

Project RECOVER – Crime doesn't pay (GA no. 101091375)

Reform Proposals for the Lithuanian National System – General Prosecutor's Office – Lithuania

The Constitutional Court of Lithuania has received a request from a natural person to examine the compatibility of Article 72(3) Para 1 (Extended Confiscation) of the Criminal Code with Articles 23, 31 of Constitution of the Republic of Lithuania. Having established that the application meets the requirements for admissibility laid down in Article 106(4) of the Constitution and in the Law on the Constitutional Court, the application is admitted for examination before the Constitutional Court. The Constitutional Court will assess the constitutionality of the Criminal Code's provisions on extended confiscation of property. The case has not yet been examined.

In his application, the applicant submits that Article 23 of the Constitution ensures the right to property and guarantees the protection of this right. This right is not absolute, but may be restricted by law on the basis of the nature of the object of the property, the commission of acts contrary to the law and/or a socially necessary and constitutionally justifiable necessity. The applicant submits, referring to the provisions of the official constitutional doctrine formulated in the interpretation of Article 23 of the Constitution, that in all cases of restriction of the right to property, the following conditions must be complied with: the right to property may be restricted only on the basis of a law; the restriction must be necessary in a democratic society in order to protect the rights and freedoms of others, the values enshrined in the Constitution, and the constitutionally necessary and important objectives pursued by the society; and the principle of proportionality, according to which the measures provided for by law must be in conformity with the objectives pursued, which are necessary for the society and which are constitutionally justifiable, must be respected.

According to the applicant, under the contested legislation, the court's doubt as to the lawfulness of the acquisition of the property, which is based solely on the assumption that the property may have been acquired unlawfully, is sufficient for the application of extended confiscation, and that such property may therefore be confiscated, even though its connection with a criminal offence has not been proved. Thus, in principle, it is permissible to expropriate a person's assets which are not necessarily illegally acquired.

According to the applicant, given the ultima ratio nature of criminal law, the grounds for restricting the right to property must be clear and precisely formulated, but, in the applicant's view, the contested legislation allows the court to deprive property on the basis of presumptions, without the unlawful origin of the property being objectively established and proved. Moreover, according to the applicant, the extended confiscation of property is not the main penalty for the convicted person, but an additional measure of penal effect intended to help achieve the purpose of the penalty, but in the absence of a mandatory requirement to establish and prove the illegality of the origin of the property beyond doubt, the above-mentioned measure of penal effect, in the applicant's view, is to be regarded as an extreme measure, which is more serious than a penalty, and which is manifestly disproportionate in relation to the circumstances and seriousness of the crime committed. The applicant therefore doubts that a severe criminal measure such as extended confiscation can be justified in the interests of public security.

The applicant submits that the presumption of innocence, enshrined in Article 31(1) of the Constitution, is a fundamental principle of the administration of justice in criminal proceedings and one of the most important guarantees of human rights and freedoms, namely that a person shall be presumed to be innocent of any offence until his or her guilt is proved in accordance with the procedure laid down by the law and recognised by a final judgment of a court. The applicant points

out that, in accordance with the principle of the presumption of innocence, the burden of proving the unlawfulness of the acquisition of property should be borne by the prosecuting authorities, and that this burden cannot be shifted to the accused, but that any doubt should be assessed in favour of the accused. Therefore, in the applicant's view, the contested legislation, which requires the prosecution to prove the lawfulness of the acquisition of the property in the course of the criminal proceedings, establishes a 'presumption of guilt' of the person subject to the extended confiscation of property. This does not respect the principle of in dubio pro reo, according to which doubts are to be interpreted in favour of the accused when all possibilities have been exhausted and cannot be removed. The applicant considers that such a presumption of guilt is therefore incompatible with the principle of the presumption of innocence enshrined in Article 31(1) of the Constitution and infringes the rights of the defence.

Proposal of reforms in light of the Proposal for the Directive on Asset Recovery and Confiscation

In light of the Art 16 of the Proposal for the Directive on Asset Recovery and Confiscation (hereinafter New Directive), which sets out provisions for "Unexplained Wealth" that are broadly consistent with civil confiscation in Lithuania, we can also understand that the nature of civil confiscation is criminal. **Amendments to Regulation 2018/1805** should be made after the New Directive will be adopted in order to set out clear provisions and procedures to freeze and confiscate assets within the framework of civil confiscation.

Lithuania nowadays meets the requirements of Directive 42/2014 but after the adoption of the New Directive during the transposition period new measures will have to be considered, for example, strengthening the powers of Asset recovery offices (urgent freezing, etc.), improving asset management (support with pre-seizure planning to the competent authorities responsible for the management of frozen and confiscated property; cooperation with other competent authorities responsible for the tracing and identification, freezing and confiscation of property, etc).