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The Prospect of the Civil Confiscation in Lithuania

Summary

The study marks another milestone in the long run research of the confiscation based strategies aimed at the prevention of serious crime.[1] The spectrum of the strategies of this kind has been within the academic focus of Skirmantas Bikelis since 2012. Skirmantas Bikelis with colleagues published a monograph on this topic in 2014. Later couple of articles have been published, including publication in *Journal of Money Laundering Control*[2], that debated a specific strategy – the criminalization of illicit enrichment. The current study takes into focus two strategies – the civil confiscation (CC) and the aforementioned criminalization of illicit enrichment.

The main research question in this study was if civil confiscation would contribute substantial added value to the prevention of serious greedy and organized crime and corruption in the Lithuanian legal system.

Before coming to this question, the civil confiscation compliance with human rights standards had been re-examined. The issue of the legal nature of CC served as starting point for the examination. The analysis of the *Engel* criteria with the focus on the aims of CC allowed to reaffirm that within the meaning of the Article 6 of Convention for the Protection of Human Rights and Fundamental Freedoms legal nature of CC is civil, not criminal. This conclusion goes in line with the practice of the European Court of Human Rights and diminishes relevance of the presumption of innocence in the CC proceedings. The practice of the ECHR also defines the main areas (serious organized crime, corruption) where CC could be considered as the proportionate interference with the peaceful enjoyment of person's possessions.

The question of the added value of the CC was approached by discussing the existing strategies of expropriation of property. Firstly, expropriation of ownerless things was discussed. This strategy is being increasingly used in the investigations of suspicious funds flows (in the cases of suspected money laundering). This strategy turns out to be

[1] Full text of the study in Lithuanian is available online:
http://teise.org/wp-content/uploads/2019/02/Konfiskavimas.pdf

[2] Skirmantas Bikelis, (2017) "Prosecution for illicit enrichment: the Lithuanian perspective", Journal of Money Laundering Control, Vol. 20 Issue: 2, pp.203-214.

efficient but it does not compete with CC. The first focuses on the cases where the genuine ownership of the funds may not be established and the second focuses on the origin of the property with the established ownership.

Later, tax proceedings and measures are discussed. Lithuanian tax laws provide the tax inspectorate with the authority to impose tax fines to the owners of the unexplained wealth. The fine may amount from 50 to 100 per cent of income tax duties. Thus in total tax measures enable the State to claim up to nearly 50 per cent of unexplained property's value. The specific rules of evidence that shift the burden of proof on a respondent and allow indirect and even statistics based evaluation of his or her income enable tax inspectorate run very fast and efficient tax proceedings. It makes huge advantage for tax proceedings comparing to any other strategy. However, the value of the unexplained property that might be claimed in the tax proceedings cannot amount to the value that might be claimed in the CC proceedings. Also, some doubts rise if such proceedings, in case they resulted in withdrawal of very significant share of respondent's property, on one hand, still constituted fair proceedings and, on the other, were compatible with the principle of proportionality.

Considering grounds for CC provided in the draft of the law on Illegal Enrichment Prevention and provisions on the extended confiscation in Lithuanian penal code, the enforcement area of CC and the extended confiscation would overlap in the most serious cases, where value of property would exceed 100 000 Eur and where property would be related to serious profitable crime, organized crime or corruption. The preference for the CC proceedings is recommended in these cases. This finding is based on the assumption that rules of evidence in the CC proceedings are by some degree more efficient than rules in the proceedings on extended confiscation. In addition, the possibility to run the confiscation proceedings independently from the criminal proceedings provides significant practical advantages.

The advantage of CC over criminalization of illicit enrichment leaves no room for a doubt. It even does not make much sense to compare these directly competing strategies as we find the concept of criminalization of illicit enrichment erroneous.

As far as the presumption of innocence is respected, the concept of criminalization of illicit enrichment (Lithuanian penal code actually criminalizes *unexplained* enrichment instead of *illicit* enrichment) does not solve the problem that it was designed to solve – the difficulties of proof of the illicit origin of property. Even more, Lithuanian penal code

does not provide legal ground for the result, that this strategy is aimed at – confiscation of property of unclear origin. Lithuanian penal code provides for confiscation of proceeds of crime, not for the confiscation of proceeds of unknown and unexplained origin. Also, we come to the conclusion that criminal liability for illicit enrichment in some cases confronts the principles of deserved and proportionate liability. I. e. in the cases where it targets the owners of property that was actually proceeds of minor crimes, misdemeanours, or even lesser infringements of laws. It has been also reasonably argued that the legal norm of criminalization of property of unexplained origin does not meet the requirements of the principle that the rules of law must be precise and clear. There are also grounds to believe that despite the effort to use legal wording that would avoid conflict with the presumption of innocence, in practice the conflict cannot be avoided.

The analysis of criminal cases for illicit enrichment in Lithuania covered all 25 proceedings that took place in the period 2015 – III quarter of 2018. Among other things, it provided insights into values and type of the property that had become subject of financial investigations, alleged origin of the property and concealment schemes, the variety of explanations from the defendants. The legal analysis of the judgements in the proceedings has shown that only in 3 out of 25 defendants had been convicted and only in 3 out of 25 judgements the courts decided to confiscate the property of unclear origin. In terms of property value, a property of total value of 250 000 Eur has been confiscated thou prosecution requested confiscate property of value 9,2 million Eur. It makes only 12 per cent success rate in terms of convictions and even less – 2,7 per cent – success rate in terms of the confiscated property value. The main reasons to acquit the defendants were 1) failure to prove illicit origin of property – in 15 cases, 2) issue of the retroactive application of the criminal law – in 3 cases as the primary reason and in 5 cases as the supplementary reason, 3) the property did not correspond definition of the law (it's value was below required minimum or it did not belong to defendant) – in 2 cases as the primary reason and in 3 cases as the supplementary reason, 4) conflict with the tax proceedings (*non bis in idem*) – in 1 case, and 5) conflict with another criminal prosecution and confiscation of the same property on other grounds – in 1 case.

We conclude that the criminalization of illicit enrichment did not work very well in practice. Considering the fundamental critic against this strategy, failure to implement it in practice may be regarded as a positive result. In addition, this result supports the assumption that criminal liability for illicit enrichment may not compete with other

confiscation strategies. Even more, it creates conflicts within the legal system. We firmly stand for the abolishment of criminal liability for illicit enrichment.

The final chapter of the study is devoted to the issue of the use of the confiscated property. The practices of countries that already implement civil confiscation are discussed. The experience in Italy, Bulgaria and the United Kingdom support the idea that confiscated property should be used for social purposes when it is possible. This assumption goes in line with the guidelines provided by the Directive 2014/42/EU. On the other hand, experience from the USA warns against use of a confiscated property for "self-funding" of the investigative agencies.

Key words: civil confiscation, illicit enrichment, principle of proportionality