Legal regulation on handling criminally acquired property and its impact upon business environment – the experience of Latvia

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Abstract

The prevailing importance of material values in contemporary society, undoubtedly, influences the nature of crime. At present, the main aim of criminal offences is to gain material benefits. In such conditions, in the majority of criminal cases it is inconceivable that the purpose of criminal proceedings could be reached without effective resolution of material issues of criminal procedure. The article examines the regulation on handling criminally acquired property in the Latvian criminal procedure, as well as assesses the impact of this regulation upon the business environment. I.e., the study provides answers to questions related to protecting the rights of a merchant as a victim, by using the tools envisaged by the Criminal Procedure Law. The study also examines business risks linked to such cases, where law enforcement institutions presume illegal origins of a merchant's property. The research also focuses on implementation of the aforementioned legal instruments in correlation with human rights recognized in the European Union. The article provides an insight into the relevant issues in the Latvian criminal procedure in connection with confiscation of criminally acquired property or returning it to the victim, as well as into Latvia's experience in implementing the Directive 2014/42/EU. Hopefully, the findings expressed in the article will be useful both for the theoreticians and practitioners of criminal procedure and will contribute to international sharing of experience. The following research methods have been used in preparing this article: analysis and synthesis of legal literature, of case law, and regulatory enactments; comparative method, analytical method, inductive and deductive method.

Keywords*: criminal procedure, property issues in criminal proceedings, criminally obtained property, proceedings regarding criminally obtained property, commercial activities.*

JEL classification: K14, K22

1. Introduction

The prevailing importance of material values in contemporary society[2], undoubtedly, influences also the nature of crime. At present, the main aim of

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[2] Hamkova D. *Noziedzīga nodarījuma kvalificēta un salikta sastāva konstrukcijas problēmas. In book: Tiesību efektivitāte postmodernā sabiedrībā. Latvijas Universitātes 73. zinātniskās konferences rakstu krājums*. Rīga: LU Akadēmiskais apgāds, 2015, p. 157.

criminal offences is to gain material benefits[3]. In view of the above, in the majority of criminal cases it is inconceivable that the purpose of criminal proceedings, defined in Section 1 of the Criminal Procedure Law that is in force in Latvia (hereinafter – the Criminal Procedure Law) - the fair regulation of criminal legal relations[4] – could be achieved without an effective solution to the property issues of the criminal proceedings. Therefore, it is important that legal regulation on reaching the solution to property issues in criminal proceedings would comply with contemporary requirements and would facilitate reaching the purpose of the criminal procedure without unjustified intervention in the life of a person.

One of the property issues in criminal proceedings is the handling of a criminally obtained property[5]. This issue of property is linked to the principle, which is generally recognised in criminal procedure law, that a person, who has committed a criminal offence, should not enjoy the material benefits gained as the result of the criminal offence[6]. In this regard, it has been validly pointed out in legal literature that the person should be "deprived of" what he has gained illegally or by using what had been illegally obtained, i.e., unjustly[7]. The opinion that the development of crime is thus deprived of its economic grounds can be found in periodicals[8]. Hence, pursuant to Section 70^{11} (1) of the Criminal Law that is in force in Latvia (hereinafter – the Criminal Law), a property, "which has come into the ownership or possession of a person as a direct or indirect result of a criminal offence" must be recognised as being criminally obtained.

The article examines regulation on the handling of a criminally acquired property in the Latvian criminal procedure and also assesses the impact of this regulation on business environment. I.e., the study provides answers to questions linked to the possibilities for protecting the rights of a merchant as a victim, using the tools provided for by the Criminal Procedure Law that is in force in Latvia. The research also examines the risks of business activities linked to cases, where law enforcement institutions presume that the merchant's property has been criminally obtained. Likewise, the study focuses on correlation between the use of the

[3] Kūtris G. *Noziedzīgi iegūta manta: tiesiskais regulējums un problemātika*. "Jurista Vārds", 17 April 2007, No. 16 (469). The document is available online at: http://www.juristavards.lv/doc/155864-noziedzigi-ieguta-manta-tiesiskais-regulejums-un-problematika/ [accessed on 27 October 2017].

[4] Meikališa Ā., Strada-Rozenberga K. *Kriminālprocesa izpratne, mērķis un kriminālprocesa tiesību avoti*. In book: Meikališa Ā., Strada-Rozenberga K. *Kriminālprocess. Raksti. 2005–2010*. Rīga: Latvijas Vēstnesis, 2010, p. 35.

[5] See Meikališa Ā., Strada-Rozenberga K. *Procesuālie termiņi, dokumenti un mantiskie jautājumi*. In book: Meikališa Ā., Strada-Rozenberga K. *Kriminālprocess. Raksti. 2005–2010*. Rīga: Latvijas Vēstnesis, 2010, p. 185.

[6] Boucht J. *Civil Asset Forfeiture and The Presumption of Innocence under Article 6(2) ECHR*. "New Journal of European Criminal Law", Vol. 5, Issue 2, 2014, p. 221.

[7] Meikališa Ā., Strada-Rozenberga K. *Procesuālie termiņi, dokumenti un mantiskie jautājumi*. In book: Meikališa Ā., Strada-Rozenberga K. *Kriminālprocess. Raksti. 2005–2010*. Rīga: Latvijas Vēstnesis, 2010, p. 183.

[8] Kūtris G. *Noziedzīgi iegūta manta: tiesiskais regulējums un problemātika*. "Jurista Vārds", 17 April 2007, No. 16 (469). The document is available online at: http://www.juristavards.lv/doc/155864-noziedzigi-ieguta-manta-tiesiskais-regulejums-un-problematika/ [accessed on 27 October 2017].

aforementioned legal tools and human rights recognised in the European Union. The article provides an insight into the topical issues related to confiscation of criminally obtained property or returning it to the victim in the Latvian criminal procedure, as well as into Latvia's experience in implementing the Directive of the European Parliament and the Council 2014/42/EU. Hopefully, the findings expressed in the article will be useful to theoreticians and practitioners of the criminal procedure, and also to merchants. Likewise, the author hopes that the study will contribute to international sharing of experience.

The first section of the article examines the understanding of the concept of criminally obtained property in the Latvian Criminal Law; whereas the second section studies the regulation on the handling of criminally obtained property set out in the Latvian Criminal Procedure Law, and the third part turns to impact of the legal regulation on the handling of a criminally obtained property on business environment. The main findings reached in the course of research are provided in the conclusion.

The following research methods have been used in writing the article:

- analysis and synthesis of legal literature, case law and regulatory enactments, the article analyses Latvian and foreign legal literature, as well as case law and regulatory enactments. It is necessary to use the method to reveal the content of the concept of a criminally obtained property and to research the regulation on handling criminally obtained property in the Criminal Procedure Law;
- the comparative method – the method is used in analysing the legal regulation enshrined in international legal acts, as well as the explanation of norms provided in the case law of the European Court of Human Rights. The use of this method helped to establish, whether the Latvian legal regulation and the practice of applying law complied with the internationally recognised practice and human rights standards;
- the analytical method – the method was used in researching the findings expressed in the legal doctrine and in case law, Latvian and international legal acts, as well as other materials needed to reveal the topic;
- the inductive and deductive method – the inductive method was used to substantiate the generalised conclusions that were made, in analysing concrete cases from practice. The deductive method, in turn, was used, to reach conclusions, following theoretical guidelines and general findings.

2. The understanding of a criminally obtained property in the Latvian criminal law

On 1 August 2017, by implementing the Directive of 3 April 2014 of the European Parliament and of the Council No. 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

(hereinafter – Directive 2014/42/EU), sizeable amendments to the Criminal Law[9] and the Criminal Procedure Law[10] also entered into force, which, *inter alia*, introduced legal regulation on a criminally obtained property.

With respect to the concept of criminally obtained property, it must be noted that prior to the amendments referred to above, the concept of criminally obtained property was defined in the Criminal Procedure Law, which, in the author's opinion, was not correct. I.e., it follows from Section 1 of the Criminal Procedure Law that the purpose of the Criminal Procedure Law is to establish such criminal law procedure that would ensure effective application of the norms of the Criminal Law and fair regulation of criminal law relations without unjustified interference into a person's life. This means that the Criminal Procedure Law regulates the procedure of criminal proceedings (the procedure, in which regulation of criminal law relations is achieved) and, essentially, the Criminal Procedure Law should comprise procedural norms and not substantive ones. The norms that define the concept of criminally obtained property are to be recognised as being substantive norms, therefore the legislator's action in choosing a solution, where the grounds for recognising a property as being a criminally obtained currently are defined in the Criminal Law (to eliminate a situation, where norms of substantive nature are regulated in a procedural law) is commendable. In this respect, it is noted in the annotation to the amendments to the Criminal Procedure Law, "In view of the fact that Section 355 [of the Criminal Procedure Law] (Criminally Obtained Property), which defines, which property must be recognised as being criminally obtained, is a substantive norm, it is planned to delete Section 355 [of the Criminal Procedure Law] by Section 8 of the draft law, and to include the regulation that it comprises in [the Criminal Law]"[11].

As the result of the amendments that were adopted, Chapter VIII[2] "Special Confiscation of Property" was added to the Criminal Law. It is explained in Section 70[10] of the Criminal Law that special confiscation of property is the compulsory alienation of a criminally acquired property or instrumentalities of a criminal offence, or the property connected to a criminal offence to the State ownership without compensation. It is underscored in particular in the new chapter of the Criminal Law that the special confiscation of property is not a criminal punishment, but a measure that is used to regulate criminal law relations.

In this respect, it must be noted that Latvia is one of the few Member States of the European Union, which still have retained confiscation of property as a criminal punishment (see Section 42 of the Criminal Law). This punishment is

[9] Amendments to the Criminal Law. The document is available online at: https://likumi.lv/ta/id/292016-grozijumi-kriminallikuma [accessed on 27 October 2017].

[10] Amendments to the Criminal Procedure Law. The document is available online at: https://likumi.lv/ta/id/292018-grozijumi-kriminalprocesa-likuma [accessed on 27 October 2017].

[11] Annotation to the law "Amendments to the Criminal Procedure Law". The document is available online at: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/AB2871419A747C7FC2258011002DD2FA?OpenDocument [accessed on 27 October 2017].

applicable to the alienation of property that has been legally acquired[12], to punish the guilty person for the criminal offence committed. Confiscation as a criminal punishment is not applied to confiscate a criminally acquired property. In this aspect, confiscation, essentially, is similar to a monetary fine – its purpose is not to alienate what has been criminally obtained, but to punish a person by recovery of a financial nature[13]. Although heated discussions regarding the admissibility of confiscation of property as a criminal punishment have been on-going for a long time, even discussing the issue of renouncing this type of punishment[14] (some practitioners even calling confiscation of property "a shameful "stone age" type of punishment"[15]), the Constitutional Court of Latvia (hereinafter – the Constitutional Court), recognised in 2015 that "the possibility of losing one's property is an appropriate measure to deter persons from committing criminal offences of financial nature"[16].

Section 70^{11} of the Criminal Law defines the concept of a criminally acquired property, as well as defines actions with a criminally obtained property, the procedure of which is regulated in a more detailed way in the Criminal Procedure Law.

Thus, the first part of Section 70^{11} of the Criminal Law provides that a criminally acquired property is a property, which has come into the ownership or possession of a person as a direct or indirect result of a criminal offence. To recognise property as being criminally acquired on the basis of Section 70^{11} (1) of the Criminal Law, the exact criminal offence, as the result of which it has been obtained, must be established[17].

It must be noted, that similar understanding of the concept of a criminally acquired property to the one defined in the first part of Section 70^{11} of the Criminal

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[12] Meikališa Ā., Strada-Rozenberga K. Study "*Mantas konfiskācijas tiesiskais regulējums Latvijā un Eiropas Savienībā, tās izpildes mehānisma efektivitātes nodrošināšana*", 2010, p. 9. The document is available online at: https://www.tm.gov.lv/files/archieve/ lv_ministrija_imateriali_MantKonf.pdf [accessed on 27 October 2017].

[13] Decision of 6 January 2011 by the Constitutional Court on terminating legal proceedings in Case No. 2010-31-01 "*On Compliance of the Words "With Confiscation of Property" in Section 320(2) of Criminal Law (in the Wording of 25 April 2002 of the Law) with Article 105 of the Satversme of the Republic of Latvia*", para [7.3].

[14] See Meikališa Ā., Strada-Rozenberga K. Study "*Mantas konfiskācijas tiesiskais regulējums Latvijā un Eiropas Savienībā, tās izpildes mehānisma efektivitātes nodrošināšana*", 2010, pp. 9-15. The document is available online at: https://www.tm.gov.lv/ files/archieve/lv_ministrija_imateriali _MantKonf.pdf [accessed on 27 October 2017].

[15] "*Nedēļas jurists: Egons Rusanovs*". "Jurista Vārds", 8 March 2011, No. 10 (657). The document is available online at: http://www.juristavards.lv/doc/226711-egons-rusanovs/ [accessed on 27 October 2017].

[16] Judgement of 8 April 2015 by the Constitutional Court in Case No. 2014-34-01 "*On Compliance of words "with or without confiscation of property" in Section 36(2)(1), Section 42 and Section 177(3) of Criminal Law with the Second and Third Sentence of Article 105 of the Satversme of the Republic of Latvia*", para [19].

[17] Meikališa Ā., Strada-Rozenberga K. *Pārmaiņu laiks krimināl*procesā turpinās – *2017. gada grozījumi*. "Jurista Vārds", 10 October 2017, No. 42 (996). The document is available online at: http://www.juristavards.lv/doc/271467-parmainu-laiks-kriminalprocesa-turpinas-2017gada-grozijumi/ [accessed on 27 October 2017].

Law is found also in international legal acts. Pursuant to the United Nations Convention against Transnational Organised Crime (the Palermo Convention) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (the Warsaw Convention), "proceeds from crime" mean any property (economic advantage), derived or obtained, directly or indirectly, from criminal offences. Whereas pursuant to Directive 2014/42/EU, "proceeds from crime" mean any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form or property and include any subsequent reinvestment or transformation of direct proceeds and any valuable benefits.

The described case is not the only one, where a property can be recognised as being criminally obtained. The second part of Section 70^{11} of the Criminal Law provides that if the value of the property is not proportionate to the legitimate income of the person and the person does not prove that the property is acquired in a legitimate way, as a criminally acquired property can also be recognised the property that belongs to a person:

1) who has committed a crime, which in its nature is focused on the gaining of financial or other kind of benefit;

2) who is a member of an organised group or abets such group;

3) who is connected with terrorism.

This norm regulates the cases of so-called "presumably" criminally acquired property. I.e., the norm regulates three pre-requisites for recognising a property as being "presumably" criminally acquired:

- the value of the property is not proportionate to the person's legitimate income;
- the person fails to prove that the property has been legally obtained;
- the property is owned by a person, who has committed a crime, which in its nature is focused on the gaining of financial or other kind of benefit; is a member of an organised group or abets such group; or is connected with terrorism.

In this connection, it has been validly noted in the legal doctrine that, to apply this presumption, it is not necessary to establish that the benefit, indeed, has been obtained; it is enough, if the crime in its nature has been focused on gaining benefit[18]. Abiding by the wording used in this norm (crime that "in its nature is focused on the gaining of financial or other kind of benefit"), it can be recognised that the range of cases, where this presumption can be applied, is infinite, it can be used, actually, in all financial offences, offences of corruptive nature, offences in commercial activities, as well as in a rather extensive range of other criminal offences[19].

[18] Meikališa Ā., Strada-Rozenberga K. *Pārmaiņu laiks krimināl*procesā turpinās – *2017. gada grozījumi*. "Jurista Vārds", 10 October 2017, No. 42 (996). The document is available online at: http://www.juristavards.lv/doc/271467-parmainu-laiks-kriminalprocesa-turpinas-2017gada-grozijumi/ [accessed on 27 October 2017].

[19] Ibid.

This presumption was included in the Criminal Law by implementing Directive 2014/42/EU, Article 5 of which provides for confiscation of property belonging to a person convicted of a criminal offence, which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

Admissibility of the presumption follows not only from Directive 2014/42/EU, but also from a number of international legal acts. For example, Para 7 of Article 12 of the Palermo Convention provides that the State Parties consider the possibility of requiring that an offender demonstrate the lawful origin of property liable to confiscation, to the extent such a requirement is consistent with the principles of their domestic law. Likewise, Para 7 of Article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) provides that each Party may consider ensuring that the onus of proof is reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

The third part of Section 70^{11} of the Criminal Law envisages one more case of "presumably" criminally acquired property. I.e., it provides that also a property which is at the disposal of such person who maintains permanent family, economic or other kind of property relationships with the person referred to in the second part Section 70^{11} (i.e., a person who has committed a crime which in its nature is focused on the gaining of financial or other kind of benefit; who is a member of an organised group or abets such group; or who is connected with terrorism), can also be recognised as a criminally acquired property, if the value of the property is not proportionate to the legitimate income of the person and the person does not prove that the property is acquired in a legitimate way. Thus, it can be recognised that the Criminal Law envisages the possibility to recognise as being criminally obtained also the property of a person, who has not committed a criminal offence himself or herself (on the basis of his or her link to a person, who has committed a criminal offence).

The fourth part of Section 70^{11} of the Criminal Law provides that:

- the criminally acquired property;
- proceeds of crime which the person has obtained from the disposal of such property;
- and also the yield received as a result of the use of the criminally acquired property

must be confiscated, unless it must be returned to the owner or legal possessor.

It must also be noted that Section 70^{14} of the Criminal Law provides for a number of cases, where, instead of confiscating the criminally obtained property itself, the confiscation of the value of the criminally obtained property or of another

property is admissible. It follows from Section 70^{14} of the Criminal Law that in those cases, where the criminally acquired property has been alienated, destroyed, concealed or disguised, and the confiscation of such property is not possible, the value of the property being confiscated can be recovered. If the confiscation of a criminally acquired property has been imposed on a person, the property being confiscated can be substituted with financial resources the value of which is equal to the value of such property. The property, which has a historical, artistic or scientific value, cannot be substituted. Whereas in the case, if a criminally acquired property cannot be confiscated because it is alienated, destroyed, concealed or disguised and the perpetrator of the criminal offence does not have any other property, against which the recovery proceedings could be brought, the following can be confiscated:

- the property, which the person has alienated after the commencement of the criminal offence free of charge or for a value which is significantly lower or higher than the market value;
- the property of the perpetrator of a criminal offence and the joint property of a spouse thereof, unless separate ownership of the property of the spouses has been specified at least one year before the commencement of the criminal offence;
- the property, which belongs to another person with whom the perpetrator of a criminal offence has a joint (single) household, if this property has been acquired after the commencement of the criminal offence.

With respect to confiscation of criminally acquired property that can be applied to a third person (not only to persons, who maintain relationships with the accused or convicted person), it must be noted that pursuant to Article 6 of Directive 2014/42/EU, Member States take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value[20].

3. Regulation on handling a criminally acquired property in the Criminal Procedure Law

Handling a criminally acquired property has been regulated also in the Criminal Procedure Law. I.e., the Criminal Procedure Law establishes two models

[20] See Annotation to the law "Amendments to the Criminal Law". The document is available online at: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/1CF2B4A0A7C28D09C2258011002BB45B?OpenDocument [accessed on 27 October 2017].

of actions for handling property that has been recognised as being criminally obtained:

- it must be returned, on the basis of ownership, to the owner or lawful possessor (Section 357 of the Criminal Procedure Law);
- it is confiscated with a court decision, and acquired financial resources are included in the State budget (Section 358 of the Criminal Procedure Law).

The first variant is applied, if the owner or the legal possessor of the property has been identified (for example, a person, who has been robbed of property), moreover, after it is no longer necessary to store the property in order to reach the purposes of criminal proceedings. The illegally obtained property, which no longer must be stored to achieve the purposes of criminal proceedings and which must not be returned to the owner or legal possessor, by a court decision, is confiscated for the Sate and the acquired financial resources are included in the State budget.

At the same time, there is a number of ways to reach a solution in criminal proceedings in the part on handling a criminally acquired property:

- property may be recognised as criminally acquired by a court judgment that has entered into effect, or by a decision of a public prosecutor to terminate criminal proceedings (Section 356 (1) of the Criminal Procedure Law);
- during pre-trial criminal proceedings, property may be recognised as criminally acquired by a decision of a person directing the proceedings (i.e., an investigator or a prosecutor), if, during a pre-trial criminal proceedings, property was found with and seized from a suspect, accused, or third person in relation to which property the owner or lawful possessor thereof had previously submitted a loss of property, and, after finding thereof, has proven his or her rights to such property, eliminating any reasonable doubt (Para 2 of Section 356 (2) of the Criminal Procedure Law);
- during pre-trial criminal proceedings, property may also be recognised as criminally acquired by a decision of a district (city) court in accordance with the procedures laid down in Chapter 59 of the Criminal Procedure Law, if a person directing the proceedings (i.e., an investigator or a prosecutor) has sufficient evidence that does not cause any doubt regarding the criminal origins of the property or the relation of the property to a criminal offence (Para 1 of Section 356 (2) of the Criminal Procedure Law).

Among the aforementioned actions with a criminally obtained property, the third one deserves special attention – discrete and isolated proceedings regarding the criminally acquired property. As the Constitutional Court has recognised, it might be necessary, within criminal proceedings, to deal simultaneously with the issues related to establishing the guilt of a person in committing a criminal offence also with issues that affect a person's right to property or financial interests.

However, often investigation of criminal offences is a complicated and lengthy procedure, in which it is necessary to decide on recognising property as being criminally obtained and on further actions with this property, without waiting for the final decision in criminal proceedings. Therefore the Criminal Procedure Law provides that property issues may be dealt with not only in the basic criminal proceedings, but also in proceedings regarding criminally obtained property[21].

These proceedings are initiated during the pre-trial criminal proceedings and focus upon solving the property issues that have arisen within the criminal proceedings. In the proceedings regarding criminally obtained property a person's guilt is not established, but a decision is adopted on the criminal origins of the property or its links to a criminal offence[22]. Actually, in the proceedings regarding a criminally acquired property, the jurisdiction of the court comprises only one among the issues, which the court examines and assesses in the basic criminal proceedings, *inter alia*, deciding on a person's guilt in committing a criminal offence.

It must be noted, that the decision on property matters adopted in these proceedings is final. If the pre-trial criminal proceedings have included proceedings regarding criminally acquired property and within these the court has recognised property as being criminally acquired, then in the basic criminal proceedings the court no longer decides on actions with respect to the criminally acquired property[23].

The grounds for admissibility of such special proceedings are found in international legal acts. Thus, for example, Para 2 of Article 4 of Directive 2014/42/EU provides that at least in those cases, where confiscation is not possible due to illness or absconding of the suspected or accused person, Member States take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial. Likewise, the Financial Action Task Force (FATF), which develops and promotes political position, including for the protection of global financial system against legalisation of proceeds from crime, has noted in its Recommendation 4 "Confiscation and

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[21] Judgement of 11 October 2017 by the Constitutional Court in Case No. 2017-10-01 "*On Compliance of Section 629 (5) of Criminal Procedure Law with the First Sentence of Article 92 of the Satversme of the Republic of Latvia and on Compliance of the Second Sentence of Section 631 (3) of Criminal Procedure Law with the First Sentence of Article 91 of the Satversme*", para [20.1].

[22] Judgement of 23 May 2017 by the Constitutional Court in Case No. 2016-13-01 "*On Compliance of the Fifth Part of Section 629 of the Criminal Procedure Law with the First Sentence of Article 92 of the Satversme of the Republic of Latvia*", para [10].

[23] Judgement of 11 October 2017 by the Constitutional Court in Case No. 2017-10-01 "*On Compliance of Section 629 (5) of Criminal Procedure Law with the First Sentence of Article 92 of the Satversme of the Republic of Latvia and on Compliance of the Second Sentence of Section 631 (3) of Criminal Procedure Law with the First Sentence of Article 91 of the Satversme*", para [20.1].

provisional measures" that Countries should consider adopting measures that allow confiscation of proceeds from crime or instrumentalities without requiring a criminal conviction (non-conviction based confiscation).

Two pre-requisites for initiating criminal proceedings regarding a criminally acquired property follow from Section 626 of the Criminal Procedure Law:

- the totality of evidence provides grounds to believe that the property, which has been removed or seized, is of a criminal origin or related to a criminal offence;
- due to objective reasons, the transferral of the criminal case to court is not possible in the near future (in a reasonable term), or such transferral may cause substantial unjustified expenses.

The author holds that both these requirements are equally important; however, frequently a rather formal attitude towards the second requirement regarding initiation of proceedings regarding a criminally acquired property can be encountered in the practice of the Latvian law enforcement institutions. I.e., often the compliance with this requirement is linked to the fact that the maximum terms for restricting a person's rights in pre-trial criminal proceedings (at the expiry of which the seized property should be released), defined in Section 389 (1) of the Criminal Procedure Law, have almost expired. The author believes that this circumstance *per se* does not prove "objective reasons", due to which the transferral of the criminal case to court would not be possible in the near future (within a reasonable term) or such transferral might cause substantial unjustified expenses. Such circumstances, as, for example, the large scale or legal complexity of the case, amount and complexity of procedural actions, etc. could be considered as being "objective reasons". The person directing the proceedings, upon initiating proceedings regarding a criminally obtained property, should indicate these reasons in the decision on initiating proceedings, because the court should verify these reasons and decide, whether the "objective reasons", referred to in Section 626 of the Criminal Procedure Law, are present[24] (i.e., decide, whether initiation of proceedings regarding a criminally acquired property has been valid).

In the presence of pre-requisites referred to in Section 626 of the Criminal Procedure Law, the person directing the proceedings adopts a decision to initiate proceedings regarding criminally acquired property and transfers the criminal case regarding criminally acquired property to a court for adjudication. "A criminal case regarding criminally acquired property" must be understood as the materials on the criminally acquired property separated from the criminal case (the so-called "basic case").

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[24] See Stukāns J. *Mantas konfiskācijas tiesiskais regulējums Latvijā un Eiropas Savienībā; tās izpildes mehānisma efektivitātes nodrošināšana*, p. 23. The document is available online at: https://www.tm.gov.lv/files/l1_MjAxNS9Qcm9qZWt0dSBzYWRhxLxhL2tvbmYgSUlJL1JpZ2ExNzE4MTAyMDEyU3R1a2Fuc19sdi5wZGY/2015/Projektu%20sada%C4%BCa/konf%20III/Riga1718102012Stukans_lv.pdf [accessed on 27 October 2017].

The judge, upon receiving the decision on initiation of proceedings regarding a criminally acquired property:

- determines the time and place of the court session (the court session must take place within 10 days after receipt of the decision by the person directing the proceedings at the court);
- summon the person directing the proceedings and a public prosecutor, if a decision has been taken by an investigator, as well as the persons referred to in Section 628 of the Criminal Procedure Law (i.e., the suspect or accused and the person, with whom the removed or seized property had been, if such persons exist in the relevant criminal proceedings, or to another person who has the right to concrete property).

The first part of Section 630 of the Criminal Procedure Law provides that, in examining materials regarding criminally acquired property, a court decides:

- whether the property is related to a criminal offence or is of criminal origin;
- whether there is information regarding the owner or lawful possessor of the property;
- whether a person has lawful rights to the property;
- actions with the criminally acquired property.

If a court finds that the connection of property with a criminal offence has not been proven or the property is not of criminal origin, the court takes a decision to terminate proceedings regarding the criminally acquired property.

The court's ruling in criminal proceedings regarding a criminally acquired property can be appealed against only to the appellate instance court (Section 631(1) of the Criminal Procedure Law). The Criminal Procedure Law does not envisage reviewing the proceedings regarding a criminally acquired property at the cassation instance court.

As regards the scope of procedural safeguards granted to the involved persons in these proceedings, it must be noted that it has been recognised in the case law of the European Court of Human Rights that judicial proceedings that are not linked to imposing or establishing a criminal punishment (*inter alia*, judicial proceedings regarding confiscation of a criminally acquired property) do not pertain to "validity of charges in a criminal case" in the meaning of the first part of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention). However, confiscation of property as the outcome of proceedings regarding a criminally acquired property is to be regarded as "controlling" the use of property in the meaning of Article 1 of Protocol 1 to the Convention, and therefore the judicial proceedings related to it pertains to establishment of a person's civil rights and obligations in the meaning of the first part of Article 6 of the Convention[25].

[25] See, for example, Judgement of 12 May 2015 by the European Court of Human Rights in case "*Gogitidze and Others v. Georgia*", para 121.

It has been established in the case law of the European Court of Human Rights with respect to third persons that measures involving confiscation of property that have adverse impact upon the rights of those persons, who have not been charged, pertain to civil law aspects in the functioning of Article 6 of the Convention[26]. Thus, the safeguards of the first part of Article 6 of the Convention, in interconnection with the safeguards provided by the first sentence of Article 92 of the *Satversme* – the Constitution of the Republic Latvia ("Everyone has the right to defend his or her rights and lawful interests in a fair court.") – are fully applicable, which has been recognised also by the Constitutional Court [27].

4. The impact of legal regulation on handling criminally acquired property upon business environment

This, the concluding section of the article, will examine the impact of legal regulation on handling criminally acquired property upon business environment. Three most typical situations will be examined below:

- the merchant as the victim, who has been robbed of property;
- the merchant as a person, with respect to whom an assumption is made regarding the criminal origins of property in his ownership;
- the merchant as a third person.

4.1 Merchant as the victim

The author holds that the legal regulation on handling criminally acquired property with respect to a merchant, who has suffered from a criminal offence and who has been robbed of property, is favourable and is aimed at restitution (restoring of the previous situation) as fast as possible. As noted above, the Criminal Law and Criminal Procedure Law provide for the possibility to decide on the issue of handling the criminally acquired property before the ruling has entered into force in criminal proceedings, in which the case is adjudicated on its merits, which significantly increases the merchant's possibilities to regain, as swiftly as possible, the property that he has been robbed of.

If a merchant has been robbed of property, the merchant can submit an application regarding lost property (in practice this means reporting to law enforcement institutions about the robbed property). When the robbed property is found and seized, the merchant must prove his title to the property, eliminating reasonable doubts. I.e., the merchant should submit to the person directing the proceedings (an investigator or a prosecutor) evidence proving that he owns the

[26] See Judgement of 10 April 2012 by the European Court of Human Rights in case "*Silickiene v. Lithuania*", para. 45-46.

[27] Judgement of 23 May 2017 by the Constitutional Court in case No. 2016-13-01 "*On Compliance of the Fifth Part of Section 629 of the Criminal Procedure Law with the First Sentence of Article 92 of the Satversme of the Republic of Latvia*", para [10].

property. For example, documents evidencing the origin of the property may serve as such proof.

When the merchant has proven his title to the robbed property, the person directing the proceedings (an investigator or a prosecutor) may employ the mechanism established by Para 2 of Section 356 (2) of the Criminal Procedure Law, i.e., to recognise the property as being criminally acquired and return it into the ownership of the merchant, according to Section 357 (1) of the Criminal Procedure Law (when it is no longer necessary to store the property in order to reach the purpose of criminal proceedings). Likewise, the person directing the proceedings can initiate proceedings regarding criminally acquired property in the procedure established by Chapter 59 of the Criminal Procedure Law, to decide, within a shortened term, on the issue of recognising a property as being criminally acquired and returning to the victim – the merchant. It must be noted that the Criminal Procedure Law provides for a number of additional protective mechanisms in those cases, where the property is returned, on the basis of ownership, to the owner or legal possessor. For example, pursuant to Section 357 (4), if the criminally acquired property – immoveable property – is returned, on the basis of ownership, to the owner or legal possessor, then the agreements on renting or leasing residential premises, which have been concluded after the criminal offence was committed, are no longer valid. Likewise, the provisions of Section 356 (1^1) must be highlighted; these provide that in case, where a property is recognised as being criminally acquired, then the arrest, encumbrances, restrictions and pledge rights imposed upon it, including all entries on encumbrances and restrictions made in the public register, must be deleted. Thus, the principle that the property should be returned to the affected merchant in the same condition, as it had been at the moment when he was robbed of it, has been enshrined in the Criminal Procedure Law.

In view of the above, it must be recognised that the legal regulation on handling criminally obtained property with regard to a merchant, who has been a victim of the criminal offence and who has been robbed of property, has a positive impact on business environment, since it envisages a quite effective mechanism of actions for as swift restitution as possible (restoring the previous situation) in cases of criminal offences.

4.2 Merchant as a person, with respect to whom a presumption is made regarding the criminal origin of property in his ownership

In those cases, where a presumption is made with respect to the merchant regarding criminal origins of property in his ownership, the merchant must take into consideration a number of important rules that apply to proving the origin of property.

First of all, it must be noted that since 1 August 2017 a special standard of proof applies to proving criminal origins of property. I.e., pursuant to Section 125 (5) of the Criminal Procedure Law, the circumstances included in the object of

proof are considered to be proven, if in the course of proving all reasonable doubts regarding the existence or absence thereof are excluded; however, with respect to proving the criminal origins of property referred to in the fifth part of the aforementioned Section another standard of proof has been set – the circumstances included in the object of proof with respect to the criminal origins of property are to be considered as being proven, if, in the course of proving, there are grounds to consider that the property, most probably, is of criminal and not of legal origin (the so-called " prevalence of probability").

Secondly, attention must be drawn to Section 126 $(3)^1$ of the Criminal Procedure Law, which provides that if a person involved in criminal proceedings asserts that the property should not be considered as being criminally acquired, then the duty to prove that the property is of legal origin lies upon this person. It follows from the above that in those cases, where a presumption is made regarding criminal origins of property owned by merchants, the merchant should be able to prove the opposite, i.e. – to submit to the person directing the proceedings (an investigator, a prosecutor or a court) information that would credibly prove legal origins of property. In fact, with respect to proving the legal origins of property the so-called "reversed burden of proof" operates.

Thirdly, in those cases, where criminal proceedings regarding criminally acquired property have been initiated with respect to a merchant in the procedure established by Chapter 59 of the Criminal Law, the specifics of these proceedings must be taken into consideration and the response to the legal situation that has arisen must be fast.

As noted above, Section 629 (2) of the Criminal Procedure Law provides that the court sitting must be held within 10 days following the receipt of the decision by the person directing the proceedings by the court. Moreover, the absence of the summoned persons is not an obstacle for adopting a decision on the criminally acquired property, if the procedure for summoning these persons has been complied with. This means that a merchant, who wishes to prove the legal origin of property in his ownership, must become actively involved in the proceedings and come to the court hearing, otherwise, the issue might be decided on in the absence of the merchant himself. Likewise, in proceedings regarding criminally obtained property, the fact that procedural rights are limited must be reckoned with, this is, predominantly, manifested in two ways – limited accessibility of the case materials and limited possibilities to appeal against the court's ruling.

Pursuant to Section 629 (5) of the Criminal Procedure Law, the case materials of the proceedings regarding criminally obtained property is a secret of investigation, and only the persons directing the proceedings, the prosecutor and the court, which adjudicates this case, may get acquainted with these materials. The merchant may familiarise himself with the materials of the case only with the permission of the person directing the proceedings (an investigator and a prosecutor), and in the scope set by him. Hence, the regulation included in Section 629 (5) of the Criminal Procedure Law allows a situation, where the scope of rights

of persons involved in proceedings regarding criminally obtained property differs, i.e., the person, the criminal origin of whose property or its links to a criminal offence is decided on, may have been fully or partially denied access to materials in the case on criminally obtained property.

The constitutionality of this norm was contested before the Constitutional Court, and on 23 May 2017 the Constitutional Court recognised that Section 629 (5) of the Criminal Procedure Law, insofar the court could not review the legality and validity of the decision by the person directing the proceedings regarding a person's right to familiarise himself with materials in the case regarding criminally acquired property, was incompatible with the first sentence of Article 92 of the *Satversme* (the right to have the case adjudicated in a fair trial)[28]. This means that in the future the court, which examines the respective proceedings, will review the refusal by the person directing the proceedings (an investigator or a prosecutor) to allow the merchant to familiarise himself with the case materials (it is envisaged that in the near future amendments to Section 629 (5) of the Criminal Procedure Law will be adopted). It must be noted that previously the Criminal Procedure Law envisaged appealing the refusal only within the framework of the prosecutor's office, which was recognised by the Constitutional Court as not being sufficiently objective.

At the same time, the Constitutional Court has recognised that in proceedings regarding criminally acquired property, disclosing and presenting of the materials in the case without prior assessment would be contrary to the other persons' right to a fair trial and might jeopardise successful course of pre-trial criminal proceedings[29] (in view of the fact that proceedings regarding criminally acquired property take place during pre-trial criminal proceedings). Thus, the Constitutional Court has recognised that, essentially, such a situation would be admissible, where all materials in the proceedings regarding criminally acquired property are not disclosed to a person, insofar this complies with the right to a fair trial and, in particular, the principle of equality of arms.

As noted above, the court's ruling in proceedings regarding criminally acquired property can be appealed only at the appellate instance court (Section 631 (1) of the Criminal Procedure Law), the Criminal Procedure Law does not envisage reviewing the proceedings at the court of cassation instance.

The constitutionality of the aforementioned norm also was contested before the Constitutional Court, and on 11 October 2017 the Constitutional Court recognised that the procedure established by this norm was compatible with the *Satversme*. I.e., the Constitutional Court has ruled that in a democratic state governed by the rule of law the legislator, in adopting procedural laws, enjoys discretion in determining both the categories of cases to be reviewed in respective

[28] Judgement of 23 May 2017 by the Constitutional Court in case No. 2016-13-01 "*On Compliance of the Fifth Part of Section 629 of the Criminal Procedure Law with the First Sentence of Article 92 of the Satversme of the Republic of Latvia*".

[29] Ibid., para [14.2].

proceedings and in deciding on the procedure for reviewing cases belonging to various categories[30].

In view of the above, it must be recognised that the legal regulation on handling criminally obtained property with respect to a merchant, with respect to whom a presumption has been made regarding criminal origins of property in his ownership, is quite stringent, and the protection of rights and lawful interests of such a merchant to a large extent depends upon the merchant's own active participation in criminal proceedings, *inter alia*, the merchants ability to prove independently the legal origins of the property.

4.3 Merchant as a third person

In the meaning of this sub-section, "a third person" is to be understood as a merchant, who has obtained in good faith property, which has been recognised as being criminally acquired.

Section 360 (1) of the Criminal Procedure Law provides that in case, if the criminally acquired property has been found with a third person, it must be returned, on the basis of ownership, to the owner or the legal possessor. Pursuant to the second part of this Section, if the criminally acquired property is returned to the owner or legal possessor, the third person, who had acquired such property, or pledge, in good faith has the right to submit a claim regarding compensation for the loss, including against an accused or convicted person.

The constitutionality of this procedure was also reviewed by the Constitutional Court. In the particular case, the applicant – AS DNB Banka – had acquired immoveable property (an apartment) at an auction in 2011. In 2015, the person directing the proceedings – an investigator – adopted a decision during pre-trial criminal proceedings to recognise this property as being criminally obtained and return it to the owner, who had lost the immoveable property as the result of a criminal offence – fraud. In the course of the criminal proceedings, it was established that later the immoveable property, acquired through fraud, had been sold to another person, who had corroborated his title to property in the Land Register. Afterwards, the apartment had come into the ownership of AS DNB Banka.

The Constitutional Court has recognised that in a democratic state governed by the rule of law the principle of public credibility exists, from which the principle of protecting a *bona fide* acquirer is derived and which in Latvia, *inter alia*, is implemented with the help of the Land Register. Although entering immoveable property in the Land Register and corroboration of the rights *in rem* is mandatory and the respective registers are ensured public credibility with respect to third persons, such entries, which are made following a criminal offence, cannot be

[30] Judgement of 11 October 2017 by the Constitutional Court in Case No. 2017-10-01 "*On Compliance of Section 629 (5) of Criminal Procedure Law with the First Sentence of Article 92 of the Satversme of the Republic of Latvia and on Compliance of the Second Sentence of Section 631 (3) of Criminal Procedure Law with the First Sentence of Article 91 of the Satversme*", para [20.2].

recognised as being lawful. The Constitutional Court found that an exception to the principle of protecting a *bona fide* acquirer was admissible, if legal relations were founded upon a criminal offence[31]. Thus, the Constitutional Court has recognised the procedure described above as being constitutional.

The author holds that the right of the merchant as a third person, currently envisaged in the Criminal Procedure Law, to submit a claim for compensation of damages in civil procedures, *inter alia*, against an accused or convicted person, cannot be recognised as being a sufficiently effective legal remedy, because quite frequently the accused or the convicted person has no property from which losses could be recovered. Thus, it must be concluded that the legal regulation on handling criminally obtained property with respect to third persons is, in general, unfavourable, which may have a negative impact on the business environment. In particular, the insufficient procedural safeguards affect the banking sector, because, as noted above, if a pledged property is recognised as being criminally obtained, the encumbrances, restrictions and the right of pledge imposed upon the property, including all entries regarding encumbrances and prohibitions regarding the property that are made into a public register, must be deleted.

5. Conclusion

In the Latvian Criminal Law, a criminally obtained property is understood as a property, which has come into the ownership or possession of a person as a direct or indirect result of a criminal offence. At the same time, the Criminal Law envisages also the cases of the so-called "presumed" criminally acquired property.

The Latvian Criminal Procedure Law establishes two models of actions to handle property that has been recognised as being criminally obtained:

- it must be returned, on the basis of ownership, to the owner or lawful possessor (Section 357 of the Criminal Procedure Law);
- it is confiscated with a court decision, and acquired financial resources are included in the State budget (Section 358 of the Criminal Procedure Law).

There are a number of ways to reach a solution in criminal proceedings in the part on handling a criminally acquired property:

- property may be recognised as criminally acquired by a court judgment that has entered into effect, or by a decision of a public prosecutor to terminate criminal proceedings (Section 356 (1) of the Criminal Procedure Law);
- during pre-trial criminal proceedings, property may be recognised as criminally acquired by a decision of a person directing the proceedings (i.e., an investigator or a prosecutor), if, during a pre-trial criminal

[31] Judgement of 8 March 2017 by the Constitutional Court in case No. 2016-07-01 "*On Compliance of Section 356(2) and Section 360(1) of the Criminal Procedure Law with Article 1, the First Sentence of Article 91, Article 92 and Article 105 of the Satversme of the Republic of Latvia*", para [25.1], [25.2].

proceedings, property was found with and seized from a suspect, accused, or third person in relation to which property the owner or lawful possessor thereof had previously submitted a loss of property, and, after finding thereof, has proven his or her rights to such property, eliminating any reasonable doubt (Para 2 of Section 356 (2) of the Criminal Procedure Law);

– during pre-trial criminal proceedings, property may also be recognised as criminally acquired by a decision of a district (city) court in accordance with the procedures laid down in Chapter 59 of the Criminal Procedure Law, if a person directing the proceedings (i.e., an investigator or a prosecutor) has sufficient evidence that does not cause any doubt regarding the criminal origins of the property or the relation of the property to a criminal offence (Para 1 of Section 356 (2) of the Criminal Procedure Law).

The legal regulation on handling criminally obtained property with respect to a merchant, who has been a victim of the criminal offence and who has been robbed of property, is favourable and has a positive impact on business environment, since it envisages a quite effective mechanism of actions for as swift restitution as possible (restoring the previous situation) in cases of criminal offences. I.e., the Criminal Procedure Law envisages a number of procedural possibilities for regaining the robbed property already during the pre-trial criminal proceedings.

The legal regulation on handling criminally obtained property with respect to a merchant, with respect to whom a presumption has been made regarding criminal origins of property in his ownership, is quite stringent, and the protection of rights and lawful interests of such a merchant to a large extent depends upon the merchant's own active participation in criminal proceedings, *inter alia*, the merchants ability to prove independently the legal origins of the property. I.e., a special standard of proof has been set (prevalence of probability); moreover, if the merchant asserts that the property has not been criminally acquired, it is his duty to prove the opposite. In some cases (in the proceedings regarding criminally obtained property), the procedural safeguards of persons involved in the proceedings are limited.

The legal regulation on handling criminally obtained property with respect to third persons is, in general, unfavourable, which may have a negative impact on the business environment. I.e., if the property has been found with a third person, the property must be returned, on the basis of ownership, to the owner or the legal possessor, whereas the third person, who had acquired such property, or pledge, in good faith has the right to submit a claim, in accordance with civil procedures, regarding compensation for the loss, including against an accused or convicted person; however, quite frequently the accused or convicted person has no property, from which losses could be recovered.

The insufficient procedural safeguards of third persons affect, in particular, the banking sector, because if a property pledged to a bank is recognised as being

criminally obtained, the encumbrances, restrictions and the right of pledge imposed upon the property, including all entries regarding encumbrances and prohibitions regarding the property that are made into a public register, must be deleted.

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