

Country Report – Croatia

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Part A

– Analysis by each Member of the Research Team of the legal order of their EU Member State

<p>Introductory question: How is the extended confiscation understood in legal order of your EU Member State?</p>
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Extended confiscation is regulated with Article 78 of the Croatian Criminal Code in following: If the perpetrator of a criminal offence under jurisdiction of the Office for the Suppression of Corruption and Organised Crime, as well as criminal offences of sexual abuse and sexual exploitation of children (Title XVII) and criminal offences against computer systems, programmes and data (Title XXV) owns or owned property that is disproportionate with his or her legitimate income and unless he or she makes it probable that the property is of legitimate origin, it is presumed that such property constitutes a proceeds of crime (Article 78 Para 2).

If the proceeds from a criminal offence have been merged into legitimately acquired property, the entire property shall be subject to confiscation up to the estimated value of the proceeds of crime. The material gain acquired from property in which the legitimately acquired property was merged with the proceeds of crime shall also be confiscated in the same manner and in the same ratio (Article 78 Para 3).

The proceeds of crime referred to in paragraphs 2 and 3 of Article 78 shall be confiscated from a family member irrespective of the legal basis on which he or she possesses it and regardless of whether he or she lives in a shared household with the perpetrator. The proceeds of crime referred to in paragraphs 2 and 3 of Article 78 shall be confiscated from another person irrespective of the legal basis on which it was acquired unless this person makes it

probable that he or she acquired the advantage in good faith and at a reasonable price. If a person against whom criminal proceedings have been instituted dies, the proceeds of unlawful conduct may be confiscated from his or her successors in proceedings prescribed by a special act (Article 78 Para 4-6).

Conditions for and manner of confiscation of proceeds of crime are set out in Article 77 of the Croatian Criminal Code. Proceeds of crime shall be confiscated on the basis of a court decision establishing the commission of an unlawful act. Proceeds of crime shall also be confiscated from the person to whom it was transferred if it was not acquired in good faith. If the injured party has been awarded a material claim which by its nature and contents corresponds to the acquired proceeds of crime, the part of proceeds of crime exceeding the awarded material claim shall be confiscated. The court shall confiscate the proceeds of crime also in cases where it has instructed the injured party to assert his or her material claim in a civil action. Where it has been established that confiscation in full or in part of objects or rights acquired as proceeds of crime is impossible, the court shall order the perpetrator to pay the corresponding money equivalent. It may be ordered that payment be made in instalments. The confiscated proceeds of crime shall not be reduced by the value of resources invested in the criminal activity. The court may decide against the confiscation of proceeds of crime if its value is negligible.

So, there are three varieties of extended confiscation in Croatia: **conviction-based confiscation**, **non-conviction-based confiscation** (if accused was found mental incapable at the time of commission of the offence) and finally, **confiscation from the third party**.

In addition, Article 117 of the Croatian General Tax Act provides that the tax supervision can be performed in the procedures of determining the difference between the acquired property and the proven funds for the acquisition of that property according to the regulations on income tax. Income tax on other income¹ shall be calculated by the Tax Administration at the rate of 30%. The previously calculated income tax shall be increased by 100%.²

¹ Other income is considered to be the income determined as the difference between the value of acquired property and significant expenditures made especially for luxury, entertainment and leisure on the one hand (hereinafter: acquired property) and the proven amount of funds for its acquisition and acquisition of these expenses on the other according to Article 76 of the Income Tax Act.

² Article 78 of the Income Tax Act.

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

- before the transposition of Directive 2014/42/EU (if compensation regulation existed)?

The provisions on extended confiscation have been introduced into Croatian Criminal Code for the first time in 2006 by amending Article 82 with paragraph 2.³ The notion of proceeds of crime included now the benefit acquired by a group of people or a criminal organization which is temporally related to the crime committed and for which it can reasonably be considered to have originated from that crime because its lawful origin cannot be determined. The reasons for introduction of the new provision were explained as more effective combating organized crime and complying with European standards.⁴

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

The amendment was considered as *lex incerta* for at least three reasons: it was unclear whether the confiscation is limited only to the proceeds originating from the particular criminal offence or further criminal offences may be included; the provision implied that extended proceeds was acquired by a group of people or a criminal organization which was practically difficult to implement and it was unclear must the perpetrator be a part of group or criminal organization.⁵ In 2008 (OG 152/2008) the provision was changed as following: If a criminal offence under the jurisdiction of the Office for the Suppression of Corruption and Organized Crime is committed, it is presumed that the perpetrator's total property was acquired as proceeds from the criminal offence unless the perpetrator makes it probable that

³ Hrupec, M., Oduzimanje i prošireno oduzimanje imovinske koristi stečene kaznenim djelom, Master's thesis, Faculty of Law – University of Zagreb, Zagreb, 2019, p. 3.

⁴ Bojanić, I., Promjene u općem dijelu Kaznenog zakona prema Prijedlogu zakona o izmjenama i dopunama Kaznenog zakona iz 2005. godine, Croatian Annual of Criminal Sciences and Practice, Zagreb, vol. 12, 2/2005, p. 338.

⁵ *Ibid.*

its origin is legal. The significant improvement of the provision was made in adoption of new Criminal Code in 2011 (OG 125/11).⁶

- in the transposition procedure into the internal domestic law ?

In 2015 only the title of the provision was changed (instead of Confiscation of proceeds of crime under the jurisdiction of the Office for the Suppression of Corruption and Organised Crime, it became Extended confiscation of proceeds) and besides the offences under jurisdiction of the Office for the Suppression of Corruption and Organised Crime, now the criminal offences of sexual abuse and sexual exploitation of children (Title XVII) and criminal offences against computer systems, programmes and data (Title XXV) were included.

Directive 2014/42/EU is implemented in Croatian legal system within amendments of the Criminal Procedure Act in July 2017 (OG 70/17). There was an obligation to include provisions which regulate better and in more detail the confiscation of property gain on the basis of a conviction and without a conviction according to Art. 4 of the Directive, temporary measures of confiscation of property gain according to Art. 7 of the Directive as well as protective measures to ensure the protection of the rights of defendants and other persons and their active participation in the proceedings under Art. 8 of the Directive.⁷

• **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 (extended) confiscation?
- applied do (extended) confiscation?
- rejected the (extended) confiscation?
- formulate any additional criteria / conditions for the admissibility of (extended) confiscation? What are those criteria? Are those criteria are met in the current extended confiscation regimes?

⁶ The text is in the answer to the previous question.

⁷ Marušić, V., Vučko, M., Kuštan, M., Oduzimanje imovinske koristi i privremene mjere osiguranja s posebnim osvrtom na trajanje mjera i poteškoće u praksi, Croatian Annual of Criminal Sciences and Practice, Zagreb, vol. 27, 2/2020, p. 474.

There has long been controversy over the application of the gross and net principles in determining the value of proceeds of crime. With the Criminal Code from 2011, the legislator opted for the gross principle in Art. 77 Para. 5 explicitly prescribing that the confiscated property gain is not reduced by the amount of funds invested in criminal activity. This was confirmed by the Croatian Supreme Court I Kž 321 / 2014-6, October 16, 2018.⁸

Article 559 of the Criminal Procedure Act provides obligation of the court to determine the amount of the acquired gain of an individual participant at its own discretion, taking into account for each individual his / her role in obtaining gain and all the circumstances of his / her participation in its acquisition and distribution. According to the decision of the Croatian Supreme Court, Kž-941/10, data and indications must exist even during this difficult assessment. Solidarity confiscation of proceeds is prohibited because it would punish one perpetrator, while the restorative character of all others would be excluded.⁹

If the value of the perpetrator's proceeds of crime has been increased from the moment of acquisition, such increase in value shall also be taken into account within the confiscation (Croatian Supreme Court, KZZ-14/92 and I Kž-138/93). However, if there has been a decrease in the value of the proceeds in any way, it should not be taken into account (Kž-527/09, September 3, 2009).¹⁰

According to Article 557.b Para 1 Criminal Procedure Act, in the procedure of insurance within a interim measure, it is presumed that there is a danger that the claim of the Republic of Croatia regarding confiscation of property gain through illegal action will not be realized or that its realization will be difficult if the interim measure is not imposed. By prescribing a legal presumption of the existence of a danger that the claim of the Republic of Croatia will not be realized, i.e. that its realization would be significantly more difficult if no interim measure is imposed, the burden of proof is shifted to the opponent.¹¹ The decision of the Croatian Supreme Court I Kž-U 141 / 16-3 of November 22, 2016 clarified that the court does not have to justify the danger that the claim of the Republic of Croatia will not be

⁸ *Ibid.*, p. 478.

⁹ *Idem.*

¹⁰ *Idem.*

¹¹ *Ibid.*, p. 481.

realized or that its realization will be difficult if a interim measure is not imposed.¹² The irrefutability of that presumption was also confirmed by the decision of the Croatian Supreme Court Kž 324 / 2018-6, November 14, 2018.

The court shall *ex offio* examine at least every three months whether the legal conditions for maintaining the interim insurance measure in force still exist. The stated period of three months is not preclusive, but it is a term of instructive character, so its expiration does not lead to the automatic termination of the interim measure (Croatian Supreme Court, I Kž 66/2020-4, February 12, 2020).¹³ The measure shall be revoked if the court finds that it is no longer necessary, if the purpose of the insurance can be achieved by a less invasive measure and at the proposal of the authorized prosecutor (Art. 557e Para. 4), or if the defendant, another person on whom the beneficiary is transferred or a third party lodges bail (Art. 557e Para. 2).¹⁴

In a recent case law, we find solutions in which, regardless of the fact that the formal deadline of two years from the date of imposition of interim measures has expired, if the measures are in force at the time of confirmation of the indictment and if there are conditions, they will remain in force (County court, Kv-I-Us-79/2021, County court, K-Us – 46 / 2017).¹⁵ According to the court, at that stage of the proceedings the provision of Art. 557e Para. 2, which prescribes a legal deadline of two years for the duration of a interim measure to ensure the confiscation of proceeds from its determination until the confirmation of the indictment, cannot be applied retroactively. This deadline applies only to the stage of the proceedings until the indictment is confirmed. Once the indictment has been confirmed, the proceeding is at the stage where the re-examination is also allowed of whether there are still legal conditions, i.e. substantive legal preconditions, for further application of interim measures, as well as for their re-imposition if they were abolished due to the expiration of the deadline. Therefore, due to the expiration of the two-year deadline, it is no longer possible to abolish this measure as a formal reason.¹⁶

¹² *Idem.*

¹³ *Ibid.*, p. 484.

¹⁴ *Idem.*

¹⁵ *Ibid.*, p. 485.

¹⁶ *Idem.*

In one case, after the suspension of the interim insurance measure due to the expiration of a period of two years, the State Attorney proposed re-imposition after the confirmation of the indictment. In that case, the first-instance court accepted the motion and again ordered the same measures, and the Supreme Court of the Republic of Croatia upheld the said decision. The confirmation of the indictment subsequently dropped the reason why the interim measures were revoked, and there were reasons for re-imposing them (Croatian Supreme Court, Kž-Us-160/14-3, 2014). An interim measure imposed before the initiation of criminal proceedings and revoked due to the expiration of the time limit does not eliminate the possibility of re-imposing it after the confirmation of the indictment (Croatian Supreme Court, Kž-34/15-3, 2015).¹⁷

Ensuring the confiscation of proceeds and ensuring the realization of a property claim are different measures. The property claim has priority over the confiscation of proceeds, and in that way, the interim measures to ensure the realization of property claim have priority over the insurance of proceeds (Croatian Supreme court, Kž- 606/12-4, September 26, 2020).¹⁸

• **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?

Most prominent cases of extended confiscation in Croatia include politicians in corruption affairs. One of the latest is the case against Nadan Vidošević and others¹⁹ in the *Remorker affair* for the commission of abuse of position and authority and aiding in the abuse of position and authority. When an investigation was launched against him in 2013, a financial and accounting expertise was made, during which experts determined that the disparity between the income and expenses of Vidošević and his family amounted to HRK 33.4 million. Based on that, the trial later showed, a very dubious financial and accounting

¹⁷ *Ibid.*, p. 488.

¹⁸ *Ibid.*, p. 488.

¹⁹ Politician and businessman.

expertise, Office for Suppression of Corruption and Organized Crime requested an extended confiscation of property, believing that Vidošević cannot prove that he acquired the 33.4 million HRK in a legal way. But during the trial, it turned out that the experts did not take much into account when making the findings. Vidošević's income did not include the sums he received as a member of various supervisory boards and assemblies. His income did not include the payment of shares in the profit, nor the money he received from renting his real estate. On the other hand, the experts included some parts of Vidošević's property in the table of values two or three times. However, this calculation began to fall apart like a tower of cards when Vidošević submitted various documents to the court, on the basis of which he has reduced the disparity in revenues and expenditures to HRK 9.2 million. In other words, out of the incriminated HRK 33.4 million, Vidošević has managed to prove that he legally acquired HRK 24.2 million. And as it went, it was likely that the disparity would be further reduced by further expertise. Well, OSCOC has no choice but to drop the request for extended confiscation of property. On the other hand, Vidošević's case pointed to a problem that is becoming more frequent, and these are the findings of financial and accounting expertise. It often happens, especially in high-profile VIP trials, that the prosecution has an expert report at the beginning of the investigation in which the damage or gain is measured in hundreds of millions of kunas, and then the same expert reduces the sum. Whether this discrepancy is due to outdated calculation methods or another reason is a question that the profession should seriously address.²⁰

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

- Is extended confiscation in your EU Member State:
 - a criminal sanction (accessory or principal criminal penalty)?
 - a preventive measure without the nature of criminal sanction (security measure in a broad sense, administrative measure adopted within or outside criminal proceedings)?

²⁰ Jakelić, I., Afera HKG – REMORKER, USKOK činjenični opis Vidoševićeve optužnice prilagodio dokazima, available at: <https://www.vecernji.hr/vijesti/uskok-cinjenicni-opis-vidoseviceve-optuznice-prilagodio-izvedenim-dokazima-1541657> (February 17, 2022).

- a precautionary measure on a suspect's assets (civil measure *in rem* or a kind of *ante delictum* criminal prevention measure)?
- a civil consequence of committing an offense, provided for by criminal law?
- an autonomous (*sui generis*) instrument of another kind (e.g. a measure aiming at neutralisation of criminal profit and at the removal of illegal proceed)?
- Is there only one type of extended confiscation or are there in fact several different instruments with a common name?
- Does a non-conviction-confiscation exist in your EU Member State?
- Is the proof of guilt of the offender required to apply extensive confiscation?
- Is a reversed burden of proof applied by extended confiscation?
- Are there any other evidence rules / lowered standards of evidence relating to extended confiscation?

Extended confiscation is *sui generis* institute. This is stipulated also in the decision of the Croatian Supreme Court (I Kž 98/2016-4, March 8, 2016). But, until 2011 it was considered as one of the security measures (Croatian Supreme Court, I Kž 1150/04-6, March 15, 2005). Since it refers to a specific property and not *ad personam*, and is imposed independently of guilt, it is a measure *in rem* (Croatian Supreme Court, I Kž 378/2006-6, April 8, 2009). It is of restorative character because it prevents enrichment by committing a criminal offence and seeks to restore the situation before the commission of the criminal offence. However, a certain amount of punitive character observed in this measure cannot be ignored, although confiscation of property is not considered a criminal sanction.

There is one type of extended confiscation but proceeds may be confiscated from different persons (perpetrator of specific offences, a family member or another person, successors of the person against whom criminal proceedings have been instituted (and who died)) and may concern legitimately acquired property.

Conviction is not precondition for extended confiscation. Namely, it can be concluded from Article 77 prescribing that proceeds of crime shall be confiscated on the basis of a court decision establishing the commission of an unlawful act. Additional qualification of conviction is not required. Proceeds acquired by criminal offence shall be confiscated from the perpetrator who has been convicted by a court decision of committing a criminal offence, or who has been found to have committed an unlawful act which is the subject of the charge,

or certain third parties who have acquired such proceeds. But, if the accused perpetrator or perpetrators are acquitted, or the offence is statute – barred, no extended confiscation can be imposed.

Yes, a reversed burden of proof is applied by extended confiscation. Namely, in case that a perpetrator owns or owned property that is disproportionate with his or her legitimate income there is a legal presumption that such property constitutes proceeds of crime. The perpetrator is the one who makes it probable that the property is of legitimate origin.

Besides a reversed burden of proof, there is a certain reduction in the standard of proof also for the purpose of easier confiscation. Namely, the obligation of the state attorney is to bring the fact of disproportion of property and income only to the level of probability (existence of grounds for suspicion). In decision of the Croatian Supreme Court I Kž Us 66/13-3, October 23, 2013 court “demanded” existence of at least two indications that would suggest disproportion of property and income.

• **RT 5:** What are the legal instruments for the protection of individual rights in your EU Member State

- at each stage of the confiscation procedure?
- in the substantive legal basis for adjudication?

Are considered as sufficient to protect individual rights and freedoms?

The guarantees for the protection of individual human rights are based in the fact that only a court may impose decisions concerning temporary or definite restriction of property rights and the right to appeal is guaranteed.

The reasons for prescribing a maximum term of two years of the interim insurance measure until the indictment is confirmed are found in the fact that interim measures of longer duration can significantly limit the constitutional rights, i.e. business and existence of a certain person. However, these measures are necessary to protect the entire legal order in the eyes of the public and as measures of special and general prevention. By careful determination, based on

the principle of proportionality, and considering all the circumstances of the case, they do not constitute an intrusion into the rights of the defendant and third parties who gained property in lack of good faith because they are prevented from disposing of what they should not have. Of course, ensuring the principles of equality of arms and justice and the presumption of innocence should always be the first and foremost aspiration. However, after analyzing the practical application of this institute, it can be noticed that the stated deadline, especially in cases under the jurisdiction of the Office for Suppression of Corruption and Organised Crime (OSCOC cases), is too short. In complex OSCOC cases, where investigations often take a maximum of a year and a half, experience has shown that the two-year deadline is too short.

In such cases, in which after the finalization of the investigation (which lasted a maximum of one year and half) an indictment was filed, but it was not confirmed in the remaining six months of the maximum prescribed period (no indictment panel has been scheduled, illegal evidence has been decided and the case is on appeal in a higher court, the indictment has been returned for revision, etc.) it comes to the expiration of the maximum duration of interim measures of two years from Art. 557e Para. 2 Criminal Procedure Act, which leads to their repeal. In cases where the indictment has not been confirmed within two years, a situation arises where, if the court issues a final conviction, and imposes the measure of confiscation of proceeds, that proceeds cannot be confiscated given that there is no insurance. After the confirmation of the indictment, the prosecutor may again propose the imposition of interim measures, but the time from the abolition of interim measures to the confirmation of the indictment is used by the defendants to dispose of property that could serve as insurance. As a result, the conduct of property surveys loses its purpose and the principle that no one can keep the proceeds of crime remains just a dead letter on paper.

In 2018, only in four OSCOC cases, 16 temporary measures to ensure the confiscation of proceeds were abolished and the property total value of about 50 million HRK was unblocked, and it is expected that this trend will continue. The expected continuation of the further abolition of interim insurance measures followed in the following year. In 2019, in four cases even more interim insurance measures, as many as 30 were abolished (the value of unblocked assets amounted to around HRK 43.3 million).

However, in practice there are criminal cases in which a decade or more has passed since the indictment was confirmed, without a final verdict, and that the interim measures are still in

force. In these proceedings, the interim measures were imposed until the final conviction or acquittal or the indictments were confirmed within two years, so that the conditions for the duration of the interim measures were met. Regardless of the long period of time in which the property was frozen, it has not been determined in those cases the existence of disproportionate and pointless restrictions on property rights, as confirmed by the Supreme Court (I Kž 196/2019-4, January 18, 2019).

• **RT 6:** Does – in your opinion based on the answer of the above mentioned questions / the literature in your EU Member States – extended confiscation comply with the principles of:

- legality?
- legal specificity of a statute?
- proportionality?
- non-retroactivity of the /more severe/ statute?
- protection of the citizen's trust in the state and law?
- the right to private property?
- the rights to defence?
- the rights to a fair trial?
- the presumption of innocence?
- the right to privacy?
- and others relevant rights – what sort of?

Croatian legal provisions concerning the extended confiscation comply with the above referred principles, but their implementation in practice can lead to violations as in the following case.

In the case of *Džinić v. Croatia* (Application no. 38359/13) of 17 May 2016, a violation of Art. 1 Para. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, violation of the right to peaceful enjoyment of possessions was established. In the *Džinić* case the applicant complained that the blockade of his real estate

was not proportionate to the circumstances of the case because the property exceeded the amount of the unlawful gain he had allegedly acquired. In the Court's view, the interim measures blocking the property were lawful and had a legitimate aim. But, even when interference with one's property rights is in accordance with the law and in the public interest, there must be proportionality between certain measures applied by the state and the aim pursued by determining such measure that wants to be achieved. This relationship between the protection of the rights of the individual and the requirements of the general interest is called "fair balance". There was no clear indication of the value of the property in the specific case, because no assessment was made of the proportionality between the value of the frozen property and the acquired property gain. This imposed an excessive burden on the applicant due to his inability of disposition of his property and failure to provide procedural guarantees that would prevent arbitrary and unpredictable impact on his property rights. The "fair balance", i.e. the proportionality between the means used and the goal, has been violated.

Part B – Common / Comprehensive Analysis of the Research Team on the basis of the outcomes of Part A

- **RT 7:** How does the extended confiscation relate to the fundamental rights and general principles of EU law guaranteed by the Charter of Fundamental Rights and constitutional orders of EU Member States?
- **RT 8:** What are the limits of acceptable (not infringing on their essence) interference of instruments of crime prevention like extended confiscation with fundamental rights and general principles of EU law and constitutional orders of EU Member States?