

## **Country Report – Poland**

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### **Part A:**

#### **Analysis by Members of the Research Team of the legal order of their EU Member State**

#### **Introductory question:**

**How is extended confiscation understood in legal order of your EU Member State?**

#### **I. Historical understanding of ‘confiscation of property’:**

‘**Confiscation** of property’ (resulting in its transfer to State Treasury) was in former (‘socialistic’) Penal Code from 1969 adjudicated (next to custodial sentence) if a criminal offence was committed for a purpose of economic benefit. It could cover all or part of property of convicted person, which belonged to him at the time of judgment<sup>1</sup>, and was based on irrefutable presumption that property in question derived from a criminal offence. For this reason and for the fact that it affected not only convicted person, but also (innocent) members of his family, confiscation of property was seen as contradictory to the principles of justice and individual criminal liability, and even to the concept of human rights<sup>2</sup>. Although provisions on confiscation of property were abolished in 1990, negative historical associations related to concept of ‘confiscation of property’ remained<sup>3</sup>. Therefore **instruments of deprivation of property** (for the benefit of State Treasury) are in current Penal Code from 1997 (and Fiscal Penal Code from 1999) called: ‘**forfeiture**’ (of item, benefit, enterprise, their equivalent-in-value). The concept of ‘extended confiscation’ is used in legal language (and commonly understood), but not used in a statute.

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<sup>1</sup> Articles 46-47 of Penal Code from 1969; for other regulations on confiscation of property in 1944-1990, see: I. Rzeplińska, *Konfiskata mienia. Studium z historii polityki kryminalnej*, Warszawa 1997, p. 33-82.

<sup>2</sup> Cf. A. Spotowski, *Konfiskata mienia i przepadek rzeczy (uwagi de lege ferenda)*, Państwo i Prawo 1989, No. 3, p. 101-103; I. Rzeplińska, *Polityka stosowania kary konfiskaty mienia w PRL*, *Archiwum Kryminologii* 1992, vol. XVIII, s. 147-167.

<sup>3</sup> Confiscation of property ‘is unacceptable due to its shameful tradition and its contradiction with principles of international law’. J. Kochanowski, *Opinia dotycząca nowelizacji przepisów kodeksu karnego określających przepadek przedmiotów i korzyści majątkowych (druk 869)*, Biuro Studiów i Ekspertyz 17.01.2003, p. 1 (*Opinion on project of amendments of Penal Code*).

## **II. Current understanding of ‘extended confiscation’ in Polish law:**

### **1. Conviction-based confiscation**

In Polish law ‘extended confiscation’ is associated with forfeiture of economic benefits derived from criminal offence. Prerequisite for its application is proving that accused person committed criminal offence of certain type, resulting in his conviction<sup>4</sup>. Those types of offences include:

- (1.) criminal offence from which economic advantage of substantial value (over 200.000 PLN<sup>5</sup>) was obtained directly or indirectly, or
- (2.) criminal offence from which (any) economic advantage has been or could have been obtained, directly or indirectly, punishable by a custodial sentence of a maximum of at least 5 years (in Fiscal Penal Code: 3 years), or
- (3.) criminal offence committed in organised criminal group aimed at perpetrating criminal activity<sup>6</sup>.

‘Economic advantage’ may be obtained by suspected (accused) person or by another subject<sup>7</sup>. In case **of conviction**, forfeiture of economic benefits derived from crime is **mandatory** and includes proceeds which convicted person has taken possession of, or has acquired entitlement to, within a period of 5 years before committing a criminal offence until the moment of passing of a (non-final) sentence. The regulation is supplemented by provision of Executive Penal Code indicating that by execution of forfeiture of economic benefit derived from criminal offence (or its equivalent-in-value), it is presumed that the property which is in possession of convicted person belonged to him at the time of passing of sentence<sup>8</sup>. Convicted or another interested person **has right to prove** that property in question doesn’t constitute economic benefit derived from a criminal offence.

### **2. Non-conviction-based confiscation**

In certain cases court may apply extended confiscation although conviction is excluded due to:

1. negligible social harmfulness of a criminal offence,
2. the fact that suspected (accused) person committed criminal offence in state of insanity,

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<sup>4</sup> unless conviction is not possible due to formal reasons, then see: non-conviction-based confiscation.

<sup>5</sup> Such understanding of ‘economic advantage of substantial value’ results from customary equation of this concept with ‘property of significant value’, as defined in Article 115 § 5 of Penal Code (‘property the value of which at the time of committing a criminal offence exceeds 200 000 PLN’. See: Z. Sienkiewicz, Uwagi o zmianie przepisu art. 45 k.k., Nowa Kodyfikacja Prawa Karnego 2001, Vol. 8, p. 119-120.

<sup>6</sup> Article 45 § 2 of Penal Code, Article 33 § 2 of Fiscal Penal Code.

<sup>7</sup> Article 115 § 4 of Penal Code.

<sup>8</sup> Article 29a § 1 of Executive Penal Code.

3. existing circumstances excluding punishment of suspected (accused) person<sup>9</sup>,
  4. ordering probation instrument of conditional discontinuation of criminal proceedings<sup>10</sup>,
  5. death of suspected (accused) person,
  6. discontinuation of criminal proceedings due to failure to detect suspected (accused) person,
  7. suspension of criminal proceedings due to absconding of suspected (accused) person or his illness resulting in inability to participate in criminal proceedings,
- whereas in above mentioned cases 5-7 exists and additional requirement that gathered evidence indicate that in case of conviction the forfeiture would have been ordered<sup>11</sup>.

### **3. Confiscation from a third party**

If property constituting proceeds from crime has been, effectively or under any legal title, transferred to third party it is deemed (within criminal proceedings) that items remaining in possession of that party (and other property rights that it is entitled to) belong to suspected (accused) person – **unless** the circumstances attendant to acquisition of such property could not have given rise to assumption that it has been (even indirectly) obtained by means of a criminal offence<sup>12</sup>. This regulation is supplemented by provision of Executive Penal Code indicating that natural person (but not other subjects) to whom the indicated presumption applies may ask for exclusion from its scope assets, total value of which, according to assessment of enforcement authority, does not exceed the average six-month income of that person<sup>13</sup>; in case of refusal, the person concerned may demand, in civil proceedings, that the items be excluded from the scope of freezing or confiscation<sup>14</sup>.

### **4. Instruments of similar character to extended confiscation**

- Introduction to Polish law **preventive (in rem) confiscation** understood as “forfeiture of property assets the formal owners of which are third parties, but which remain in possession of perpetrators of the most serious crimes”<sup>15</sup>, has been considered by Polish Ministry of Justice at least since 2016. However, until now, no project in that matter has been presented to public discussion.

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<sup>9</sup> They include e.g. the so-called ‘active regret’ in form of abandoning commission of prohibited act or preventing its commission by an accomplice, the statute of limitations (the lapse of time) of criminal proceedings.

<sup>10</sup> Article 45a § 1 of Penal Code referring to examples 1-4.

<sup>11</sup> Article 45a § 2 of Penal Code and Article 43a of Fiscal Penal Code, referring to examples 5-7.

<sup>12</sup> Article 45 § 3 of Penal Code, Article 33 § 3 of Fiscal Penal Code.

<sup>13</sup> Article 29a § 2 of Executive Penal Code.

<sup>14</sup> Article 29a § 3 of Executive Penal Code.

<sup>15</sup> M. Warchoń, *Konfiskata in rem w świetle rozwiązań prawnoporównawczych*, [in:] *Konfiskata in rem. Nowoczesna metoda zwalczania przestępczości zorganizowanej*, Warszawa 2021, p. 19.

- Forfeiture of **enterprise** (or its equivalent in value) of:
  - suspected (accused) person may be ordered when he committed a criminal offence from which economic advantage of substantial value (exceeding 200.000 PLN) was achieved and the enterprise served to commit this offence or to conceal proceeds derived from it<sup>16</sup>.
  - third party may be ordered in case of conviction for a criminal offence from which economic advantage of substantial value (exceeding 200.000 PLN) was achieved, if the enterprise was used as instrumentalities to commit that offence or to conceal profits derived from it, and its owner **wanted** it or, foresaw such possibility and **accepted** it<sup>17</sup>.
- **taxation of undisclosed sources of income with 75% tax rate**<sup>18</sup> - this sanction aimed at preventing tax evasion shall (also) refer to *'the so-called shadow economy, often related to criminal activity'*<sup>19</sup>. However taxable are only activities which can be subject of legally effective contract, because otherwise taxation would serve to legalize criminal offence<sup>20</sup>. Due to the above assumption and sanctioning nature of a 75% tax rate, that kind of fiscal sanction shall not be cumulated with (fiscal) penal liability<sup>21</sup>.
- **obligation put directly on third party** which obtained profits from criminal offence committed by another person, to return it to State Treasury or local government unit<sup>22</sup>.

## **5. Summary**

Polish provisions on extended confiscation – understood as: forfeiture of economic benefit derived from criminal offence – are based on:

1. **legal presumption of illicit origin of property** resulting in shifting the burden of proof of its non-criminal origin to suspected (accused) person as its presumed owner,
2. **acquired within 5 years before the commission**
3. **of one of criminal offences** listed in statute (committed in organized criminal group, or resulting, directly or indirectly, in economic advantage of substantial value or crimes of average gravity which resulted or could result in economic benefits, e.g. simple theft);
4. **or transferred to third party** (unless that party acted in good faith);

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<sup>16</sup> Article 44a § 1 of Penal Code.

<sup>17</sup> Article 44a § 2 of Penal Code.

<sup>18</sup> Article 30 § 1 p. 7 of the Personal Income Tax Act.

<sup>19</sup> Judgement of Supreme Administrative Court in Wrocław from 4.9.1997 (I SA/Wr 948/96).

<sup>20</sup> P. Pietrasz, Opodatkowanie dochodów osiągniętych nielegalnie, Glosa August 2001, p. 28.

<sup>21</sup> Judgement of Constitutional Tribunal from 4.9.2007 (P 43/06, OTK-A 2007/8/95); A. Bartosiewicz, R. Kubacki, Opodatkowanie dochodów z nieujawnionych źródeł, Przegląd Podatkowy – dodatek 2010, No. 10, p. 21.

<sup>22</sup> Article 24 § 5 of Fiscal Penal Code; Article 91a of Code of Penal Procedure.

5. **in case of conviction for such criminal offence** (unless conviction is not possible due to formal reasons).

**RT 1: How was adoption of extended confiscation explained in the process of its introduction into domestic legal system of your EU Member State (e.g. by legal amendments):**

**1.1. before the transposition of Directive 2014/42/EU (if confiscation regulation existed)?**

Although elimination of confiscation of property from former Penal Code in 1990<sup>23</sup> was justified by numerous irregularities in its shape and application, and corresponded with social feelings about its instrumental treatment to the detriment of citizens, it stood in contradiction to **dynamically growing serious crime** (e.g. drug trafficking, organized crime), from which huge, illegal profits were made<sup>24</sup>. Therefore that decision soon started to be rated as too radical. Restoring confiscation of property was proposed in 1995, in governmental draft of Penal Code from 1995, but met heavy criticism and was abandoned<sup>25</sup>.

Eventually, Penal Code from 1997 included forfeiture of economic benefits from criminal offence, which in 2003 obtained form of extended confiscation (based on reversed burden of proof, going beyond the property proven as proceeds derived from certain criminal offence) and confiscation from third party (of property transferred to or acquired by third party from suspected or accused person)<sup>26</sup>. In grounds for draft of mentioned amendments it was indicated that propose regulation *met social expectations about extending the possibility of depriving offenders of fruits obtained through criminal offence (as well as instrumentalities used or intended to be used to commit criminal offence)* – and that proposed amendments were aimed at *counteracting the practice, common in the criminal world, of getting rid (in factual or only formal way) of fruits of criminal offence or instrumentalities used to commit it.*<sup>27</sup> Attempts to

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<sup>23</sup> With legal force from 26.3.1990, by Law on amendment of Penal Code and other legal acts from 23.2.1990 (Journal of Laws 1990.14.84).

<sup>24</sup> Grounds for draft amendment to Polish Penal Code (print No. 1274 from 1995, II Sejm's term of office), p. 32; K. Laskowska, Kara konfiskaty mienia w kodeksie karnym z 1969 r. i w projekcie nowego kodeksu, Prokuratura i Prawo 1996, No. 11, p. 46–51; E. Pływaczewski, Wokół postulatu tzw. konfiskaty rozszerzonej (rozszerzonego przypadku mienia), [in:] Pohl Ł. (ed.), Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca, Poznań 2009, p. 469-470, 476; Z. Sienkiewicz, Zamiast konfiskaty mienia, Nowa Kodyfikacja Prawa Karnego 1999, Vol. 4, p. 156-157.

<sup>25</sup> I. Rzeplińska, Konfiskata mienia – powrót kary, Państwo i Prawo 1996, No. 2, p. 77–80; B. Zygmunt, Konfiskata mienia a przypadek korzyści majątkowych, Prokuratura i Prawo 2001, No. 11, p. 25–27; J. Raglewski, Materialnoprawna regulacja przypadku w polskim prawie karnym, Kraków 2005, p. 90-91; V. Konarska-Wrzošek, J. Lachowski, Instytucja przypadku w polskim prawie karnym, Lex/el. 2020, Chapter I unit 4.

<sup>26</sup> By Law on amendment of Penal Code and other legal acts from 13.6.2003 (Journal of Laws 2003.111.1061). Similar solutions were introduced into Penal Fiscal Code by Law on amendment of Penal Fiscal Code and other legal acts from 28.5.2005 (Journal of Laws 2005.178.1479) with legal effect from 17.12.2005.

<sup>27</sup> Grounds for draft amendment of Penal Code (print No. 869 from 2002, IV Sejm's term of office), p. 17.

expand this institution in accordance i.a. with Council Framework Decision of 24.2.2005 (2005/212/JHA) on confiscation of crime-related proceeds, instrumentalities and property, were taken in 2007<sup>28</sup>, but without success.

## **1.2. in the process of transposition of Directive 2014/42/EU into internal domestic law ?**

Amendments in Polish criminal law on a base of Directive 2014/42/EU came into force on 1.7.2015 and predicted that **every** transfer of proceeds from criminal offence was ineffective within criminal proceedings. Third party was protected by a '**good-faith-clause**', according to which presumption of illicit origin of assets doesn't apply to situation where in circumstances accompanying their acquisition, it could not be assumed that the assets, even indirectly, resulted from criminal offence<sup>29</sup>. Due to **guarantee function** of this figure, in accordance with amended provisions, transfer of proceeds from criminal offence by suspected (accused) person to third party should be **proved**, not simply 'assumed with high probability'<sup>30</sup>.

Directive 2014/42/EU was transposed into Polish law also by another amendment, which came into force on 27.4.2017 and introduced **retroactive** extension of forfeiture of economic benefit derived from criminal offence (not directly mentioned in Directive 2014/42/EU, but acceptable within limits of its Article 5) in form of (rebuttable) presumption that assets controlled or obtained by suspected (accused) person within 5 years before criminal offence was committed (until even a non-final sentence) also constitutes proceeds of crime<sup>31</sup>. **Reason** for retroactive extension of confiscation, indicated in grounds for draft amendment, **included needs**: to make mechanisms aimed at deprivation of proceeds derived from criminal activity, effective, to strengthen general and individual prevention by confirming thesis that 'crime doesn't pay' (is unprofitable), to deprive offenders of serious and lucrative crimes of financial basis for their criminal activity<sup>32</sup>. **Other arguments** for extending the scope of forfeiture of proceeds derived from criminal offence, presented in grounds of draft of Law from 2017, **were as following**:

- forfeiture is not sanction, but instrument *sui generis* of criminal law (of mixed: repressive, preventive and other nature), what significantly extends possibilities of its application,

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<sup>28</sup> Draft amendment of Penal Code (print No. 640 from 2007, VI Sejm's term of office).

<sup>29</sup> Figure of 'objective duty to predict illegal origin of property' introduced by Law on amendment of Penal Code and other legal acts from 20.2.2015 (Journal of Laws 2015. 396).

<sup>30</sup> Grounds for draft amendment to Penal Code (print No. 2393 from 2015, VII Sejm's term of office), p. 27-28.

<sup>31</sup> By Law on amendment of Penal Code and other legal acts from 23.3.2017 (Journal of Laws 2017.768). The same amendment was introduced simultaneously to Penal Fiscal Code.

<sup>32</sup> Grounds for draft amendment of Penal Code (print No. 1186 from 2017, VIII Sejm's term of office), p. 1-3. The same amendment introduced forfeiture of enterprise (of suspected or accused person and of third party).

- there is often justified supposition that, apart from criminal offences attributed to suspected (accused) person in criminal proceedings, he committed other offences that have remained undisclosed or have not been proven to him. Legal limitations of scope of forfeiture in such cases hinder possibility of deprive him of real proceeds from his criminal activity,
- proving connection between committed offence and financial status of suspected (accused) person and his contractors in criminal turnover is very difficult or even impossible and should be supported by legal presumptions, enabling shifting burden of proof about (legal) origin of possessed property to suspected (accused) person,
- 5-year period for the scope of retractive confiscation has guarantee function for suspected (accused) person and coincides with period of mandatory storage of tax documentation,
- presumption of illicit origin of property may be relatively easy rebutted (and for this reason shifted burden of proof is proportional to its expected effects),
- death of suspected (accused) person shall not be an obstacle to order forfeiture of criminal proceeds; his heirs shall not take advantage of economic benefits of his criminal activity,
- adopting legal solutions shifting, by serious crime, the burden of proof of legal origin of owned property to suspected (accused) person is recommended in international law,
- extended confiscation and confiscation from third party is accepted by European Court of Human Rights, which indicated in its judgements that presumptions of fact or law exist in European criminal law systems and are acceptable within certain limits, taking into account the importance of matters at stake and preservation of defence rights.

In literature it was indicated that reaching for extended confiscation results from changes in concept of how to combat organized crime: by making criminal activity unprofitable instead of extending scope of criminalization or increasing punitiveness of penal regulations<sup>33</sup>.

### **Was (extended) confiscation seen as (un)acceptable under certain (what?) conditions before the transposition of the Directive 2014/42/EU?**

Conditions for acceptable shape and application of extended confiscation in Polish law before and after the transposition of the Directive 2014/42/EU are equal.

Extended confiscation shall meet **formal** requirements specified in Article 46 of Polish Constitution<sup>34</sup>, according to which forfeiture (of any kind):

1. shall take place only in cases **specified in statute**,

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<sup>33</sup> M. Korzeniak, M. Szurman, Domniemanie przestępnego pochodzenia mienia (jurydyczne ukształtowanie art. 45 § 2 k.k.), *Czasopismo Prawa Karnego i Nauk Penalnych* 2019, No. 1, p. 50.

<sup>34</sup> Property may be forfeited only in cases specified by statute, and only by virtue of a final judgment of a court.

2. shall be ordered only on basis of **final court decision**,
3. shall be limited to property components identified as **‘things’** (confiscation of ‘entire property’ of natural person or legal entity is forbidden<sup>35</sup>).

On this base it was specified in court judgements and in literature that:

- It is **exclusively legislator's duty** to specify in statute what kind of property may be forfeited (e.g. not ‘anything with specific value’ or ‘any amount of money’, because then forfeiture would become a kind of fine<sup>36</sup>) and conditions for forfeiture (e.g. the maximum retroactive scope of confiscation<sup>37</sup>, only rebuttable legal presumptions<sup>38</sup>),
- In concrete case forfeiture shall be **exclusively court’s decision**, based on its discretion and examination of evidence; such decision cannot be limited to control of correctness of extrajudicial body’s decision in that matter (no automatism based on formal provisions)<sup>39</sup>.

The following criteria for **substantive** justification of forfeiture (incl. extended confiscation) were specified in court judgements and in literature:

- Court decision on forfeiture shall be **preceded by fair trail**, in which suspected (accused) person shall have right to defend himself by proving legal origin of his property and in which it shall be verified whether: the equivalent-in-value of proceeds from criminal offence haven’t been reimbursed so far, rights of third parties do not preclude forfeiture or it won’t be disproportionate to the gravity of committed offence<sup>40</sup>.
- Correct practice is forfeiture of **defined assets** and not of undefined ‘criminal proceeds’. Forfeiture of equivalent-in-value of economic benefits derived from criminal offence shall

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<sup>35</sup> M. Florczak-Wątor, [in:] P. Tuleja (ed.) Commentary to Polish Constitution, LEX/el. 2021, art. 46, thesis 2.2; T. Sroka, [in:] M. Safjan, L. Bosek (ed.) Commentary to Polish Constitution, Warszawa 2016, art. 46, thesis 37.

<sup>36</sup> M. Florczak-Wątor, art. 46, thesis 2.3; P. Sarnecki, [in:] L. Garlicki, M. Zubek (ed.), Commentary to Polish Constitution, Warsaw 2016, art. 46, thesis 8.

<sup>37</sup> A. Sakowicz, Opinia o zmianie ustawy – Kodeks karny, ustawy - Kodeks postępowania karnego, ustawy - Kodeks karny wykonawczy oraz ustawy - Prawo prasowe (druk nr 640), Biuro Studiów i Ekspertyz, Warszawa 30.10.2008, s. 11-12 (*Opinion on project of amendments of Penal Code*).

<sup>38</sup> W. Wróbel, Opinia w sprawie zgodności z Konstytucją RP poselskiego projektu ustawy o zmianie ustawy - Kodeks karny, ustawy - Kodeks karny skarbowy, ustawy - Kodeks postępowania karnego, ustawy - Kodeks karny wykonawczy oraz ustawy - Prawo prasowe wraz z autopoprawką (druki 640 i 640-A), Biuro Studiów i Ekspertyz, Kraków 8.12.2009, p. 13 (*Opinion on project of amendments of Penal Code*).

<sup>39</sup> Judgments of Constitutional Tribunal from: 28.10.2015 (SK 59/13, OTK-A 2015/10/162), 30.6.2008 (P 4/06, OTK-A 2008/5/76), 29.6.2005 (SK 34/04, OTK-A 2005/6/69), 17.4.2000 (SK 28/99, OTK 2000/3/88), 6.10.1998 (K 36/97, OTK 1998/5/65).

<sup>40</sup> Judgement of Supreme Court from 21.2.2019 (IV KK 486/17); J. Raglewski, [in:] M. Melezini (ed.), System Prawa Karnego, Vol. 6, Warszawa 2016, p. 842-849. See also Judgment of European Court of Human Rights from 12.08.2015 in case No. 36862/05, Gogitidze and Others v. Georgia; T. Sroka, art. 46, thesis 22.



not refer to abstract amount of money, but to amount secured in the proceedings, or to amount which has been found to be in possession of suspected (accused) person<sup>41</sup>.

- Forfeiture shall be ordered **against the owner of assets**; a court decision on forfeiture cannot apply to assets that are not the property of subject against whom it is directed<sup>42</sup>,
- The owner of property ought to have **known** or at least **foreseen** with due care required in the circumstances that it could have been used or intended to commit a criminal offence (requirement of **reprehensibility**, especially important by third party)<sup>43</sup>,
- **In case of acquittal**, subsequent forfeiture (as well as other measures with similar effect) is prohibited as unacceptable violation of presumption of innocence<sup>44</sup>.
- The principle of **proportionality** of (the scope of) confiscation to the gravity of the offence shall be obeyed<sup>45</sup>; however it is also indicated that this principle doesn't apply to forfeiture, because it is not a form of restriction but of (not gradual) depriving owner of his right<sup>46</sup>.

Polish provisions on extended confiscation were discussed in literature with following doubts and reservation:

- Polish provisions lack elements constituting correct shape of extended confiscation, which are: precise catalogue of offences by which court may order extended confiscation (and assess its proportionality), guarantee of court's discretion based on individual examination of each case (due to mandatory application of presumption of illegal origin of property)<sup>47</sup>.
- Extended confiscation, due to unique means of proof, shall be ordered only by particularly dangerous criminal offences (e.g. by organized crime)<sup>48</sup>; in Polish law the relevant scope of criminal offences is much broader<sup>49</sup>.
- Retroactive confiscation, especially when it applies to offences committed before entry into force of relevant provisions, is contrary to **guarantee function of criminal law** (protection

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<sup>41</sup> M. Siwek, *Opinia prawna dotycząca zmian w kodyfikacjach karnych w zakresie przepadku korzyści majątkowych*, Biuro Studiów i Ekspertyz, Lublin 18.12.2002, p. 6 (*Opinion on project of amendments of Penal Code*).

<sup>42</sup> M. Florczak-Wątor, art. 46, thesis 1, 2.1.

<sup>43</sup> Judgements of Constitutional Court from 29.6.2005 (SK 34/04, OTK-A 2005/6/69) and from 28.10.2015 (SK 59/13, OTK-A 2015/10/162).

<sup>44</sup> Judgment of European Court of Human Rights from 1.06.2007 in case 30810/03, *Geerings v. the Netherlands*.

<sup>45</sup> Judgements of Constitutional Court of 29.06.2005 (SK 34/04, OTK-A 2005/6/69) and 30.06.2008 (P 4/06, OTK-A 2008/5/76); see also: T. Sroka, art. 46, thesis 4-6, 40; W. Wróbel, p. 4-5.

<sup>46</sup> M. Florczak-Wątor, art. 46, thesis 3.1.

<sup>47</sup> C. Kulesza, P. Starzyński, *Powrót konfiskaty mienia?*, *Prokuratura i Prawo* 2008, No. 3, p. 41; M. Korzeniak, M. Szurman, p. 57, 64.

<sup>48</sup> J. Kochanowski, p. 2-3; K. Laskowska, p. 46-50; J. Raglewski, *Materialnoprawna*, p. 105-113.

<sup>49</sup> W. Wróbel, p. 4-6; M. Serafin, *Vermögensabschöpfung – zwischen Effektivität und Rechtsstaatlichkeit. Ein deutsch-polnischer Rechtsvergleich*, Berlin 2019, p. 245.

of trust of an individual in state and law, certainty as to what legal consequences may be associated with specific behaviour)<sup>50</sup>.

- Criminal law should react first when damage is already done and proven by procedural instruments at its disposal; **not be reaction to alleged damage**. Imposing penal instrument as a response to actual inability to prove origin of property components is unacceptable in light of basic assumptions of the **rule of law**<sup>51</sup>.
- The scope of assets covered by extended confiscation - and thus the severity of this measure - is not related to committed offence, but to financial situation of suspected (accused) person / the scope of owned property and to the chance of proving sources of its origin<sup>52</sup>.
- Extended confiscation affect (innocent) members of family of convicted person, resulting in conflict with principles of justice, individual criminal liability, humanitarian treatment<sup>53</sup>.
- Presumption that property of suspected (accused) person constitutes proceeds derived from criminal activity **without need to substantiate it** interferes too rigorously with **right to property**, is contrary to the principle of **material truth** (according to which decisions shall be based on factual findings) and to **presumption of innocence**<sup>54</sup> (resulting in obligation of authorities to prove guilt of accused and to adjudicate in his favour doubts that can't be removed in proceedings)<sup>55</sup>. However, in accordance with other view presented in literature:
  - presumption of illicit origin of suspected (accused) person's property doesn't make exception to presumption of innocence, as it refers to consequences of criminal offence, which don't have to be proved with the same accuracy as commission of act and guilt<sup>56</sup>.

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<sup>50</sup> M. Kowalewska-Lukuć, Konfiskata rozszerzona oraz przepadek przedsiębiorstwa – kilka refleksji po roku obowiązywania znowelizowanych przepisów Kodeksu karnego, *Palestra* 2019, No. 9, p. 43; J. Kluza, Krytyczna analiza nowelizacji dotyczącej konfiskaty rozszerzonej – omówienie zmian w obrębie kodeksu karnego i kodeksu postępowania karnego, *Zeszyty Naukowe Towarzystwa Doktorantów Uniwersytetu Jagiellońskiego, Nauki Społeczne* 2017, No. 2 (17), p. 105-106.

<sup>51</sup> Pismo Rzecznika Praw Obywatelskich do Ministra Sprawiedliwości, 6.7.2016 (*Letter of Polish Ombudsman to the Minister of Justice of 6.7.2016*), s. 15; W. Wróbel, p. 2.

<sup>52</sup> W. Wróbel, p. 12-13.

<sup>53</sup> I. Rzeplińska, *Polityka*, p. 157-158; Z. Sienkiewicz, Uwagi o regulacji przypadku przedmiotu przestępstwa i konfiskacie mienia w projekcie kodeksu karnego, [in:] Z. Sienkiewicz (ed.), *Wybrane zagadnienia reformy prawa karnego*, Wrocław 1997, p. 34-35; K. Polit, Przepadek korzyści majątkowych pochodzących z przestępstwa – odwrócony ciężar dowodu, *Prokuratura i Prawo* 2005, No. 7-8, p. 217.

<sup>54</sup> Article 42 sec. 3 of the Polish Constitution states that: *Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.*

<sup>55</sup> M. Kowalewska-Lukuć, p. 41; K. Polit, p. 225; ny non-conviction based confiscation: K. Trybek, *Konfiskata rozszerzona mienia pochodzącego z przestępstwa w prawie polskim oraz unijnym*, Warszawa 2020, p. 279-283.

<sup>56</sup> L. Tyszkiewicz, *Opinia dotycząca projektu nowelizacji art. 44 i 45 k.k. zlecona przez Podkomisję Nadzwyczajną d/s nowelizacji kodeksu karnego Sejmu z dnia 10.12.2002*, Biuro Studiów i Ekspertyz, 16.12.2002 (*Opinion on project of amendments of Penal Code*), p. 4-5; G. Arzt, *Ułatwienia dowodowe przy przypadku*, [in:] E. Pływaczewski (ed.), *Proceder prania brudnych pieniędzy. Studia i materiały*, Toruń 1993, p. 184.

- presumption of (illicit) origin of property should be analysed not in terms of compliance with a specific rule of law (e.g. presumption of innocence), but in context of all other evidence gathered in criminal proceedings<sup>57</sup>.
- Polish provision on extended confiscation would comply with presumption of innocence if, instead of reversed burden of proof, the ‘unless there is no other way to explain origin of the property’ clause was applied (*constitutes economic benefit derived at least indirectly from the crime, if there is no other way to explain origin of the property*)<sup>58</sup>.
- Economic advantage derived indirectly from criminal offence constitutes property acquired legally. Therefore, requirement of proving its legality is pointless<sup>59</sup>.
- Presumptions shall serve effective crime prevention<sup>60</sup>. If crime didn’t bring suspected (accused) person any economic benefits, ordering forfeiture is contrary to the purpose of this institution, which is to prevent the offender from getting rich as a result of crime<sup>61</sup>.
- There is no coherent, comprehensive system of disclosing and securing assets derived from criminal offences, ensuring efficient recovery of this property, in Poland. None of entities engaged in the process have complete and reliable data on its course and effectiveness<sup>62</sup>.

**RT 2: Is there any case-law in your EU Member State relating to confiscation (e.g. of constitutional court, court of appeals), which referred to / ordered / rejected (extended) confiscation or formulated additional criteria / conditions for its admissibility? What are those criteria? Are those criteria met in current extended confiscation regimes?**

There are few judgements referring explicitly to extended confiscation. There are, however, some general requirements referring to certain aspects of forfeiture (in general):

1. **Economic benefit from criminal offence** shall be understood as any addition to property or avoidance of property losses or encumbrances, to which there was no legal title, obtained by suspected (accused) person or by third party<sup>63</sup>, directly or indirectly as a result of

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<sup>57</sup> G. Arzt, p. 182-183.

<sup>58</sup> M. Siwek, p. 8. Similarly: J. Raglewski, *Materialnoprawna*, p. 80; A. Sakowicz, p. 14.

<sup>59</sup> M. Siwek, p. 13-14.

<sup>60</sup> A. Czwojda, *Przepadek korzyści majątkowej w polskim prawie karnym*, Wrocław 2018, p. 318; see also: Judgement of Polish Constitutional Court of 29.6.2005 (SK 34/04, OTK-A 2005/6/69).

<sup>61</sup> J. Kluza, *Krytyczna*, p. 105.

<sup>62</sup> Information on results of control of Polish Supreme Audit Office on recovery of property derived from crimes (the audited period: 2016-2018), Warszawa 2019, p. 10

<sup>63</sup> Article 115 § 4 of Polish Penal Code.

committing criminal offence<sup>64</sup>. Its equivalent-in-value is property, property right or amount of money adequate to the value of economic advantage derived from criminal offence<sup>65</sup>.

2. Forfeiture must be **ordered by court** and **preceded by evidence procedure** in which involvement in crime and guilt of the owner of forfeited property must be proven<sup>66</sup>.
3. Requirement to **precisely determinate** in judgement the object of forfeiture (form and size of proceeds or its equivalent-in-value, type of crime from which it derives)<sup>67</sup>.
4. Object of forfeiture **must exist at the moment of issuing judgement**. For this requirement speaks that judgment on forfeiture is constitutive and must refer to existing object, which changes its owner with validity of sentence. Lack of substrate for forfeiture at the time of its ordering causes impossibility of its application<sup>68</sup>. **Against** this requirement speaks *ratio legis* of forfeiture: suspected (accused) person should be deprived of economic advantage derived from criminal offence. It only matters what proceeds he effectively obtained and not how he dealt with it later<sup>69</sup>. Different concept could lead to unfounded rewarding of persons who, in order to avoid forfeiture, concealed or consumed proceeds of crime or allocated them to reduce or liquidate their liabilities – and result in inequality before the law<sup>70</sup>.
5. Inadmissibility of **specifying terms** of forfeiture (e.g. payment deadlines), since forfeited proceeds become property of State Treasury when the judgment becomes final<sup>71</sup>.

Compliance of court judgments with the above mentioned criteria is controlled within criminal proceedings by courts of higher instance, Supreme Court and Constitutional Court.

**RT 3: Is there any specific experience by practitioners in your EU Member State which created a special attitude to (extended) confiscation (e.g. organised crime, terrorism, drug crime, money laundering)? How did it influence the legislation (formulation of legal provisions of) (extended) confiscation?**

Confiscation of property **was eliminated** from Polish penal law in 1990<sup>72</sup>, due to its negative associations with totalitarian legal system in which this instrument was misused *i.a.* for political

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<sup>64</sup> Judgment of Court of Appeal in Warszawa from 20.11.2015, II AKa 274/15; Judgment of Supreme Court from 17.05.1972, III KR 67/72, OSNKW 1972/10/157.

<sup>65</sup> Order of Court of Appeal in Lublin from 29.6.2005 (II AKz 154/05, OSA 2005/12/82).

<sup>66</sup> Judgement of Polish Constitutional Court from 29.6.2005 (SK 34/04, OTK-A 2005/6/69), § 60.

<sup>67</sup> Judgment of Court of Appeal in Wrocław from 19.10.2016, II AKa 244/16.

<sup>68</sup> Judgment of Court of Appeal in Wrocław from 10.7.2013, II AKz 266/13.

<sup>69</sup> Judgement of Polish Supreme Court from 31.10.2017, V KK 189/17.

<sup>70</sup> Judgement of Polish Supreme Court from 12.4.2017 (V KK 387/16) and from 24.8.2016 (V KK 33/16); judgement of Court of Appeal in Wrocław of 22.1.2016, II AKa 330/15.

<sup>71</sup> Judgement of Polish Supreme Court from 23.5.2013, IV KK 56/13.

<sup>72</sup> By Law on amendment of Penal Code and other legal acts from 23.2.1990 (Journal of Laws 1990.14.84).

purposes. Dynamically growing profitable serious crime (e.g. organized crime) in 90's of XXth century **resulted in restoration of forfeiture** (of proceeds from criminal offence), but the use of concept of 'confiscation of property' in statute is still avoided<sup>73</sup>. Former misuse of the concept of confiscation resulted also in **constitutional regulation** limiting its application to constitutive court judgement based on statutory authorization to order forfeiture of property components ('things') in explicitly specified cases.

**RT 4: What is the legal nature of extensive confiscation in your EU Member State?**

- **Is extended confiscation in your EU Member State:**
  - **criminal sanction (accessory or principal criminal penalty)**
  - **preventive measure without nature of criminal sanction (security measure in broad sense, administrative measure adopted within or outside criminal proceedings)?**
  - **precautionary measure on suspect's assets (civil measure *in rem* or a kind of *ante delictum* criminal prevention measure)?**
  - **civil consequence of committing an offense, provided for by criminal law?**
  - **autonomous (*sui generis*) instrument of another kind (e.g. a measure aimed at neutralisation of criminal profit and at removal of illegal proceeds)?**

In literature three (or four) models of confiscation of property are distinguished:

- **1<sup>st</sup> model** based on **repressive criminal law**, where confiscation is sanction.
- **2<sup>nd</sup> model** based on **preventive police law**, where confiscation shall prevent future damage caused by or with property (when no unlawful act has yet been committed); preventive measures applied in appropriate manner don't amount to sanction.
- **3<sup>rd</sup> model** based on **civil law**, where confiscation is based on unjustified enrichment and attempts to re-establish the situation before crime was committed.
- **4<sup>th</sup> (additional) tax approach**, where suspected person is obliged to pay taxes on his gains (and authorities are not hampered by strict rules of proof); however it doesn't lead to full forfeiture of proceeds and some countries consider taxing criminal gains as controversial<sup>74</sup>.

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<sup>73</sup> K. Laskowska, p. 46–51; E. Pływaczewski, p. 469-470.

<sup>74</sup> J.P. Rui, U. Sieber, Non-Conviction-Based Confiscation in Europe. Bringing the Picture Together, [in:] J.P. Rui, U. Sieber, Non-Conviction-Based Confiscation in Europe, Berlin 2015, p. 249-255.

Extended confiscation (forfeiture of economic benefits derived from criminal offence) has – in Polish law – a form of:

1. **Criminal measure** – penal instrument of **preventive** and **repressive** character, based on conviction, ordered independently or ancillary to penalty, which, unlike penalty, is adapted to type of crime and cannot be converted at execution stage to penal instrument of different type. Forfeiture was classified as criminal measure in Penal Code until 30.6.2015 and then reclassified to instrument ‘similar to compensation measures’, but still subject to rules and directives of imposing penalty. In Fiscal Penal Code forfeiture is still classified as criminal measure. Significant ailment associated with its use speaks for its penal character (1<sup>st</sup> model)<sup>75</sup>, but reason given for its retroactive character (deprivation of economic resources constituting basis for criminal activities) speaks for its preventive character (2<sup>nd</sup> model)<sup>76</sup>.
2. **Instrument *sui generis*** – penal instrument based on conviction, but aimed at neutralisation (removal) of illegal proceeds (3<sup>rd</sup> model), regulated from 1.7.2015 in Penal Code, but still subject to rules and directives of imposing penalty (1<sup>st</sup> model).
3. **Preventive<sup>77</sup> or *quasi-preventive*<sup>78</sup> measure** – non-conviction-based instrument strongly marked preventive, aimed at neutralisation (removal) of illegal proceeds when conviction is not possible due to: negligible social harmfulness of an offence, commission of an offence in state of insanity, existence of circumstances excluding punishment, court decision on conditional discontinuation of proceedings (Penal Code) or death of suspected (accused) person, discontinuation of proceedings due to failure to identify offender or if proceedings are suspended because of illness or absconding of suspected (accused) person (Penal Code and Fiscal Penal Code). In such cases extended confiscation shall lead to mere re-establishment of situation before the offence took place (3<sup>rd</sup> model)<sup>79</sup>.
4. **Civil consequence** of committing an offense applied by **civil court** if benefit was obtained for committing act prohibited by statute or for fraudulent purpose<sup>80</sup>. If benefit was obtained from public institution, **criminal court** applying civil law provisions, shall oblige enriched person or entity to reimburse benefit (its equivalent-in-value) to entitled entity or order

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<sup>75</sup> M. Serafin, p. 242-246.

<sup>76</sup> Cf: Grounds for draft amendment to Penal Code (print No. 1186 from 2017, VIII Sejm’s term of office), p. 3, 6.

<sup>77</sup> Cf. K. Postulski, M. Siwek, *Przepadki w polskim prawie karnym*, Kraków 2004, p. 199-234; M. Serafin, p. 248-250; J. Raglewski, [in:] *System Prawa Karnego*, p. 791; W. Wróbel, p. 2.

<sup>78</sup> R. Stefański, [in:] R. Stefański (ed.), *Commentary to Penal Code*, Warszawa 2020, Article 45a, Nb. 1.

<sup>79</sup> Order of Supreme Court from 21.05.2004 (I KZP 6/04, OSNKW 2004/5/49); J. Karaźniewicz, *Orzekanie przypadku przedmiotów i korzyści majątkowej osiągniętej z popełnionego przestępstwa z postępowaniu karnym*, [in:] E. M. Guzik-Makaruk (ed.), *Przepadki przedmiotów i korzyści pochodzących z przestępstwa*, Warszawa 2012, p. 253.

<sup>80</sup> Article 412 of Civil Code.

forfeiture of benefit (its equivalent-in-value) to State Treasury. It shall be a result of simple obtaining economic benefit by that person or entity, without need to prove their guilt or awareness (3<sup>rd</sup> model)<sup>81</sup>.

5. **Freezing assets** – temporary measure supporting (conviction-based and non-conviction-based) confiscation regulations by securing their execution, where there is justified concern that without such security execution of forfeiture be impossible or significantly impeded<sup>82</sup>.

**Is there only one type of extended confiscation or are there in fact several different instruments with a common name?**

Extended confiscation, understood as forfeiture of economic benefits derived from criminal offence based on shifting burden of proof of (non-criminal) origin of property to its (presumed) owner<sup>83</sup>:

- can be based on conviction or not,
- can refer to (presumed) proceeds from certain criminal act or of ‘criminal activity’ in a more general manner – especially in its retroactive version,
- can refer to property of suspected (accused) person or of third party.

Therefore it may be assumed that in Polish law there are in fact **several instruments with different nature** that can be referred to by a **common name of ‘extended confiscation’**.

**Does a non-conviction-based confiscation exist in your EU Member State?**

Yes, see above: Introductory question II.2.

**Is the proof of guilt of the offender required to apply extended confiscation?**

Proof of guilt is required by conviction-based (extended) confiscation. Then it refers only to criminal offence which is the ‘trigger’ for application of (retroactive) confiscation.

**Is reversed burden of proof applied by extended confiscation?**

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<sup>81</sup> Article 91a of Code of Penal Procedure, Article 24 of Fiscal Penal Code; M. Serafin, Vermögenabschöpfung – zwischen Effektivität und Rechtsstaatlichkeit. Ein deutsch-polnischer Rechtsvergleich, Berlin 2019, p. 250-251; J. Zagrodnik, [in:] K. Marszał, J. Zagrodnik, Proces karny, Warszawa 2017, p. 212; J. Kluza, Procesowe aspekty orzekania konfiskaty rozszerzonej, Studia Prawne i Administracyjne 2018, No. 1 p. 9.

<sup>82</sup> Article 291 of Code of Penal Procedure.

<sup>83</sup> Cf: Grounds for draft amendment to Penal Code (print No. 1186 from 2017, VIII Sejm’s term of office), p. 6.

Reversed burden of proof, shifted from authorities to (presumed) owner of property, based on rebuttable presumption of illicit origin of that property, is seen as immanent part of the structure of extended confiscation<sup>84</sup>.

**Are there other rules / lowered standards of evidence relating to extended confiscation?**

- Confiscation **from third party** is based on a concept of **relative** (applicable only in criminal proceedings) **legal ineffectiveness** of transfer of proceeds by suspected (accused) person to third party. If property recognized as proceeds from one of criminal offences listed in statute has been transferred to another legal subject, it is assumed that property possessed by that subject and property rights that subject is entitled to, still belong to suspected (accused) person. Reversed burden of proof (existing from 1.7.2003) was replaced (on 1.7.2015) by requirement to verify whether circumstances of acquisition of property could have given rise to assumption that it has been (in)directly obtained from criminal offence.
- Another lowered standard of evidence is associated with **retroactive confiscation**: in case of committing one of criminal offences listed in statute, there is a rebuttable presumption that **any** property that suspected (accused) person took possession of, or acquired entitlement to, within 5 years before committing a criminal offence until passing of a non-final sentence, constitutes proceeds from criminal offence.
- By execution of forfeiture of economic benefits derived from criminal offence (or its equivalent-in-value) it is presumed that things and property rights that are in possession of convicted person after judgement, **belonged to him already at the time of issuing the judgment**<sup>85</sup>. **Excluding** at this stage **time limits related to presumptions** shall be justified by the fact that the purpose of freezing and enforcement proceedings, is to take away any assets constituting (equivalent-in-value of) proceeds of crime. Third party may use judicial remedies to exclude his unjustly seized property from execution<sup>86</sup>.

**RT 5: What are legal instruments for protection of individual rights in your EU Member State at each stage of confiscation procedure / in substantive legal basis for adjudication? Are they considered as sufficient to protect individual rights and freedoms?**

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<sup>84</sup> Cf: Grounds for draft amendment to Penal Code (print No. 1186 from 2017, VIII Sejm's term of office), p. 6.

<sup>85</sup> Article 29 § 1 of Executive Penal Code.

<sup>86</sup> M. Siwek, p. 9.



**Suspected (accused) person:** In criminal proceedings suspected (accused) person has right to defence, including right to be assisted by a defence counsel:

→ about which he should be informed,

→ if he has no defence counsel, public defence counsel shall be appointed to participate in proceedings (also in forfeiture proceedings if criminal proceedings is suspended)<sup>87</sup>;

At the stage of **gathering evidence:**

- for the purpose of revealing property at risk of forfeiture of proceeds derived from criminal offence **surveillance and recording of content** of telephone conversations (and other information transmissions, including e-mail correspondence) is allowed<sup>88</sup>. Decision on that matter may be contested. By its challenging, a person to whom it relates may demand control of validity and legality of surveillance and recording<sup>89</sup>.
- suspected (accused) or other person may **present evidence to rebut presumption** of illicit origin of property components acquired by suspected (accused) person within 5 years before commission of criminal offence resulting in achieving economic advantage of substantial value to the moment of passing sentence.

By **securing (freezing) of assets:**

- execution of forfeiture of proceeds derived from criminal offence may be secured *ex officio* on property of suspected (accused) person or of third party, if there is justified concern that without such security execution of ruling on forfeiture will be impossible or significantly impeded<sup>90</sup>. Decision on securing of assets may be contested.

In case of **conviction** or **suspending** or **discontinuation of criminal proceedings:**

- court may decide on forfeiture only in cases specified in statute and only on basis of final court decision<sup>91</sup>. Decision on forfeiture may be contested.

By **execution** of forfeiture:

- decision on forfeiture may be contested.

**Third party**, whose property is object of forfeiture **is neither a party** in criminal proceedings, **nor has rights of a party**; he may take part in criminal proceedings, but to limited extent:

- in **preparatory proceedings** he can challenge provisions, orders and activities that infringe his rights<sup>92</sup>.

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<sup>87</sup> Article 22 § 4-5 and Article 340 § 2-3 of Code of Penal Procedure.

<sup>88</sup> Article 237 § 3a and Article 241 of Code of Penal Procedure.

<sup>89</sup> Article 240 and Article 241 of Code of Penal Procedure.

<sup>90</sup> Article 291 §1 and 2 of Code of Penal Procedure; Article 180a of Fiscal Penal Code.

<sup>91</sup> Article 340 § 2-3 & Article 414 § 3 of Code of Penal Procedure.

<sup>92</sup> Article 302 § 1-3 of Code of Criminal Procedure

- he **may submit requests** for performance of activities that authorities may or are obliged to undertake *ex officio*<sup>93</sup>.
- he may **appoint an attorney at law** if it is required by his interests in criminal proceedings. However, court (in preparatory proceedings – public prosecutor) may refuse to admit an attorney at law to participate in proceedings, if it considers that it is not required to defend the interests of a person who is not a party<sup>94</sup>.
- he may **indicate that** on basis of circumstances accompanying acquisition of his property components from suspected (accused) person, it could not have been assumed that they, even indirectly, came from a prohibited act.
- he may apply for **exclusion from forfeiture** assets, the total value of which (estimated by enforcement authority) doesn't exceed his average six-month income.
- he may institute proceedings against State Treasury in order to determine that his property shall **not be subject to forfeiture** (or freezing of assets); until final resolution, enforcement proceedings shall be suspended<sup>95</sup>.

**Owner of enterprise** threatened with forfeiture has **rights of a party** in procedural steps relating to this measure<sup>96</sup>. However, the lack of a mechanism that would make the granted rights real, such as informing the person concerned about their rights, is indicated in literature<sup>97</sup>.

**Entity enriched** as a result of crime has **a status of a witness**; its representative can refuse to testify.

What refers to opinion whether legal instruments for protection of individual rights in Poland can be considered as sufficient to protect individual rights and freedoms – see: RT6. In general it shall be appointed that subject other than suspected (accused) person, whose property is at risk of forfeiture most often don't have rights of a party in criminal proceedings (e.g. third person), what may negatively influence their status in that proceedings and constitute a breach of EU law in accordance with CJEU judgment of 21.10.2021 in joined cases C-845/19 and C-863/19. Suspected (accused) person enjoys, in the criminal proceedings, procedural rights of a party (including rights to defence and to challenge court orders), but in extent limited by the structure and character of extended confiscation (e.g. by legal presumptions of illicit origin of

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<sup>93</sup> Article 9 § 3 of Code of Penal Procedure.

<sup>94</sup> Article 87 § 2-3 of Code of Penal Procedure

<sup>95</sup> Article 29 § 2-3 & Article 29b of Execution Penal Code; Article 293 § 7 of Code of Penal Procedure, Article 33 § 4 of Fiscal Penal Code.

<sup>96</sup> Article 91b of Code of Penal Procedure.

<sup>97</sup> J. Zagrodnik, [in:] K. Marszał, J. Zagrodnik, *Proces karny*, Warszawa 2017, p. 216-217.

his property and reversed burden of proof in that matter), which is questioned and criticized in literature – see: RT 1.2 *in fine*.

**RT 6: Does – in your opinion based on answers of the above mentioned questions / other data / jurisdiction or literature in your EU Member States – extended confiscation comply with the principles of / the right to:**

- **legality?** **No**, extended confiscation creates *de facto* a new type of crime: simple possession of proceeds derived from criminal offence with significantly lowered standard of evidence.
- **legal specificity of statute?** **It depends** on specific regulation. E.g. Article 46 of Polish Constitution requires that forfeiture refers to ‘things’, not the whole property of suspected (accused) person, but provisions of Penal Code refer to forfeiture of ‘property’ (in general).
- **proportionality?** **No**, it might be proportional e.g. **if** extended confiscation referred only to specified groups of serious crimes (e.g. organized crimes). Mandatory forfeiture of (all) property of suspected (accused) person acquired in certain person if he cannot succeed in proving its legal origin, by every criminal offence punishable by a custodial sentence of a maximum of at least 5 years (like in Polish law) may formally be in accordance with Article 5 of Directive 2014/42/EU, but doesn’t leave court enough indispensable space to decide on proportionality of forfeiture in concrete cases.
- **non-retroactivity of /more severe/ statute?** **No**, extended confiscation shall not be applied to acts committed prior to entry into force of relevant provisions<sup>98</sup>. In Polish law provisions on extended confiscation apply to acts committed before their entry into force (27.4.2017). Regulation stipulating that, in case of change of statute between commission of the act and adjudication in case, the law more favourable to accused shall be applied, was excluded<sup>99</sup>.
- **protection of citizen's trust in state and law?** **No**, trust is an effect of complying of provisions on extended confiscation with other rules of law / legal principles.
- **private property?** **No**, but in certain cases (e.g. due to character of most severe crimes of transnational character) it may be justified.
- **defence?** **Yes** by suspected (accused) person participating in criminal proceedings, **if** he has formal right (and factual possibility) to be assisted by a defence counsel. However, the exercise of right to defence can be questioned if extended confiscation is applied in the same proceeding in which guilt of suspected (accused) person is stated. **No** by third party

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<sup>98</sup> See: Judgement from 9.2.1995 of European Court of Justice in case No. 17440/90, *Welch v. the United Kingdom*.

<sup>99</sup> Article 4 § 1 of Penal Code excluded by Article 23 of Law from 23.3.2017 on Amendment of Penal Code and some other acts.

whose property may be forfeited, due to (existing in Polish law) limits of his participation in proceedings to dispersed rights, the exercise of which may be at discretion of prosecutor (e.g. by appointing attorney at law). **No** in case of ordering forfeiture without establishing who suspected person is, in case of his absconding or death<sup>100</sup>. The mentioned insufficient guarantee of right to defence may constitute, in accordance with CJEU judgment of 21.10.2021 in joined cases C-845/19 and C-863/19, a breach of EU law.

- **to fair trial? It depends** on specific regulations (legal aspect) and circumstances of individual case (factual aspect); and is an effect of more complex approach to various aspect of criminal proceedings.
- **presumption of innocence? No** (also by more specific aspects of that principle, e.g. *in dubio pro reo* principle), but it may be **justified** in certain cases (e.g. by most severe crimes of transnational character); however, such regulation still shall be treated as **exception** from (the principle of) presumption of innocence and refer to situation when it is highly probable (on basis of evidence proceedings carried out by authorities) that certain components of property of suspected (accused) person come from criminal activity.
- **right to privacy? No**, but in certain cases it may be seen as justified (e.g. by most severe crimes of transnational character).
- **other relevant rights / principles? Yes**, questioned may be:
  - principle of humanitarian treatment: in relation to innocent third parties (e.g. convict's child, who in case of forfeiture of house perceived as proceeds of crime would be homeless) vs. problem of equal treatment of parents and childless convicts in criminal proceedings;
  - prohibition of double-jeopardy (if certain property component has already been subject to verification in terms of its origin in criminal / other proceedings) and double sanctioning (in case of cumulation of administrative e.g. tax and criminal sanction relating to the same act or economic advantage derived from it);
  - principle of ordering instrument of repressive nature as last resort (forfeiture of property components whose connection with criminal activity has not been positively proven, but its non-criminal origin has also not been sufficiently substantiated; without requirement put on authorities to try to explain the origin of property components in question)<sup>101</sup>.

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<sup>100</sup> Cf. J. Wawrzyniak-Zaczyńska, Konstrukcja podmiotu obowiązującego do zwrotu korzyści majątkowej w świetle przepisów ustawy z 23.03.2017 r. o zmianie ustawy Kodeks karny i innych ustaw, *Palestra* 2018, No. 1–2, p. 75-76, J. Kluza, Procesowe aspekty orzekania konfiskaty rozszerzonej, *Studia Prawne i Administracyjne* 2018, No. 1 p. 8-10.

<sup>101</sup> See: proposition of the 'unless there is no other way to explain origin of the property' clause, presented in Polish literature e.g. by M. Siwek (p. 8), J. Raglewski (*Materialnoprawna*, p. 80) and A. Sakowicz (p. 14).