

RECOVER – GA 101091375*Answers from Finland***Raimo Lahti (University of Helsinki)**

Prof. Lahti firstly illustrated how the Directive 2014/42/EU was transposed in Finland and how this affected national law¹. He specified that the Penal Code was revised in 2016 (356/2016) to harmonize the provisions with the contents of the Directive 2014/42/EU. This was particularly the case with regard to the extended confiscation and the confiscation from a third party. He then delved into the features of the national legislation on extended confiscation, stressing that extended confiscation is generally understood as a form of confiscation of proceeds of crime with certain specific features (*sui generis*). Among the criminal sanctions it is regarded as a type of security or protective measures (*Sicherheitsmassnahme*) and not as a punishment (penalty). He pointed out that the main argument for the introduction of extended confiscation was the aim of efficiency. An extended forfeiture of the proceeds of crime was regarded as necessary to increase the efficiency of deprivation of the economic benefits of the offense concerned and to prevent the proceeds from being used to finance new offenses, in particular as for organized crime and/or financial crime of serious nature. He emphasized the problems of compatibility of this form of confiscation with the presumption of innocence, as the prosecutor has no burden of proving the origin of the property in case of extended confiscation. Such property may be confiscated if there is disproportionality between the lawful income of the accused and his assets, unless it is probable that the property is derived from non-criminal activities, and the burden of showing that is on the accused/defendant. Professor Lahti then illustrated extensively the work of the Finnish Constitutional Law Committee of the Parliament on the compatibility between extended confiscation and fundamental rights. He summarized that the principles of protection of property (right to private property), of legality (including legal specificity of a statute and non-retroactivity) and of rights to a fair trial (including rights to defense, presumption of innocence and privilege of self-incrimination) were to certain extent examined in *travaux préparatoires*. In addition, the principle of proportionality was *de facto* up for consideration, not by using this term as such, but trying in the regulation to

¹ By the present paper Professor Lahti contributed on the extended confiscation in Finland also for the research and book project of Prof. Elżbieta Hryniewicz-Lach (ed.) *Extended Confiscation of Illicit Assets and the Criminal Law: National and EU perspectives* (to be published by Routledge 2024-25).

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avoid unreasonable application of extended confiscation. Finally he quoted and illustrated case law from the Court of Cassation and Courts of Appeals (but not constitutional cases, as in Finland there is no constitutional court, and the Government Bills are dealt with in the Constitutional Law Committee of the Parliament in case of possible constitutional or human rights violations. This procedure was also applied when Finnish confiscation reforms of 2001 and 2016 were handled in the Parliament, see above observations on extended confiscation).

Written answers of Prof. Raimo Lahti

Section I – The application of the Regulation no. 1805/2018

1. Can You provide us with a **short list** of the **forms of forfeiture and seizure (as well as the related legislative provisions)** which fall under the scope of the Regulation and within the **concept of proceeding in criminal matter (Art. 1 REG)**?
2. Can You give some **statistical data** about the application of the Regulation (e.g.: how many cases, which models of confiscation)?
3. Which are the **problems** encountered in applying the Regulation (both in executing requests from foreign authorities in Your country and in obtaining the execution of Your requests abroad)? And which are the **grounds for refusal** applied in the praxis?
4. Within your national legal system, is there any need to reform the confiscation models to comply with the guarantees required by the Reg. 1805/2018?
5. Do you believe the guarantees provided for in the Reg. 1805/2018 to be sufficient? If not, why?
6. Could you give your inputs about **possible guidelines** on the practical implementation of the Regulation?
7. How was the Directive 2014/42/EU transposed in Your national legal order and how did this affect national law?

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In connection with the transposition of Directive 2014/42/EU, Chapter 10 (Forfeiture) of the Penal Code was revised in 2016 (356/2016), including the provision on extended confiscation (PC 10:3). Its contents are following from 1 September 2016 onward (unofficial translation and italics by the author):

Section 3 (PC 10:3). – Extended forfeiture of the proceeds of crime (356/2016)

(1) If done

- 1) an offense punishable by a maximum term of imprisonment of at least four years;
- 2) receiving and money laundering offences (Ch. 32);
- 3) smuggling (Section 4 of Ch. 46);
- 4) narcotics offense or abetting a narcotics offense (Sections 1–2 and 4 of Ch. 50);
- 5) giving a bribe or acceptance of a bribe in business (Sections 7,7a, 8 and 8a of Ch. 30);
- 6) participation in the activities of an organized criminal group;
- 7) distribution of a sexually offensive picture (Sections 18 and 18a of Ch. 17), solicitation of a child for sexual purposes referred to in Chapter 20, Section 8 b, Subsection 2, or pandering (Sections 9 and 9a of Ch. 20);
- 8) causing danger to data processing; or
- 9) a punishable attempt of an offence referred to in points 1 to 8 above

and if the offense is of such a nature that it may generate financial gain, property derived from the criminal activity may be confiscated to the State; when considering confiscation, particular account shall be taken, inter alia, of whether the property appears to originate from non-minor criminal activity and whether the confiscation is necessary to prevent further offenses and whether the criminal activity repeatedly generates a significant proportion of the person's income.

(2) A person who has committed or participated in an offense referred to in subsection or in whose name or for whose benefit the offense has been committed may be sentenced to a sanction of forfeiture.

(3) The property mentioned in subsection (1) above may also be sentenced to be forfeited in whole or in part to the state as well 1) from a person in a relationship referred to in subsection (2) of this section in a relationship referred to in section 3 (1) of the Act on the Recovery of Assets to Bankruptcy Estates (758/1991) (close person), and 2) a private trader, company, other entity or foundation which has a relationship with the person referred to in subsection (2) of this section or a person close to him or her in a manner referred to in section 3 (2) (1) or (2)

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of the Act on the Recovery of Assets to Bankruptcy Estates, if there is reason to believe that the property has been transferred to the above in order to avoid a forfeiture or liability.

(4) The sanction of forfeiture referred to in subsection 3 above shall not be imposed if the property has been transferred more than five years before the offense referred to in subsection 1 has been committed.

(5) If two or more are sentenced to the same forfeiture, they will be jointly and severally liable.

The main argument for making amendments to Chapter 10 of the Penal Code was to harmonize the provisions with the contents of the Directive 2014/42/EU. This was particularly the case with regard to the extended confiscation and the confiscation from a third party². The crimes mentioned in the Section 3 are generally called ‘trigger’ crimes, because such a new crime triggers an extended confiscation related to perpetrator’s earlier criminal activity. The forfeiture is imposed at the request of the prosecutor. It is for the prosecutor to rely on and prove the facts on which his claim is based. However, the prosecutor has no burden of proving the origin of the property in case of extended confiscation. Such property may be confiscated unless it is probable that the property is derived from non-criminal activities. Accordingly, the legal amendment of 356/2016 (PC 10:9.4) introduced the reversal of the burden of proof for extended confiscation. This amendment was controversial, as can be noticed from the documents of the Constitutional Law Committee and the Legal Affairs Committee of the Parliament³ (see infra, section II, question no. 5).

8. Do you have **any proposals of harmonization of MS legislation, also in consideration of the new proposal of a directive (May 2022) on freezing and confiscation orders?**

9. Do you have any further **reform proposals**, at a national or international level?

10. Do you have any further **policy recommendations**, at a national or international level?

² Government Bill, 4/2016.

³ Statement of the Constitutional Law Committee, 8/2016, and Report of the Legal Affairs Committee, 4/2016.

11. Which models of confiscation can be applied against legal persons and which are their constituent elements? o Could you give your inputs about **possible guidelines** on the implementation of the Regulation

against **legal persons**?

o Do you have any **reform proposals** for your country in this regard?

Section II – The models of confiscation: harmonisation

1. **Which are the different models of forfeiture/confiscation in Your system of law** (direct confiscation, confiscation of the value, extended confiscation, non-conviction based confiscation, confiscation against third parties, etc.)? Please, explain which are the different models in general, also the ones not falling under the scope of the Regulation.

Extended Confiscation

The provisions on confiscation (forfeiture) were revised as part of the total reform of the Finnish Penal Code in 2001 (Chapter 10, of the Penal Code; PC. 875/2001)⁴, which came into force on 1 January 2002. One of the innovations concerned the introduction of the provision on the extended forfeiture of the proceeds of crime in paragraph 3 of the Chapter 10. Its contents were following up to 31 August 2016, with the amendment of 641/2009 (italics by the author):

Section 3 — Extended forfeiture of the proceeds of crime (875/2001)

(1) Full or partial forfeiture of property to the State may be ordered

1) on a person who is found guilty of an offence which carries a possible penalty of imprisonment for at least four years, a punishable attempt of such an offence, or an offence referred to in Chapter 32, sections 1 or 6, Chapter 46, section 4, Chapter 50, sections 1 or 4, of this Code, or in section 82 of the Alcohol Act (459/1968), and

2) on a participant in an offence referred to in paragraph (1) above and on a person on whose behalf or to whose benefit the said offence has been committed, provided that the nature of the offence is such that it may result in considerable financial proceeds and that there is reason to believe that the property is fully or partially derived from criminal activity that is not to be considered insignificant. (641/2009)

⁴ See the unofficial translation of the Penal Code, with the amendments up to 2015 on the open website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf.

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(2) Moreover, full or partial forfeiture of property, referred to in subsection 1, to the State may be ordered:

1) on a person whose relationship to a person referred to in subsection 1 is one covered by section 3, subsection 1 of the Act on the Recovery of Assets to Bankruptcy Estates (758/1991) (close person) and

2) on a private entrepreneur, a company, another corporation or foundation whose relationship to a person referred to in subsection 1 or a close person of his or hers is one covered by section 3, subsection 2, paragraphs (1) or (2) of the Act on the Recovery of Assets to Bankruptcy Estates, if there is reason to believe that the property has been conveyed to the same in order to avoid forfeiture or liability.

(3) A forfeiture referred to in subsection 2 shall not be ordered if the property has been conveyed more than five years before the commission of the offence referred to in subsection 1.

(4) If the same forfeiture is ordered on two or more persons, their liability is joint and several.

In the Government Bill of 2000 this new provision was defended by following arguments⁵ (*italics in the citations by the author*).

“When considering the loss of the proceeds of crime, the prosecutor must prove the crime, the proceeds and who has benefited from the crime. The prosecutor must be able to show from which individual crime the benefit comes as well as the amount of the benefit. Usually, the offender benefits the perpetrator or an accomplice. A legal person can also benefit from a crime. The premise is that the benefit is judged from the one who has actually benefited from the crime. Sometimes it is difficult to find out who has benefited from a crime and how much. In this respect, the case law has condemned, for example, those involved in a crime to forfeit a benefit jointly and severally when the distribution of the benefit is not clear. The court also has the option of assessing the amount of the benefit when the crime is ordinary or professional.

However, a regulatory model such as the one described has no effect on crime, where the offenses are committed specifically for profit, in an organized or otherwise planned manner, and involve complex corporate arrangements and other means of obscuring and concealing the origin of the proceeds and their involvement in the crime. It is also typical that the property is transferred, for example, to a so-called tax haven or to a seemingly outside person, such as a legal person close to the offender or under the control of the offender. In this case, the penalty of forfeiture cannot always be enforced, even if the offender is sentenced to forfeiture. However, an amendment to

⁵ Government Bill, No. 80/2000, p. 12–13.

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the Law on Enforcement (37/1895) which entered into force on 1 June 1999 introduced provisions aimed at preventing the avoidance of enforcement based on artificial arrangements. Such offenses include, for example, drug and concealment offenses, debtor offenses and other systematic financial offenses.

“The need to enhance the confiscation of benefits has been highlighted in the Government Decision of 22 October 1998 on an Action Program for the Reduction of Economic Crime and the Gray Economy and in the Government Decision of 22 December 1998 on Drug (Narcotics) Policy. According to the government program adopted on 15 April 1999, a reversal of the burden of proof for the recovery of proceeds of crime in serious financial gain will be introduced. However, from the point of view of legal certainty, it is justified that extended confiscation can only be applied in some cases. Extended confiscation is only necessary in cases where the offenses are committed for financial gain, in a planned and possibly organized way, within a more or less fixed criminal organization. It is also very important that extended confiscation is applied to serious crime... Extended confiscation of proceeds should apply only to crimes of a substantial financial gain. Such offenses typically include drug offenses, the smuggling and sale of large quantities of alcohol and spirits, and various financial offenses. Examples of financial offenses are debtor offenses, fraud, tax evasion and concealment, in particular money laundering. While it must be assumed that the economic benefit sought must be substantial, extended confiscation must be applied specifically to aggravated acts. Offenses punishable by a term of imprisonment of at least four years are considered serious offenses.”

As can be noticed from the cited parts of the Government Bill, the main argument for the introduction of extended confiscation was the aim of efficiency. An extended forfeiture of the proceeds of crime was regarded as necessary to increase the efficiency of deprivation of the economic benefits of the offense concerned and to prevent the proceeds from being used to finance new offenses, in particular as for organized crime and/or financial crime of serious nature.

As it has been explained above, the 2001 provision on extended confiscation was keenly connected with the efforts to combat economic crime and grey economy and organized crime, but the 2016 provision had a clear link to the national implementation of the Directive 2014/42/EU. The formulation and contents of the provisions can be explained by these background factors. The role of the fundamental (constitutional and human) rights was important in limiting the scope of the application of the provision concerned. The colliding interests and values were tried to balance in drafting the provisions.

Non conviction based confiscation

In Finland, extended confiscation of the proceeds of crime (PC 10:3) is the only type of innovative confiscation regulated in the legal system (see above). A non-conviction-confiscation does not exist in the Finnish legal order in the sense of civil confiscation, although in design law and patent cases the loss of profit to the right holder – i.e., civil confiscation – is recognized. However, it should be noticed Section 1 of Chapter 10 (875/2001), according to which decisive is that act fulfils the statutory definition and objective wrongfulness and a pure confiscation procedure is possible. See more PC 10:1, especially the new Section (3), which was added in 2016. In the Statute of limitation (Ch. 8 of the Penal Code) there is a special provision on the time-barring of the imposition of forfeiture (PC 8:9).

Chapter 10 — Forfeiture (875/2001)

Section 1 — General prerequisites of forfeiture (875/2001)

(1) A prerequisite for a forfeiture order is an act criminalised by law (offence).

(2) A forfeiture order may be based on an act criminalised by law also 1) where the perpetrator has not attained the age of fifteen years at the material time, or is without criminal capacity, 2) where the perpetrator is exempt from criminal liability pursuant to Chapter 4, section 2, section 4, subsection 22, section 5, subsection 2, section 6, subsection 3 or Chapter 45, section 26(b), subsection 2, (515/2003) or 3) where a corporation may be sentenced to a punishment in accordance with Chapter 9 (Corporate criminal liability) even if the individual committing the offence cannot be identified or for some other reason cannot be sentenced to a punishment.

(3) If sufficient evidence is presented of a criminal offense or an act punishable by a penalty for a criminal offense, a penalty may be imposed even if the perpetrator of the offense or act cannot be identified or prosecuted or sentenced. (20.5.2016 / 356)

A reversed burden of proof is applied by extended confiscation according to the 2016 provision. In the earlier version of 2001 of the provision, there was a lower threshold of proof for the prosecutor (see above).

Because in Finnish legal system does not recognize a non-conviction confiscation, the ordinary rules and principles of criminal procedure are applied to forfeiture and extended forfeiture, except otherwise explicitly enacted⁶.

⁶ As for a short presentation on the Finnish criminal law and procedure, see R. Lahti & M. Rainiala, Alternative Investigation and Sanctioning Systems for Corporate and Corporate-related Crime in Finland, *Revue Internationale de Droit Pénal*, Vol. 90, 2019, p. 131–163, ch. II.

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However, the fact that the various types of forfeiture are characterized as security measures and not penalties, may have implications in relation to the caselaw of Article 6, paragraphs 2 and 3 (fair trial), of the ECHR so that they are not applied as such to security measures⁷.

2. For each model of confiscation:

d. Which is the object of the confiscation and its meaning/interpretation? (proceeds, products of the crime, instruments of the crime, etc.). Clarify if and in which case it is possible to confiscate the ‘value equivalent’.

e. Which are the elements to be realised and/or to be assessed for its application? e.g., conviction for a crime, property or availability of the confiscation object, link -between the crime and the proceeds/instruments/products, etc., disproportionality (“the value of the property is disproportionate to the lawful income of the convicted person”), illegal origin (suspects/presumption of illegal origin), temporal connection with the crime, the lack of a justification of the legal origin by the owner, etc.

f. Can this form of confiscation be applied when the owner or the convicted is dead?

3. For the model of confiscation which demands the conviction for a crime:

d. Can this model of confiscation be applied when the crime is statute barred (i.e. after the prescription) or somehow (in particular circumstances) without the conviction?

e. Which is the legal nature? (a criminal sanction - accessory or principal criminal penalty -, a preventive measure - ante delictum criminal prevention measure -, security measure in a broad sense, administrative measure, civil measure in rem, a civil consequence of committing an offense - provided for by criminal law -, another type of autonomous - sui generis - instrument, etc.)

Extended confiscation is generally understood as a form of confiscation of proceeds of crime with certain specific features (sui generis). Among the criminal sanctions it is regarded as a type of security or protective measures (Sicherheitsmassnahme) and not as a punishment (penalty).

⁷ So the main drafter of the Finnish forfeiture provisions, J. Rautio, Uudet menettämisseuraamuksiin liittyvät menettelysäännökset [The provisions on the procedure regarding the new forfeiture sanctions], in: J. Riekkinen (ed.), Festschrift Tuula Linna, Alma Talent, Helsinki 2017, p. 269–279, 271.

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In Finnish legal order, extended as well as ordinary confiscation are criminal sanctions, but not punishments (penalties). They are imposed by a court following ordinary criminal procedure rules and principles (see PC 10:11.1). They are often characterized as security or protective measures (Sicherheitsmassnahmen), but I would prefer the last-mentioned title: autonomous (sui generis) instruments of its own kind (aiming at neutralization of criminal profit and the removal of illegal proceed).

f. In particular, in Your national legal order is confiscation without conviction possible in cases of death, illness, absconding, prescription, amnesty, etc. and which are the relevant legal bases?

4. For each model of confiscation:

f. Which is the procedure for its application? (the qualification/nature, the competent authority, the different steps, etc.)

g. **Which is the standard of the proof/is the reversal of the burden of the proof admitted?**

h. **Which are the safeguards (limitations e.g. proportionality clauses, relevant legal remedies)?**

i. **Is the trial in absentia possible in your legal system in order to apply the confiscation?**

j. For the confiscation without conviction: **can this form of confiscation be applied also in case of acquittal?**

5. For each model of confiscation, **does it comply with the principles of:**

j. **legality? legal specificity of a statute?**

k. **non-retroactivity of the /more severe/statute?**

l. **the right to private property?**

m. **the proportionality?**

n. **the right to a fair trial?**

o. **the right to defence?**

p. **the presumption of innocence?**

q. **the ne bis in idem principle?**

r. **and other relevant rights – what sort of?**

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In the Finnish legal system, there is a preventive mechanism for examining whether there are constitution problems, primarily related to fundamental (basic or human) rights in the Government Bills. Accordingly, the Constitutional Law Committee of the Parliament dealt with the Government Bill 80/2000 and assessed critically it from the point of view of the relevant provisions of Finland's Constitution⁸: Section of 15.1 (protection of property), Section 8 (the principle of legality in criminal cases) and Section 21.2 (fair trial and the presumption of innocent). The proposed revisions to the draft provisions were then made in the Legal Affairs Committee of the Parliament⁹. These Parliamentary Committees agreed that the penal provision on the delimitation of the assets subject to extended forfeiture was not properly reflected in the relevant general rule of the Government Bill. It should be clear from this provision that only property which has been obtained through a criminal offense or the origin of which is reasonably suspected may be the subject of proceedings leading to the imposition of a sanction. The provision was revised in order to fulfil the demands of the legality principle (subrules of accuracy and precision of definitional elements). The main amendment based on the section 21.2 (fair trial) concerned waiving of the reversed burden of proof as for the origin of the property concerned: not the guilt of the accused person. The extended confiscation could be used to sufficiently effective, when the burden of proof was not set as high as required to pass a guilty judgement or impose a sentence (so the lower threshold "there is reason to believe..." would be enough, and the full evidence "beyond reasonable doubt" would not be required). The Legal Affairs Committee ended its report with the following conclusion: as the provision on extended confiscation had been formulated with exceptional reservations and on the basis of calls for it to be applied in particular prudently, the Committee considered it necessary that the practice of applying the provision will be carefully monitored and measures taken to due to possible grievances.

The Constitutional Law Committee of the Parliament dealt with the acceptability of the reversal of the burden of proof quite extensively. It examined the issue from the points of view of the principles of fair trial and presumption of innocent as regulated in Finland's Constitution, Section 21, as well as Article 6 (2) of the European Convention of Human Rights (ECHR) and its case-law. The Committee referred to the case-law of the Convention, in particular to Phillips vs. United Kingdom (5.7.2000), in which the Court assessed the acceptability of a legal

⁸ See the unofficial translation of the Constitution of Finland (731/1999) up to 2018 on the website of the Ministry of Justice: <https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>.

⁹ Statement of the Constitutional Law Committee, 33/2000, and Report of the Legal Affairs Committee, 14/2001.

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presumption in the confiscation proceedings in Great Britain and saw not a violation of the Convention, although the reversal of the burden of proof was applied in the proceedings. The Committee concluded with the acceptance of the reversal of the burden of proof for extended confiscation with the following reasoning: 1) this exceptional principle was not directed to the question of guilt; 2) the prosecutor must prove that the accused received funds during the commitment to crime; the reversal of the burden of proof requires that the presumption of criminal nature of the origin property concerned is grounded on objective criteria; and 3) unreasonable expectations are not set to the assessment whether the accused had proved probable the legal origin of the property concerned. The Constitutional Law Committee also emphasized that the privilege of self-incrimination should be applied in case of extended confiscation, because it is one of the guarantees of fair trial according to Finland's Constitution, Section 21, and Article 6 (1) of the ECHR (as to its case law, *Saunders vs. United Kingdom*, 17.12.1996, was mentioned as an example). The same Committee did not see constitutional problems from the point of view of the protection of property (Section 15.1), although at certain enlargement of the scope of crimes was aimed. Only minor revisions were made in the Parliament for the provisions of the Government Bill. The Legal Affairs Committee underlined that the extended confiscation is discretionary. Particular account shall be taken of whether the property appears to have originated from criminal activities other than minor activities, whether confiscation for the purpose of preventing further offenses is necessary, and whether a significant part of the income of the person concerned originates repeatedly from criminal activities. When considering the necessity of the regulation of the reversal of the burden of proof the Legal Affairs Committee was doubtful, and it referred to the dividing opinions on the issue of the experts on who had been heard by the Committee. However, the Committee's conclusion was doubtful, and it referred to the dividing opinions on the issue of the experts on who had been heard by the Committee. However, the Committee's conclusion was finally supportive, and the Committee referred as an example for the application of the reversal of the burden of proof to complex economic crimes for which it may be typical to eradicate the origin of the property and to disguise it legally by resorting to so-called tax havens. The right to privacy was not an issue in the *travaux préparatoires* regarding confiscation. The conflict with the right to property was discussed in the *travaux préparatoires* but it was not recognized: the constitutional right to property is not intended to the property which is derived from criminal activities, or which was immediately connected with the criminal activity. A reference was also made to the Section 6 of Chapter 10 regarding the protected position of

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a third party¹⁰. The Constitutional Committee of Parliament emphasized the function of the confiscation regulation: committing a crime may not be economically profitable. There is no statistics about the application of the provisions on extended confiscation. Such cases are seldom in courts. My personal summary of the arguments against extended confiscation: The main contra-argument against extended confiscation has in Finnish discussion dealt with the acceptance of the reversal of the burden of proof for extended confiscation. It was in 2016 accepted with three reasons described above. In the Finnish discussion there has also been a general concern about the compliance with the fair trial principles, as with the presumption of innocence and the privilege of self-incrimination, but the proposed provisions were not regarded as being in conflict with these principles (although a doubt was expressed against the exception to the normal principles on the burden of proof). When drafting and enacting on the extended confiscation tensions with certain constitutional and human rights were recognized and it was strived for balancing those various interests and values. As described above, the principles of protection of property (right to private property), of legality (including legal specificity of a statute and non-retroactivity) and of rights to a fair trial (including rights to defense, presumption of innocence and privilege of self-incrimination) were to certain extent examined in travaux préparatoires. In addition, the principle of proportionality was de facto for consideration, not by using this term as such, but trying in the regulation to avoid unreasonable application of extended confiscation (it is discretionary as well as partial forfeiture and adjustment of forfeiture are possible). From the Finnish point of view, it is also worth mentioning the preference of individual right, i.e., a preference to compensation or return of unjust enrichment instead of the forfeiture of the proceeds of crime: see the regulation in PC 10:2.3 and 10:11.2. Finally, I cite firstly the recent opinion of the Legal Affairs Committee of the Parliament regarding the Governments hearing on the confiscation regulation EU 2018/1805¹¹: “Any new legislative measures must always be assessed for their necessity and proportionality in terms of restricting fundamental rights and the protection of personal data. Criminal law regulation at EU level should be used as a last resort and is governed,

¹⁰ Section 6 — Restrictions on forfeiture (875/2001) (1) An object or other property referred to in section 4 or 5 may not be ordered forfeit if it belongs in full or in part to someone else than the offender, a participant or a person on whose behalf or with whose consent the offence has been committed. However, the object or property may be ordered forfeit from a person to whom it has been conveyed after the commission of the offence, if, when receiving it, he or she knew or had justifiable reason to believe that the object or property was linked to an offence, or if he or she has received it as a gift or otherwise free of charge. (2) Regardless of ownership, an object or property shall be ordered forfeit also if the owner would commit an offence by having the object or property in his or her possession.

¹¹ Statement of the Legal Affairs Committee of the Parliament, 13/2021.

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for example, by the conditions set out in Article 83 TFEU... Account must be taken of knowledge-based needs assessment, as well as the coherence of criminal law and the diversity of national systems and legal traditions”.

Secondly, I cite the recent opinion of the Constitutional Law Committee of the Parliament, when it dealt with the notification of the Council of State on the draft proposal of the directive (EU) on asset recovery and confiscation COM(2022) 245 final¹²: “The Constitutional Committee of the Parliament was, in line with the reasoning of the Council of State, concerned about the extension of the scope of extended confiscation, because the EU draft proposal was questionable from the points of view of rule of law, presumption of innocence and (other) procedural rights of fair trial. Such solutions should be strived for which would balance the goal of efficient crime prevention and the observance of constitutional rights in accordance with the basic principles of national legal order”.

6. For each model of confiscation:

d. Are there constitutionality issues which have been detected in the legal doctrine and is there any relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure?

In Finland, there is no constitutional court but the Government Bills are dealt with in the Constitutional Law Committee of the Parliament in case of possible constitutional or human rights affiliations. This procedure was also applied when Finnish confiscation reforms of 2001 and 2016 were handled in the Parliament (see above).

Supreme Court has so far given four precedents on the issues of extended confiscations: KKO 2006:9 and 51, KKO 2012:60 and KKO 2023:23. In all of them the provisions from the year 2001 were applied. So, the precedents based on the 2016 reform are so far missing.

In the precedent KKO 2006:9, the convicted of an aggravated narcotics offence (PC 50:2) had seized funds in various currencies worth about 30,000 euros. The amount corresponding to the economic benefit generated by that crime was confiscated from the State under Chapter 10, Section 2 of the Penal Code (ordinary forfeiture of the proceeds of crime), and the remainder under Section 3 of that chapter (extended forfeiture of the proceeds of crime). In its reasoning the Supreme Court argued that serious drug crime is typically a crime of a nature that can generate significant financial gain and referred in the assessment of the evidence to the prosecutor’s lower threshold of the burden of proof, as expressed in the Report of the Legal Affairs Committee of the Parliament.

¹² Statement of the Constitutional Committee of the Parliament, 78/2022.

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The precedent 2006:51, Mr. A was found to be guilty of an aggravated narcotics offence involving possession of 98.3 grams of amphetamine with a concentration of 74 to 75% and certain other drugs for distribution purposes. € 4,050 in cash had been confiscated from his apartment. On the basis of the Supreme Court's judgment, Mr. A's offense was considered to be capable of generating significant financial gain. Although the criminal activities from which the funds originated were not considered insignificant, they were not condemned to the State as an extended criminal benefit in terms of the quality and extent of the activities. This precedent confirms that in any case the imposing of extended confiscation is discretionary and parsimonious. Supreme Court referred to the reasoning in the preparatory materials of the 2001 provision: "Extended confiscation is only necessary in cases where the offenses are committed for financial gain, in a planned and possibly organized manner, within a more or less fixed criminal organization. The provision should be applied with caution and careful consideration."

In the third precedent, KKO 2012:60, Mr. A was, among other things, found guilty of four aggravated tax frauds (PC 29:2) committed in the operations of X Oy and Y Oy. Mr. A's cohabiting spouse B was found guilty of aggravated money laundering (PC 32:7), which Ms. B had committed by receiving and converting funds obtained by Mr. A through aggravated tax frauds. A property, which had been purchased in the name of Ms. B in order to avoid forfeiture, was confiscated on the basis of the provision on extended confiscation (PC 10:3.2).

In the fourth precedent, KKO 2023:23, the triggering crimes were aggravated usury (PC 36:7) and aggravated narcotics offences, but the main problem in the Supreme Court concerned the procedural issue that a full oral hearing should be organized in the Court of Appeal. As for extended confiscation, it was stated that it is a sanction based on a crime and, accordingly, the principle of more lenient law provisions should be applied (point 19 in the decision; PC 3:1.2).

In all, extended confiscation has been mostly applied to (aggravated) narcotics offences, but there are in legal practice also some cases related to economic crime (such as aggravated tax fraud and money laundering). As a whole concerning extended confiscation are seldom brought to court proceedings. The decisions of the second instance, i.e., Appeal Courts, are seldom published. I am aware of one case of the Helsinki Appeal Court (judgment 5.5.2021, 21/119511) in which the new provision from the year 2016 has already been applied (in most cases the earlier provision from the year 2001 is regarded as more lenient and, therefore, "pure" new cases are handled by higher courts just recently).

Insights from other MS States and extra-EU States

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In that case of the Court of Appeal, an ordinary narcotics offence was attributed to Mr. A. The issue at the Court was whether the seized funds from Mr. A, totaling € 1,255, originated from a criminal activity and, if so, whether the extended confiscation is applicable when taking into account other factors relevant to the assessment of the case. In its reasoning the Court referred to the aim of enlarging the application of extended confiscation, although it remained as discretionary. The intention was not to fundamentally change the principle of burden-sharing. The prosecutor still has the burden of proving the facts to which his claim for forfeiture relates based on. However, unlike before, the prosecutor has no burden of proof concerning the origin of the property targeted in extended confiscation. Such property may be forfeited, unless the accused proves probable that the property will come from a source other than criminal activity. The exercise of discretion takes into account, among other factors, whether the assets appear to be of not insignificant origin, whether the forfeiture is necessary to prevent further crimes and whether criminal activity repeatedly accounts for a significant proportion of the person's income. In balancing different factors, the Court assessed that the arguments in favor of extended confiscation had more weight than contra-arguments and upheld the first instance-court's decision for such forfeiture.

e. **Are there European Court of Human Rights cases in relation to “Your” model of confiscation?** Please, explain the position of the ECHR about “Your” model of confiscation.

f. **Is there any CJEU decision concerning “Your” confiscation model?**