

## Current understanding of *extended confiscation* in Czech law

### **Introductory question: How is the extended confiscation understood in legal order of your EU Member State?**

Neither the Criminal Code nor criminal law theory uses the concept of extended confiscation, even though the Directive 2014/42/EU has been implemented in Czech legislation. Therefore, it is useful to first introduce property sanctions that result in the permanent deprivation of property according to the Czech law.

In Czech criminal law there is a duality of criminal sanctions - penalties and protective measures (Section 36 of the Criminal Code<sup>1</sup>). The law allows for the imposition of a protective measure both independently and in addition to a sentence (Section 97, par. 1 CC).

Penalties are imposed on the perpetrator for the commission of the offence and primarily with the purpose to punish him. These include forfeiture of a thing (Section 70 CC) and forfeiture of property or part thereof (Section 66 CC). A fine (pecuniary punishment) may also serve the purpose of diverting the proceeds of crime (Section 67 of the CC); the acreage of pecuniary punishment should reflect the severity of the crime committed, and property conditions of the perpetrator, as well as his economical motivations for committing a crime.

The court may impose the penalty of forfeiture of a thing only if it the respective thing belongs to the perpetrator. The court shall obligatorily impose the penalty of a thing if the item in question is the immediate proceed of crime. The court may impose the penalty of forfeiture of a thing (a) which is an instrument of crime, or (b) which is the proceeds of crime if the value of the thing constituting the immediate proceeds of crime is not negligible in relation to the value of the thing constituting the proceeds of crime. If the perpetrator destroys, damages or otherwise devalues, alienates, renders useless, removes or utilises, in particular consumes, or otherwise frustrates the forfeiture of the item which the court could declare forfeited pursuant to Section 70 CC, the court may impose a forfeiture of a substitute value up to an amount corresponding to the value of such item before imposing the penalty of forfeiture. The value of an item which the court may declare to be forfeitable may be determined by the court on the basis of an expert opinion or an expert report.

The court may impose the penalty of forfeiture of property (or just a part thereof) if it sentences the perpetrator to an exceptional penalty or if it sentences him for a particularly serious crime by which the perpetrator has obtained or attempted to obtain a pecuniary benefit for himself or for another. Such a penalty may also be imposed, if the criminal law permits the imposition of such a penalty for the crime committed in a special part of the CC. Forfeiture of property shall affect all, or a designated part of the property of the convicted person as the court may determine.

Forfeiture of a thing may be also imposed on a juvenile (Section 24, par. 1 of the Juvenile Justice Act) and on a corporate entity (Section 19 of the Criminal Liability of Legal Persons Act). Forfeiture of a property may also be imposed on a legal person (Section 17 of the Criminal Liability

---

<sup>1</sup> Statute no. 40/2009 Coll., Criminal Code (hereinafter "CC").

of Legal Persons Act), but not on a juvenile (Section 24, par. 1 of the Juvenile Justice Act, arg. a contrario).

In addition to penalties, there are protective measures that can affect persons other than the perpetrator. Protective measures include seizure of property (Section 101 CC) and seizure of part of the property (Section 102a CC). In both cases, a substitute value can be seized if the original item or part of the property can no longer be seized. These cases are similar to the forfeiture of substitute value (see above). The seizure of the item and part of the property can also be imposed on a juvenile (Section 21 of the Juvenile Justice Act) and on a legal person (Section 15, par. 2 of the Criminal Liability of Legal Persons Act).

The seizure of part of the property may be imposed on a person who has been found guilty of a deliberate criminal offence for which the CC provides for a penalty of imprisonment with a maximum penalty of at least four years, or in the case of the commission of another, exhaustively enumerated criminal offence, for the commission of which the CC imposes a lower penalty, but such an offence is characterised by a certain individual aspect of severity, which justifies the possibility of imposing this protective measure. The following offences are concerned: production and other disposal of child pornography (Section 192 CC), unauthorised access to a computer system and information media (Section 230 CC), possession and storage of an access device and password to a computer system and other such data (Section 231 CC), fraud in a public contract and in a public tender (Section 257 CC), fraud in a public auction (Section 258 CC), illegal cultivation of plants containing narcotic or psychotropic substances (Section 285 par. 1 CC), bribery (Section 332 CC) or indirect bribery (Section 333 CC).

The law further requires that other cumulative conditions be met. The first is that the perpetrator has obtained or sought to obtain a pecuniary benefit for himself or for another by such an offence and the court considers that a certain part of his property is derived from the criminal activity. The second condition is that the court is to make such a finding on the basis that the value of the property (a) which the perpetrator has acquired, (b) transferred to a third party, or (c) transferred to a trust within a period of at least five years before the commission of the offence, is grossly disproportionate to the lawful income which the perpetrator has acquired by legal means.

The use of this protective measure is therefore appropriate in situations where there are indications of illegal origin of the property under examination. It is not necessary for the court to prove beyond reasonable doubt that the property seized originated from criminal activity or that it originated from the so-called "grey economy" - a higher degree of probability that the perpetrator's property was not acquired in accordance with the law is sufficient in such a case. The cited regulation thus represents a certain deviation from the principle of the facts beyond reasonable doubt, and it may also be perceived as a violation of the constitutionally enshrined principle of the presumption of innocence, as it may be interpreted in such a way that the person against whom criminal proceedings are being conducted must prove its innocence (i.e. the legal acquisition of property, the illegal acquisition of which is not proven). See further the decision of the Constitutional Court, Case No. II ÚS 1026/21 of 28 January 2022.

**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 confiscation regulation existed)? / in the transposition procedure into the internal domestic law?**

Directive 2014/42/EU was implemented in the Czech legal system by Act No. 55/2017 Coll., which amended the CC and other laws. The explanatory memorandum to this amendment is unusually detailed, justifying why the option of extended confiscation by way of criminal law was used rather than, for example, special civil proceedings. The explanatory memorandum also seeks to address the objections raised against the proposed amendment during the comment procedure. The apparent conflict with the *ne bis in idem* principle, the presumption of innocence or the prohibition of legal presumptions is explicitly addressed. The Act entered into legal force on 18 March 2017.

As part of the implementation, the Czech Republic has considered three different mechanisms to regulate the extended confiscation. It was considered to include this institution in a separate criminal statute, on the basis of which the confiscation of property would then be decided either by (a) a criminal court or (b) a civil court in a special procedure. In the end, however, the preferred option was to incorporate extended confiscation directly into the CC. The reason for this approach, after comparing the legislation of Western European countries, was also the fact that most EU Member States have extended confiscation of property within the meaning of Article 5 of the Directive enshrined in their general criminal legislation.<sup>2</sup>

In terms of the type of criminal sanction, two approaches were considered, corresponding to the existence of two types of criminal sanctions (i.e., penalties and protective measures) in criminal law. The first option was a modification of the already existing penalty of forfeiture of property, through which the extended confiscation of property would be implemented. The second and finally chosen option was to proceed by introducing a new protective measure. As a result of the chosen procedure, the imposition of a protective measure does not necessarily depend on proof of the guilt of the person against whom it is applied. Where the nature of the particular case so requires, the court may then reserve the evidence necessary for the imposition of the protective measure for a separate public hearing.

Retroactive effect is prevented by a transitional provision according to which, in determining the amount of the gross disproportion between the value of the property acquired or transferred by the offender to another person or to property in a trust or similar institution and his income acquired in accordance with the law, account may be taken only of the property acquired or transferred by the offender to another person or to property in a trust or similar institution as from the date of entry into force of this Act.

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

Although the Czech criminal law did not contain the extended confiscation in its current form before the transposition of the aforementioned Directive, there had already been an array of protective measures contained in the CC that could be imposed, though in lesser extent. Therefore, the notion of a confiscation imposed on the perpetrator, or even on third party was not foreign to the Czech law.

---

<sup>2</sup> Cf. House Document No. 753, 7th Election Period (2013-2017), available from [www.psp.cz](http://www.psp.cz)

**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 to (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?**

The Constitutional Court of the Czech Republic dealt with the application of Section 102a of the CC in three cases so far.<sup>3</sup> It commented on the standard of proof in its ruling of 28 January 2022 as follows: As to the standard of proof, it should be added here that the wording of Section 102a(1) of the CC "the court considers" does not imply a construction of a presumption of acquisition of property in the case of an undetected past criminal activity. The text here imports a statement of the conditions (gross disproportion, finding of other facts) which must alternatively be fulfilled in order for part of the property to be seized. According to the explanatory memorandum, it does not 'introduce a full civil standard of proof', nor does it shift the burden of proof entirely to the person liable, but 'it is not a criminal standard of proof' beyond reasonable doubt. It is 'something in between' - the prosecuting authority has to produce evidence and facts leading to the conclusion that the criminal assets are likely to have originated, the person concerned can then claim and prove otherwise.<sup>4</sup> Although the law does not specify the amount of the disproportion between the value of the acquired property and the legal income and leaves a more detailed definition to case law, in accordance with the principle of proportionality, any disproportion is not sufficient to impose this protective measure. It must be a significant ('gross') disproportion justifying a significant interference with the person's property (recitals 21 and 22).

The Supreme Court of the Czech Republic has not yet commented on the application of Section 102a in its case-law.

**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?**

In the period from 2017 to 2021, the statistics show only small numbers of cases of use of Section 102a of the CC. It could be argued that it will take some time before this relatively new provision is extensively used in the Czech justice system – in the recent history of Czech procedural law, many a new instrument of procedural law had been adopted into practical use somewhat slowly. That could also be due to the fact that in more complicated cases, the criminal proceedings may take a few years before they are concluded, and the new instrument is used.

As a consequence of very seldom use of Section 102a, there are very few, if any, respectable academic works or articles pertaining it, and there is also no significant academic or legislative discussion on the matter.

---

<sup>3</sup> Resolution I ÚS 1651/20 of 21 July 2020, Resolution II ÚS 941/21 of 26 April 2021 and ruling II ÚS 1026/21 of 28 January 2022.

<sup>4</sup> Cf. also Náhlovská, L. Protective measures seizing part of property as a crime control tool. *Právní rozhledy* No. 3/2019, p. 99 et seq.

**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)? / 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)?**

As mentioned before, in Czech criminal law there is a duality of criminal sanctions - penalties and protective measures (Section 36 CC). The law allows for the imposition of a protective measure both independently and in addition to a sentence (Section 97, par. 1 CC).

From the point of view of criminal procedural law, the protective measure is imposed by the criminal court which decides on the indictment in the main trial in the criminal case in question. In the indictment, the public prosecutor proposes the imposition of a protective measure if he considers that the legal conditions for its imposition are met. The public prosecutor may also make such a proposal independently, at any stage of the criminal proceedings. Such a procedure is also acceptable where the nature of the property seized requires an urgent decision on its seizure and it is not possible to wait for the legal force of the substantive decision (usually in the case of dangerous materials, ammunition, etc.).<sup>5</sup>

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

Although there are number of different protective measures listed in the CC (see above), only one of them has been transposed into the Czech law in order to fulfil the requirements of the aforementioned Directive, and therefore introduced as a new protective measure.

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

Due to the nature of extended confiscation of property in the form of a protective measure and not a penalty, the court may decide to impose it even in relation to a person who has not been found guilty of a criminal offence. In particular, such a procedure may be applied in cases where:

- The perpetrator of the offence is not criminally liable for lack of age; the limit of criminal liability in the Czech legal system is set at 15 years of age,
- the offender is not criminally liable for lack of sanity,
- the criminal prosecution has been discontinued or has not been initiated on the grounds that there is not a sufficient degree of social harm in the case,

---

<sup>5</sup> Šámal, P. et al., Criminal Procedure Code II, §§ 157 to 314. Prague: C. H. Beck, 2013, p. 2312.

- in the case of inadmissibility of the prosecution (Section 11 of the Criminal Procedure Code).<sup>6</sup>

In such a case, even at the pre-trial stage, and even before the prosecution of a particular person is initiated, the temporary seizure institutes under the CPC may be used, even against persons other than the perpetrator. In the written indictment, the public prosecutor is then entitled to propose the seizure of property belonging to a third party, and the court decides on the imposition of a protective measure in the same way as in the case of the accused.

The seizure of the property and the related motion for seizure of the property of a third party (in the terminology of Czech criminal procedural law it is called an interested party) are then associated with adequate procedural rights. An interested party is a party to criminal proceedings within the meaning of the CPC and has the right to express his or her views on the case and to make a statement before the court, to be present at the main trial and the public hearing, to make motions at the trial, to inspect the case file and to lodge appeals in cases provided for by law.

**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 actual seizure of the property or the seizure of a part of the property is usually preceded by the seizure of the property within the meaning of Section 79a et seq. of the CPC at the pre-trial stage. The person whose property is seized is entitled to challenge the seizure by complaint as an ordinary remedy (Section 79a, par. 5 CPC). Since the temporary seizure of a thing in criminal proceedings is a relatively significant interference with the constitutionally guaranteed rights of the person against whom the seizure is used, the court is called upon to decide on the complaint (Section 146a CPC). Even if the complaint is not upheld, the person whose property has been seized may later apply for the release or limitation of the seizure. For important reasons, the judge and, in pre-trial proceedings, the public prosecutor may, at the request of the concerned person, authorise the performance of a single action relating to the seized item.

In the event of a protective measure being imposed the verdict of the court, the person affected by this protective measure, regardless whether it is the perpetrator, or an interested party, is allowed to contest the verdict of the court by an appeal. If this is the case of the interested party, the right to lodge an appeal against the verdict of the court is limited exclusively to the extent of the sentence regarding the confiscation of property.

**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 defense?/the rights to a fair trial? / the presumption of innocence? / the right to privacy? and other relevant rights – what sort of?**

As it is was mentioned before, the extended confiscations are used very sparsely in the Czech law so far. Even in the cases where the extended confiscations were used, the decision was

---

<sup>6</sup> Act. 141/1961, Criminal Procedure Code (hereinafter “CPC”).

not extensively challenged on the grounds of breach of constitutional rights. The reason for this being the fact that the explanatory memorandum to the respective law does, quite extensively, deal with the relation of constitutional rights to the extended confiscations.

It follows from the case law of the ECtHR that after a judgment of conviction or acquittal, the principle of the presumption of innocence contained in Article 6 (2) of the Convention does not apply in relation to conclusions about the nature and conduct of the person already convicted (e.g. presumptions about the origin of assets from trade, or the existence of drug trafficking property in a seizure proceeding, even though the previous conviction concerned a different offence), except where such allegations would by their nature constitute a further charges in the autonomous sense given to the concept by the case law of the ECtHR (*Van Offeren v. the Netherlands*, no. 19581/04, judgment of 5 July 2005, *Phillips v. the United Kingdom*, §§ 34-36).

Where proceedings for the confiscation of the presumed proceeds of crime is conducted in special proceedings which can be initiated only on the basis of a conviction, under ECtHR, it is part of the decision on the sentence to be imposed on a particular person (*Van Offeren, Phillips*).

However, this will not be the case if the illegally obtained property is not demonstrably in the possession of the person concerned, even more so if the person concerned has been acquitted (*Geerings v. the Netherlands*, no. 30810/03, judgment of 1 March 2007, §§ 41-51).

It is therefore still necessary to bear in mind that Article 6 § 2 of the Convention does not apply only to the mere assessment of criminal charge, but may also be generally applicable to judicial decisions following acquittal (*Sekanina v. Austria*, no. 13126/87, judgment of 25 August 1993, §§ 23-31; *Asan Rushiti v. Austria*, no. 28389/95, judgment of 21 March 2000, §§ 24-32).

### **Summary:**

The extended confiscations as per the cited Directive had been only recently adopted to the Czech law. Presumably due to this fact, the instrument has not been extensively used in criminal proceedings so far. Despite that, the overall legislative quality of the amendment of domestic legislature appears to be performed with due care and after adequate considerations.