benefit, it might not necessarily be only cash benefit, in this case property benefit should be clarified broadly.

Furthermore, the second indicated condition of the law is that during the period of criminal offences of this Code, or after committing such a criminal action or during five years until committing such a criminal action a defendant has obtained property, which value does not correspond with his/her legal proceeds and this difference exceeds the amount of 250 MLL (Minimal Living Level) (that is to say about 32500 Lt.), or during the indicated period in this clause he/she has transferred such property. While doc. Dr. Aurelijus Gutauskas, who is a Head of the Department of Criminal Law and Criminology of M.Romeris University, is talking why a five-year period has been chosen until committing a criminal action, detecting and clarifying it, he states that a five-year period is satisfactory and optimal time and it is a quite severe punishment because a five-year period will be calculated not from the moment of the commitment of a detected and proven criminal action when a defendant could begin to use its results and could obtain property, but until this criminal action, that is to say, it will cover a period, when a defendant did not commit criminal actions which were known for the justice, and a criminal origin of his/her property was possible, presumptive, however it was not proved denying all reasonable doubts.<sup>5</sup> Also, in the second condition there is stated that confiscated property might be confiscated from the third persons, if a defendant during a five-year period until the exposure of a criminal action or after it, has transferred the property to the third

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<sup>3</sup> Criminal Code of the Republic of Lithuania, 02-12-2010 edit, from website the Seimas of Republic of Lithuania search of legal acts, available at [[http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc\\_l?p\\_id=388527](http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=388527)] (last visited 19-02-2011 12.55)

<sup>4</sup> Criminal Code, edit 21-11-2008, 11 article, 44 page

<sup>5</sup> „Extended property confiscation – surprisingly radical reform“ from website infolex.lt, available at [<http://www.infolex.lt/portal/start.asp?act=news&Tema=50&Str=44819>] (last visited 19-02-2011 13.31)

persons. The 3<sup>rd</sup> part of 72<sup>3</sup> of Criminal Code of the Republic of Lithuania indicates the list of the third persons from whom such property might be confiscated: 1) from individuals, to whom the property is transferred after concluding a false agreement; 2) from family members and close relatives of a defendant to whom the property has been transferred; 3) from legal entities where a manager, a boss, a member or participants of authorities, who control no less than fifty percent shares (contributions and similar to them) of the legal entity, are his/her family members or close relatives; 4) from a person to whom the property has been transferred or persons who have officiated as managers or have had the right to represent a legal entity, on behalf of a legal entity they could make decisions and control activities of a legal entity, and who knew or they had to know that this property had been gained by criminal way or illegal proceeds of a defendant.<sup>6</sup>

The third condition indicates that a defendant during the criminal proceedings has not proved the legitimacy of the obtained property. According to this condition a defendant is obliged to prove his/her innocence, and the legitimacy of the obtained property. So, summarizing all features of extended property confiscation which have been fixed in Lithuania, it might be drawn a conclusion that the third condition when a person during criminal proceeding has to prove legitimacy of obtaining of confiscated property, at first sight violates the principal of presumption of a person's innocence.

Besides, the principle of presumption of innocence is a fundamental and universally accepted principle of Criminal Law. Its sources are both international documents defending human rights and Constitution of the Republic of Lithuania, for instance 31 article of the Constitution of the Republic of Lithuania states that "a person is considered being innocent if his/her guilt is not proved according to the order set by the law and accepted by the court decision which is in force". The Constitutional Court of the Republic of Lithuania while clarifying this condition set on 19<sup>th</sup> of November, 1994, in the decision of the Constitution, pointed out that "in the first part of 31<sup>st</sup> article of the Constitution where is set the presumption of innocence in criminal proceedings a load of an averment of a quilt falls to the bodies of interrogation and investigation a suspect or a defendant does not need to prove his/her innocence."<sup>7</sup> According to such clarification of the Constitutional Court it is obvious that the

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<sup>6</sup> Criminal Code of the Republic of Lithuania, 02-12-2010 edit, from website the Seimas of Republic of Lithuania search of legal acts, available at [[http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc\\_l?p\\_id=388527](http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=388527)] (last visited 19-02-2011 12.55)

<sup>7</sup> Constitutional Court of the Republic of Lithuania 18-11-1994 decision „Concerning Adequacy of 3 item of second part of 58 article of Criminal Process Code of the Republic of Lithuania to the Constitution of the Republic of Lithuania“ from website of the Constitutional Court of the Republic of Lithuania search of decisions, available at [<http://www.lrkt.lt/dokumentai/1994/n411118a.htm>] (last visited 19-02-2011 14.46)

condition of the 3<sup>rd</sup> paragraph of the 2<sup>nd</sup> part of 72<sup>3</sup> article of the Criminal Code that the extended property confiscation might be applied only then when a defendant has not proved legitimacy of obtained property during criminal proceedings - in such a way a defendant is obliged to prove legitimacy of possessed property, and this apparently contradicts the presumption of innocence, as the Constitutional Court states that a defendant cannot be obliged to prove his/her innocence. The Seimas of the Republic of Lithuania establishing the extended property confiscation at the same time confirmed the presumption of innocence, which asserts in the way that a person who is adjudged to be guilty committing a rather heavy, heavy or very heavy intentional crime from which he/she had or could have had a property benefit and having obtained property, which value does not corresponds with her/his legal proceeds, and this difference exceeds an amount of 250 MGL (Minimal Living Level), the property was obtained during committing an illegal action according to the Code, or after committing it or within five years until committing it, then it can be stated that such property of a person is illegal. Thus load of averment of illegal property is transferred from a prosecutor to defense and a defendant, because it is enough for a prosecutor to ascertain that the property of a defendant exceeds 250 MGL (Minimal Living Level), his/her legal proceeds, and defense and a defendant are obliged to prove legitimacy of this property in order to protect it from confiscation. Hereby, applying the presumption of guilt it obviously violates the principle of the presumption of innocence. However, a question arises if only due to the fact that a regulation of the extended property confiscation partially contradicts an attitude of a principle of the presumption of innocence, is it necessary to cancel extended property confiscation?

Finally, the principle of the presumption of innocence should not be absolute and blindly applied in the all law system. Senior science employee Dr. Karolis Jovaisa of Law Institute also agrees with such statement, as he in his article "Innocence Presumption: unknown aspects of a known principle" points out that the principle of the presumption of innocence in the legal literature is frequently absolute unreasonably, its content is inadequately revealed ignoring realia of criminal process.<sup>8</sup> According to the attitude of Dr. Karolis Jovaisa: an indictment party is obliged to prove a defendant's guilt, while an obligation of averment cannot be transferred to a defendant, is reasonable and clear, however, it cannot be absolute. Talking about transferring the obligation of averment to a defendant applying extended property confiscation it is necessary to pay attention to nature of this expression. The extended property confiscation is one of legal means, which are used in order to prevent, first of all, from serious,

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<sup>8</sup> „Nekaltumo prezumcijos: žinomo principo nežinomi aspektai“ from Teisės institutas website, available at [\[www.teise.org/admin/docs/upload/2004%204%20Karolis.doc\]](http://www.teise.org/admin/docs/upload/2004%204%20Karolis.doc) (last visited 06-02-2011 16.00)

selfish crimes such as trafficking in human beings, drugs trade, smuggling, and bribery. The rather that this means will be applied to persons who are adjudicated committing crimes, during which they had some kind of property benefit. According to a principle of a legal state every person has to live honestly and follow the law, so if a person followed these fundamental life conditions he/she would not have any difficulties in proving their possessed property according to legal evidence. In that case it is obvious that the presumption of innocence applied in the extended property confiscation does not cause objective opportunities to abuse and apply this means against innocent people. Although an applied principle of the presumption of innocence partially violates the principle of the presumption of innocence, but it protects a society from organized crime and other serious crimes.

All things considered, applying the extended property confiscation an issue concerning inadequacy of applying this means to the principle of the presumption of innocence has arisen. However, according to my opinion and other scientists of Criminal Law (Dr.Karolis Jovaisa, doc.dr.Aurelijus Gutauskas) it is not necessary to absolute only the principle of the presumption of innocence but it is necessary to consider the essence of the extended property confiscation generally, a preventive power of this means and punishment of persons, who make money from criminal activities. The extended property confiscation should be applied in such amount which is now established in the article 72<sup>3</sup> of the Criminal Code of the Republic of Lithuania. Since the extended property confiscation will help to fight against criminality and corruption in Lithuania actively, the conclusions could be drawn that this means will not destroy legal system in Lithuania, but conversely it will help a conception of Lithuania as a legal state become stronger.

## Literature

1. European Union Council framework decision 2005/212/TVR „on Confiscation of Crime-Related Proceeds, Instrumentalities and Property“ from EUR-Lex.europa.eu, available at [<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:LT:PDF>] (last visited 19-02-2011 16.20);
2. Lietuvos respublikos baudžiamojo kodekso 3, 67, 72, 190 straipsnių pakeitimo ir papildymo ir kodekso papildymo 723, 1891 straipsniais įstatymas” from infolex search of legal acts, available at [<http://www.infolex.lt/ta/141170>] (last visited 19-02-2011 16.33);
3. Criminal Code of the Republic of Lithuania, 02-12-2010 edit, from website the Seimas of Republic of Lithuania search of legal acts, available at [[http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc\\_l?p\\_id=388527](http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=388527)] (last visited 19-02-2011 12.55);
4. Criminal Code of Republic of Lithuania, edit 21-11-2008, 11 article, 44 page;
5. „Extended property confiscation – surprisingly radical reform“ from website infolex.lt, available at [<http://www.infolex.lt/portal/start.asp?act=news&Tema=50&Str=44819>] (last visited 19-02-2011 13.31);
6. Criminal Code of the Republic of Lithuania, 02-12-2010 edit, from website the Seimas of Republic of Lithuania search of legal acts, available at [[http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc\\_l?p\\_id=388527](http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=388527)] (last visited 19-02-2011 12.55);
7. Constitutional Court of the Republic of Lithuania 18-11-1994 decision „ Concerning Adequacy of 3 item of second part of 58 article of Criminal Process Code of the Republic of Lithuania to the Constitution of the Republic of Lithuania“ from website of the Constitutional Court of the Republic of Lithuania search of decisions, available at [<http://www.lrkt.lt/dokumentai/1994/n411118a.htm>] (last visited 19-02-2011 14.46);
8. „Nekaltumo prezumcijos: žinomo principo nežinomi aspektai“ from Teisės institutas website, available at [[www.teise.org/admin/docs/upload/2004%204%20Karolis.doc](http://www.teise.org/admin/docs/upload/2004%204%20Karolis.doc)] (last visited 06-02-2011 16.00)