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CROATIA AND SERBIA: A COMPARATIVE OVERVIEW OF THE EXTENDED ASSET CONFISCATION FRAMEWORK

Abstract: Extended confiscation represents a powerful criminal law instrument aimed at depriving individuals of unlawfully acquired all types of benefit, however, it must be governed by clear and precise legal provisions. Initially introduced under the influence of international standards, this measure has evolved and broadened regarding the scope of its application. Despite its preventive and punitive characteristics, its current regulation in both Croatia and Serbia reveals normative inconsistencies and unprecise regulation. This paper examines the legal framework of extended confiscation in both countries and highlights areas in which reform is necessary to ensure legal certainty. Extended confiscation as a sui generis measure is based on a presumption of the unlawful origin of property not directly tied to a particular criminal offence, reflecting a more punitive character. This paper draws attention to key shortcomings in the existing legal frameworks, particularly the lack of clarity and consistency in legal provisions, which leads to varied interpretations and legal uncertainty.

Keywords: extended confiscation, legal frameworks, normative inconsistency, specific characteristics.

1. INTRODUCTION

Extended confiscation is a criminal law measure that judicial practice and legal theory in the Republic of Croatia (hereinafter: RC) and in the Republic of Serbia (hereinafter: RS) have, through normative regulation, separated from the system of criminal sanctions and designated as a *sui generis* criminal law measure. There is a terminological difference in extended confiscation regulation in these countries, and its placement within the frameworks of their respective

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criminal law systems also differs. Although this is not insignificant, it does not affect the substantive regulation of the measure, which is not markedly different in these two countries. Still, greater regulatory differences relate to particular aspects of this institution.

Given that RC and RS share a common history, it is important to note that both countries, as former parts of Yugoslavia, had already recognized and regulated the measure of "ordinary confiscation of proceeds of crime[1]" as well as the criminal sanction of confiscation (as a punishment). The criminal law sanction of confiscation no longer exists in either of these countries. On the other hand, both countries still recognize and regulate the ordinary confiscation, which, in the history of Yugoslav criminal law, was initially regulated as a security measure[2] (and as such constituted a type of criminal sanction), but even during the existence of the common state, it was separated from the system of criminal sanctions.[3]

Ordinary confiscation of property benefit obtained through a criminal offense differs significantly from extended confiscation. Both ordinary and extended confiscation share the same legal foundation. They both derive from the principle that "crime does not pay".

In the case of ordinary confiscation, this principle is aimed at restoring the previous state and is concretized through the possibility of proceedings being conducted against the perpetrators, third parties, or even through in rem (object-based) procedures. In all of these, the focus remains on the property benefit, which has been clearly established during proceedings as having resulted from a specific criminal offence or unlawful conduct.

In contrast, extended confiscation reflects the punitive nature of confiscation, grounded in an abstract presumption about the (il)legitimacy of the origin of assets derived from any (unspecified) criminal activity committed by the perpetrator.

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1 Rather than using the term "proceeds of crime", which appears in international documents to describe unlawful gain in a very broad term, this paper will use literal translations of "property" and "property benefit", as that more closely aligns with the native legal expressions of the countries in question.

2 "The provisions on the confiscation of property benefit have changed throughout history through several amendments to the law, from the Criminal Codification, through the Criminal Code, to the Basic Criminal Code, and finally the Penal Code. (…) The CD from 1951 did not contain specific provisions on the confiscation of proceeds in the General Part of the Codification, but it is mentioned in the Special Part of the Codification with regard to certain criminal offenses. The confiscation of proceeds was introduced into the General Part of the Criminal Code by an amendment adopted in 1959. (…) With the adoption of the Criminal Code of the SFRY, which entered into force on July 1, 1977, along with the specific republican and provincial criminal laws, the provisions on the confiscation of proceeds remained under the jurisdiction of federal legislation, and were regulated in the General Part of the SFRY Criminal Code in four articles…" – A. Garačić, *Pravna shvaćanja u kaznenom pravu: 1956.-2014.*, Libertin naklada, Rijeka, 2014, 33.

3 The legal nature of this measure was already discussed in the criminal law history of Yugoslavia. See more in: F. Bačić *et al.*, *Komentar krivičnog zakona Socijalističke Federativne Republike Jugoslavije*, Savremena administracija, Beograd, 1982, 330–332.

In both RC and RS, legal experts have pointed out the differences between this measure and criminal sanctions and characterized it as a special measure. Despite this, the nature of this measure remains the subject of ongoing debate, most often defined, interpreted, and compared in relation to the nature of the ordinary confiscation measure.

In this paper, the term *ordinary confiscation* will be used to refer to the institute of "confiscation of property benefit obtained through a criminal offence" (under the law of RS), or "confiscation of property benefit" (under the law of RC), while the term *extended confiscation* will be used to refer to the institute of "confiscation of property obtained through a criminal offence" (under the law of RS), or "extended confiscation of property benefit" (under the law of RC).

2. LEGAL FRAMEWORK OF EXTENDED CONFISCATION IN THE REPUBLIC OF CROATIA

The legal regulation of extended confiscation in the Republic of Croatia has developed in response to both internal needs and external influences, particularly those deriving from European Union legal sources.

The following section provides an overview of the normative regulation of extended confiscation in Croatian law, with particular attention to its conceptual basis, legal nature, and development. This analysis aims to clarify the position of extended confiscation within the national criminal law system, as well as to highlight some of the recognized problems that have arisen due to inadequate regulation.

2.1. Concept and position within the criminal legislation of the Republic of Croatia

Extended confiscation was introduced in 2006 with the former Penal Code.[4] The substantive legal regulation of this measure is located in Chapter VI of the current Penal Code[5] (further: Penal Code/11), in the Chapter – Confiscation of Property Benefit, Confiscation of Objects, and Public Disclosure of Judgments,[6]

4 Penal Code of 1997, *Official Gazette of the Republic of Croatia "Narodne novine"*, no. 110/1997, 27/1998 (correction), 50/2000, 129/2000, 51/2001, 111/2003, 190/2003, 105/2004, 84/2005, 71/2006, 110/2007, 152/2008 and 57/2011.

5 Penal Code of 2011, *Official Gazette of the Republic of Croatia "Narodne novine"*, no. 125/2011, 144/2012, 56/2015, 61/2015 (correction), 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023 and 36/2024.

6 This placement in the law is criticized by P. Novoselec, I. Bojanić, *Opći dio kaznenog prava*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2013, 470: "These are *sui generis* measures for which it is difficult to find a common denominator, as can already be seen from the title of Chapter VI, where no adequate genus proximus was found, but the measures were merely listed.".

with the legal basis for this measure found in Article 78, titled "Extended Confiscation of Property Benefit."

The procedural provisions governing the confiscation of property benefit were, from 2010 to 2017, regulated by a special law – the Act on the Confiscation Procedure of Property Benefit Obtained through Criminal Offense and Misdemeanor.[7] Upon its repeal, most of its provisions were incorporated into the Criminal Procedure Act[8] (further Criminal Procedure Act/08), specifically in Chapter XXVIII – Procedure for the Confiscation of Objects and Illegal Benefit.[9]

According to the literal wording of the Penal Code/11, extended confiscation refers to "property benefit obtained through a criminal offense." However, this refers to an abstract understanding of property benefit, which *de facto* relates to the perpetrator's property, or the property of other persons, for which the lawful origin has not been successfully proven and which, as such, is not directly linked to a specific criminal offense.[10] This understanding of property as a property benefit is derived, i.e., based on a rebuttable presumption regulated by Article 78, paragraph 2 of the Penal Code/11.[11]

The trigger for activating this presumption is the disproportion between the perpetrator's assets and income. If the perpetrator wishes to avoid confiscation

7 The Act on the Confiscation Procedure of Property Benefit Obtained through Criminal Offense and Misdemeanor, *Official Gazette of the Republic of Croatia "Narodne novine"*, no. 145/2010 and 70/2017 is no longer in force.

8 Criminal Procedure Act of 2008, *Official Gazette of the Republic of Croatia "Narodne novine"*, no. 152/2008, 76/2009, 80/2011, 121/2011 (consolidated text), 91/2012 (Decision of the Constitutional Court of the Republic of Croatia), 143/2012, 56/2013, 145/2013, 152/2014, 70/2017, 126/2019, 80/2022 and 36/2024.

9 The repeal of the Act on the Confiscation Procedure of Property Benefit Obtained through Criminal Offense and Misdemeanor is justified in the Draft Final Proposal of the Act on Amendments to the Criminal Procedure Act as follows: "Namely, due to the fact that the matter of confiscation of proceeds was partially regulated by other regulations as well, in practice the confiscation procedure could be conducted without referring to the ACPPB, which led to the infrequent application of the said Act in practice. Taking the above into account, and following an extensive discussion on this issue with representatives of the professional public, the proposer decided to transfer the provisions of the ACPPB into the CPA/08, of course, only those provisions which, by their content, fall within the scope of the CPA. In doing so, along with substantive amendments to certain provisions, the aim is to unify the legal regulation of the procedure for the confiscation of proceeds acquired through a criminal offense, or an unlawful act, into a single piece of legislation.".

10 "However, extended confiscation may encompass the perpetrator's entire property, which only conceptually represents property benefit from some criminal offense. If the perpetrator of one of the predicate offenses fails to prove the lawfulness of their entire property, it will, regardless of whether the origin is truly lawful or unlawful, become the subject of extended confiscation." – F. Bačić, Š. Pavlović, *Komentar Kaznenog zakona*, Organizator, Zagreb, 2004, 393.

11 If the perpetrator of a criminal offense referred to in paragraph 1 of this Article has or had property that is disproportionate to their lawful income, it shall be presumed that such property represents property benefit from a criminal offense, unless the perpetrator makes it probable that its origin is lawful.

of their property, he must present evidences, to the level of probability (which means a lower evidentiary standard than "proof"), that the origin of his property is lawful. In this case, the burden of proof is divided[12] between the perpetrator and the public prosecutor. The public prosecutor must first detect, investigate, and ultimately prove (using a higher evidentiary standard) the disproportion between the perpetrator's income and assets, after which the perpetrator has the opportunity to prove the lawful origin of their property.

In Croatian legal theory and practice, this conceptual definition of extended confiscation has been criticized due to the confusing phrase "it shall be presumed that such property represents property benefit from criminal offense," which could mislead one to believe that the property benefit refers to the benefit obtained through the specific criminal offense for which the perpetrator is being prosecuted – that is, the predicate offense. However, such an interpretation would undermine the very purpose of the extended confiscation institute.

"Unlike the confiscation of property benefit under Article 77, which concerns benefit obtained through the criminal offense for which the defendant has been convicted, extended confiscation covers property benefit originating from another, more precisely undetermined criminal offense, for which the perpetrator cannot be convicted, therefore, the criminal offenses referred to in paragraph 2 should be understood as such other, undetermined offenses."[13]

On the other hand, if the property could be linked by a causal connection to a specific criminal offense for which the perpetrator is being tried, and it could be proven that the property is the result of that offense, then it should be confiscated through the application of the institute of ordinary confiscation. Extended confiscation does not serve as a replacement for the ordinary form of confiscation.

2.2. Legal nature of extended confiscation in the Republic of Croatia

"Confiscation of property benefit in comparative law has varying legal natures, it may constitute a criminal sanction (a penalty, security measure, or special criminal law sanction), a special consequence of a verdict, or a special measure of a restorative character."[14]

12 The initial regulation of this institute in Penal Code from 2006 provided for a division of the burden of proof, while the Amendment of Penal Code from 2008 introduced a reversal of the burden of proof, as the public prosecutor was no longer required to establish the probability of the criminal origin of the property.

13 P. Novoselec, I. Martinović, *Komentar Kaznenog zakona – I. knjiga: Opći dio*, Narodne novine, Zagreb, 2019, 478.

14 Utvrđivanje imovinske koristi stečene kaznenim djelom primjenom bruto ili neto načela s obzirom na pravnu prirodu mjere (proširenog) oduzimanja imovinske koristi – E. Ivičević Karas, "Utvrđivanje imovinske koristi stečene kaznenim djelom primjenom bruto ili neto načela s obzirom na pravnu prirodu mjere (proširenog) oduzimanja imovinske koristi", *Hrvatski ljetopis za kazneno pravo i praksu*, 17/2010, 192.

The determination of the legal nature of this criminal measure is extremely important, especially considering that recent criminal law regulation of the European Union introduced new forms of confiscation,[15] as well as due to its frequent misidentification with the measure of ordinary confiscation of proceeds – particularly in terms of legal nature and the purpose each aims to serve.

Extended confiscation of property benefit is a *sui generis* measure with more pronounced punitive characteristics (unlike ordinary confiscation, where the measure has a predominantly restorative nature).[16] In theoretical discourse, it is generally accepted that extended confiscation has a preventive role as well.

The introduction of this measure into Croatian criminal legislation was primarily intended for offenses related to corruption and organized crime, as ordinary confiscation did not constitute an adequate response to this category of profit-oriented criminal offenses.[17] Namely, imprisonment sentence, and criminal sanctions in general, do not have an adequate effect on perpetrators of organized crime offenses, as organized crime continues to persist despite the sanctioning of individual identified perpetrators of such offenses.[18]

2.3. Prerequisites for ordering extended confiscation in the Republic of Croatia

Over time, the number of criminal offenses on the basis of which this measure can be imposed has increased, most often prompted by the harmonization of legislation with European Union regulations. In addition to offenses related

15 One of the new forms of confiscation is "Confiscation of Unexplained Wealth", which is linked to criminal conduct and is provided for in Article 16 of Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation, the provisions of which EU Member States are required to implement by 23 November 2026.

16 "One certainly cannot insist on a specifically restorative legal nature of this form of measure, because extended confiscation, given its fundamental characteristics – which will also be examined in this paper – undoubtedly has a punitive character toward the perpetrator." - Utvrđivanje imovinske koristi stečene kaznenim djelom primjenom bruto ili neto načela s obzirom na pravnu prirodu mjere (proširenog) oduzimanja imovinske koristi – E. Ivičević Karas, *op. cit.*, 193.

17 "Therefore, in recent years, international legal instruments and comparative criminal law have increasingly provided for special forms of the so-called "extended" confiscation of proceeds acquired through criminal offenses, precisely for cases of organized crime, in which regular, "non-extended" forms of confiscation measures have proven to be inadequate or ineffective in practice." – E. Ivičević Karas, "Kaznenopravno oduzimanje nezakonito stečene imovinske koristi", *Hrvatski ljetopis za kazneno pravo i praksu*, 2/2007, 674.

18 Similarly, M. Grubač, "Oduzimanje imovine proistekle iz krivičnog dela", *Glasnik Advokatske komore Vojvodine*, 1/2010, 35: "Moreover, in many cases, these sanctions are not capable of effectively reducing or stopping criminal activities, as there is always a certain number of old or new members of the criminal organization who remain at large and will continue to carry out such activities while others are serving their sentences.".

to corruption and organized crime, predicate offenses that may serve as grounds for imposing this measure under Penal Code/11 include offenses of sexual abuse and exploitation of a child under Chapter XVII, offenses against computer systems, programs, and data under Chapter XXV, and two offenses under Chapter XIX – unauthorized production and trafficking of drugs, and unauthorized production and trafficking of substances prohibited in sport.

There are two conditions that must be met in order to activate the rebuttable presumption of the unlawful origin of the perpetrator's property. The first condition is that a criminal offense has resulted in the acquisition of property benefit[19], and the second is that the public prosecutor has established (proven) the existence of a disproportion between the perpetrator's income and assets. This legislative solution regarding the first condition, defined as a general requirement for all predicate offenses, is justified in both theory and practice in the following way. Legal experts thus state: "…it should be concluded that this condition is a general prerequisite for extended confiscation, meaning that it must be fulfilled even when the defendant is being prosecuted for offenses under the jurisdiction of USKOK. Namely, it would indeed be illogical to confiscate property from a perpetrator of the criminal offense of giving a bribe (Article 294 of the Penal Code/11) who has not obtained any proceeds through that offense, even if there is a disproportion between their property and lawful income." [20, 21]

The second condition for activating the aforementioned presumption, namely, the existence of a disproportion between the perpetrator's income and the property they currently have or have had, is problematic and confusing, particularly due to its vague (primarily temporal) formulation. It appears as though the public prosecutor would be required to gather information on all property currently owned by the perpetrator, as well as any property they have ever owned at any point

19 The acquisition of property benefit was not originally prescribed as a condition for extended confiscation when extended confiscation was only applicable to criminal offenses under the jurisdiction of USKOK. This condition was added when the catalogue of predicate offenses was expanded to include offenses against computer systems and certain offenses against children.

20 D. Tripalo, T. Brđanović, *Imovinskopravni zahtjev, odluka o imovinskopravnom zahtjevu, oduzimanje imovinske koristi i privremene mjere osiguranja – Teorijski i praktični aspekti za suce i državne odvjetnike – Priručnik za polaznike/ice*, Pravosudna akademija, Zagreb, 2023, 41.

21 Similarly, I. Gradiški Lovreček, R. Pražetina Kaleb, "Oduzimanje imovinske koristi od druge osobe", *Novine u kaznenom zakonodavstvu – 2025.* (eds. T Bokan., *et al.*), Vrhovni sud Republike Hrvatske i Pravosudna akademija, Zagreb, 2025, 58: "In this context, the question arises whether extended confiscation can be applied to a perpetrator who is indicted and undergoing criminal proceedings for, for example, the production or procurement of drugs, but for whom not even a single individual sale has been established or proven. The answer should be negative, because the defendant did not acquire any proceeds through this criminal activity. Similarly, the perpetrator of the offense of giving a bribe does not acquire proceeds – he gives them – and even if there is a disproportion between his property and his lawful income, he did not obtain any proceeds through the offense for which he is being prosecuted, and therefore extended confiscation could not be applied to his property.".

in the past. In light of this issue, a position has developed in practice that "the calculation includes property and lawful income acquired in the last ten years,"[22] presumably counting from the commission of the predicate criminal offense.

However, although such a solution in practice certainly facilitates the task of verifying and establishing the property that could be subject to extended confiscation – both for the public prosecutor and the court – especially considering that the legislator could have, but ultimately did not, prescribe a temporal limitation for determining property, courts acting in this manner would be assuming the role of the legislator.

Therefore, this temporal limitation and thus the time-bound scope of the property that the perpetrator has or has had prior to the commission of the predicate criminal offense should primarily be regulated by law.

The prerequisites for imposing this measure are that the perpetrator has been found guilty of a predicate criminal offense, that this offense resulted in the acquisition of benefit (which are subject to ordinary confiscation), and that the perpetrator, after the public prosecutor has successfully proven the existence of a disproportion between the perpetrator's income and assets, has failed to prove (to the level of probability) the lawful origin of his property.

Some theorists raise objections to this regulation, arguing that it represents an unjustified inconsistency compared to ordinary confiscation of benefit, as ordinary confiscation may also be applied to perpetrators who are deemed criminally irresponsible.[23, 24]

Additionally, Croatian legal theory points out the partially deficient regulation of this institute, noting that extended confiscation of proceeds does not encompass all corruption-related criminal offenses. It is therefore proposed to amend the Penal Code in order to align domestic legal regulation with international legal standards.[25]

2.4. Extended confiscation from third parties in the Republic of Croatia

The Penal Code/11 distinguishes between the prerequisites for extended confiscation of property benefit from family members[26] and from "other"

22 I. Gradiški Lovreček, R. Pražetina Kaleb, *op. cit.*, 59.

23 P. Novoselec, I. Martinović, *op. cit.*, 478.

24 According to Article 1, paragraph 1 of the Penal Code/11: "Property benefit shall be confiscated by a court decision establishing that an unlawful act has been committed.".

25 Thus, M. Galiot, "Oduzimanje imovinske koristi u kontekstu međunarodne pravne stečevine i suzbijanja podmićivanja", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 1/2017, 568 states: "Namely, contrary to the international legal acquis, particularly the content of Directive 2014/42/EU, the Penal Code has not enabled the application of this institute to all corruption-related criminal offenses from the existing catalogue of incriminations, both in the public and private sectors.".

26 The Penal Code/11 defines family in Article 87, paragraph 1.

persons.[27] It is prescribed that confiscation shall be applied to family members regardless of the legal basis by which the property came into their possession and regardless of any actual cohabitation with the perpetrator. Since a family member has no possibility to prove good faith, this effectively establishes an irrefutable presumption of bad faith on the part of the family member.

On the other hand, benefit will be confiscated from other persons (i.e., those who are not family members of the perpetrator) unless they make it probable that the benefit was acquired in good faith and for a reasonable price, while the legal basis is, again, irrelevant in this case. From this legal formulation, it follows that a rebuttable presumption of good faith applies to third parties, meaning they have the opportunity to prove good faith in acquiring the property.

Additionally, it can be concluded from the provision that if the acquisition was made through a gratuitous legal transaction, such persons do not have this opportunity.

A lower standard of proof for third parties is equal to the standard prescribed for the perpetrator of the criminal offense, as they must make the existence of good faith probable in order to avoid confiscation.

In addition to family members and other persons, the Penal Code/11, in regulating extended confiscation, explicitly provides for the possibility of confiscating benefit from the heirs of a person against whom criminal proceedings had been initiated and who died during the course of those proceedings.[28] According to the explicit wording of the law, the condition for conducting a so-called object-based procedure against the heir is that proceedings against the perpetrator who died, has already been initiated. Furthermore, the provision of Article 78, paragraph 6 of the Penal Code/11 forms the basis for conducting the object-based procedure (called *in rem* proceedings).[29]

On the other hand, the Criminal Procedure Act/08 provides for the possibility of conducting an object-based procedure (in rem) in three cases: death,

27 Article 78, paragraphs 4 and 5 of the Penal Code/11.

28 Article 78, paragraph 6 of the Penal Code/11.

29 D. Tripalo, T. Brđanović, *op. cit.*, 47: "Since this is not a "true" criminal proceeding conducted for the purpose of establishing the guilt of the perpetrator and imposing an appropriate sentence, the term "commission of a criminal offense" is not used – because guilt is one of its elements – but rather the expression "commission of an unlawful act" is used (as in the case of a perpetrator lacking criminal capacity), which does not include a conviction (which can be based only on guilt), but presupposes the commission of an act prohibited by criminal law. Therefore, the judgment rendered in this proceeding merely establishes the commission of such an unlawful act. This, of course, does not mean that in the object-based procedure it is unnecessary to prove (and for the purpose of rendering a declaratory judgment, to establish) the elements of the perpetrator's guilt (criminal capacity, intent or negligence, awareness of unlawfulness, and the absence of justifying grounds). However, such findings do not result, as previously explained, in a conviction declaring the perpetrator guilty (primarily because the perpetrator does not participate in this proceeding due to the aforementioned impediments), but rather in a judgment that merely establishes that the person committed an unlawful act and that the act resulted in the acquisition of proceeds.".

permanent unfitness to stand trial, and unavailability of the perpetrator. Despite this, the Penal Code/11, in the context of extended confiscation, does not provide a substantive legal basis for conducting an object-based procedure in the remaining two cases (permanent unfitness and unavailability), which is why some authors consider such a provision to be incomplete. It is also important to point out that conducting an object-based procedure due to the death of the perpetrator is possible only in cases of extended confiscation, but not in cases of ordinary confiscation, as the legislator did not provide for this possibility in Article 77 of the Penal Code/11, which regulates the institute of ordinary confiscation.[30] This represents yet another ground for criticizing the current substantive legal framework for conducting object-based proceedings.

However, although the substantive provisions of the Penal Code/11 do not explicitly regulate the possibility of conducting *in rem* proceedings against heirs in cases of ordinary confiscation, some authors express the opposite view, claiming that *in rem* proceedings due to the death of the perpetrator can also be conducted in cases of ordinary confiscation of proceeds.[31]

In conclusion, the author holds the view that *in rem* proceedings against heirs in the Republic of Croatia are limited solely to extended confiscation (since confiscation *in rem* is provided only in Article 78, and not in Article 77 of the Penal Code/11), even though it would be more natural for *in rem* proceedings to be primarily linked to ordinary confiscation (and only exceptionally to extended confiscation). This is especially the case considering the excessive burden placed on heirs (or on the defense counsel of a defendant who is unavailable or permanently unfit to stand trial) to prove the lawful origin of property about which, due to the death, unavailability, or incapacity of the perpetrator or primary acquirer, they are unlikely to have knowledge or evidence. Therefore, with regard to the substantive legal grounds for conducting this special *in rem* procedure, it would be necessary to introduce appropriate amendments to the Penal Code/11.

30 This is, in fact, a matter of prescribing a substantive legal basis for an object-based procedure (*in rem* proceeding), but the provision is incomplete, as it applies only to extended confiscation of benefit (otherwise, it would have been included in Article 77), and does not cover the other cases of such proceedings provided for under the provisions of the Criminal Procedure Act/08 – namely, cases of permanent unfitness to stand trial and unavailability of the perpetrator of the unlawful act.

31 In that way P. Novoselec, I. Martinović, *op. cit.* 480 stated: "The provision is not limited only to extended confiscation of benefit, but also encompasses confiscation of benefit under Article 77. This also follows from Article 560f of the Criminal Procedure Act, which prescribes that in such cases, the provisions of Articles 560a to 560e shall apply.". However, Article 560f merely prescribes the corresponding application of the provisions on proceedings conducted due to the perpetrator's permanent unfitness to stand trial or unavailability to proceedings in the event of the death of the person against whom the proceedings were initiated. The author of this paper argues that this does not establish a legal basis for conducting proceedings due to the perpetrator's death in the case of ordinary confiscation.

Most importantly, the Penal Code/11 should explicitly provide for the possibility of conducting an *in rem* procedure also in the case of ordinary confiscation, by including such a provision in Article 77, since a meaningful interpretation of the material and procedural provisions does not support the conclusion that Article 78, paragraph 6 applies to ordinary confiscation as well.[32]

3. LEGAL FRAMEWORK OF EXTENDED CONFISCATION IN THE REPUBLIC OF SERBIA

In the Republic of Serbia, extended confiscation is governed by a distinct legal framework established through a special legislative act. The structure and application of this measure reflect the legislator's intent to provide a comprehensive mechanism for addressing unlawfully acquired property, beyond the boundaries of traditional criminal sanctions but also distinct from ordinary confiscation institute and outside from the scope of the Criminal Codification.

`The following analysis focuses on its normative basis, legal nature, and position within the broader framework of criminal law regulation.

3.1. Concept and position within the criminal legislation of the Republic of Serbia

In the Republic of Serbia, the measure of extended confiscation was initially introduced in 2008 by a special law, the Act on the Confiscation of Property Derived from a Criminal Offense[33] that regulated this institute from both a substantive and procedural legal perspective. Although it consists of predominantly procedural and organizational provisions, it also includes substantive provisions regarding the confiscation of "property derived from criminal offenses". By 2013, a new Act[34] of the same name was adopted (further: Confiscation Act).

The law provides a definition of such property as property of the owner that is clearly disproportionate to their lawful income.

The distinction between ordinary and extended confiscation is reflected in both terminology and placement in different laws. Ordinary confiscation is

32 On the other hand, had Article 77 of the Penal Code provided a legal basis for conducting object-based proceedings against heirs, one could argue for analogous application of those provisions to extended confiscation – but only because the Penal Code itself, in regulating extended confiscation, explicitly stipulates that the provisions of Article 77 (which governs ordinary confiscation) shall apply to extended confiscation of benefit, unless otherwise provided by the provisions on extended confiscation.

33 Act on the Confiscation of Property Derived from a Criminal Offense, *Official Gazette of the Republic of Serbia*, *"Službeni glasnik"* number 97/2008.

34 Act on the Confiscation of Property Derived from a Criminal Offense, *Official Gazette of the Republic of Serbia*, *"Službeni glasnik"* number 32/2013, 94/2016 and 35/2019.

governed by the Criminal Codification of the Republic of Serbia[35] (further: Codification), which refers to "confiscation of property benefit obtained through a criminal offense," while extended confiscation is regulated by the aforementioned special law, as "confiscation of property derived from a criminal offense."

In contrast to Croatia, the Codification of Serbia does not prescribe the principle that no one may retain proceeds obtained through a criminal offense or unlawful conduct.[36]

Given that extended confiscation is a criminal law measure, some authors advocate for its inclusion directly within the Codification, while, due to its distinctive features, recommending it be placed in a separate chapter of the Codification and distinct from the institute of an ordinary confiscation. They argue that merging it with the institute of ordinary confiscation would fail to reflect the true legal nature of extended confiscation.[37]

3.2. Legal nature of extended confiscation in the Republic of Serbia

In a part of Serbian legal theory as well, similarities have been noted between this measure and the historical punishment of confiscation of property, as well as with the measure of ordinary confiscation of proceeds.

It has also been pointed out that the measure exhibits certain punitive characteristics, though it does not, in itself, constitute a punishment. Some authors even argue that it has no punitive character at all. Others have expressed the opinion that the nature of this institute is purely procedural.[38] A significant

35 Criminal Codification of the Republic of Serbia, *Official Gazette of the Republic of Serbia, "Službeni glasnik",* number 85/2005, 88/2005 (correction), 107/2005 (correction), 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 and 94/2024.

36 The Penal Code of the Republic of Croatia from 1997 (*Official Gazette of the Republic of Croatia "Narodne novine"*, no. 110/1997, 27/1998, 50/2000, 129/2000, 84/2005, 51/2001, 111/2003, 190/2003, 105/2004, 71/2006, 110/2007, 152/2008, 57/2011, 77/2011, 125/2011 and 143/2012) stipulated in Article 82, paragraph 1 that no one may retain benefit obtained through a criminal offense. The importance of this provision is further reflected in the fact that, with the adoption of the new Penal Code from 2011, it was elevated to the level of a principle of criminal law, with a certain modification: Article 5 of the currently valid Penal Code of 2011 now states that no one may retain proceeds obtained through an unlawful act.

37 See more in: J. Gluščević, R. Dragan, "Pravna priroda mere oduzimanja imovine proistekle iz krivičnog dela", *Vojno delo*, 3/2019, 133–146.

38 See more in: M. Majić, "Oduzimanje imovine proistekle iz krivičnog dela", *Bilten Apelacionog suda u Beogradu*, 1/2010, 48: "In other words, if we accept that the confiscation of property acquired through a criminal offense has a repressive component, we are simultaneously accepting the unacceptable – the possibility of criminal acquisition of legally protected assets.". And p. 50: "Taking all of the above into account, it is possible to draw a conclusion, supported by multiple arguments, that the rules governing the

number of authors do not share this view, but it cannot be disputed that this institute is regulated by a law which primarily governs procedural rules for the confiscation of property.

In Serbia as well, both judicial practice and legal theory have adopted the view that this *sui generis measure* is object-focused, a so-called *in rem* measure[39,40], which is evident also from the fact that it may be imposed not only on the perpetrator of a criminal offense, but also on third parties.

However, unlike Croatian criminal law scholars, who argue that confiscation of benefit has a dual nature (so that, depending on whether it is ordinary or extended confiscation, either its restorative or punitive character will prevail), some Serbian authors emphasize that the nature of this measure is polyvalent, given the multiple purposes it seeks to achieve.

3.3. Prerequisites for imposing extended confiscation in the Republic of Serbia

Article 2 of the Confiscation Act exhaustively lists the criminal offenses on the basis of which extended confiscation of property may be proposed and imposed. Compared to the Croatian Penal Code/11, the Serbian law defines predicate offenses much more broadly, allowing for extended confiscation in a wider range of criminal cases.[41]

One of the conditions for imposing this measure, just as in Croatia, is a conviction of the perpetrator for one of the criminal offenses explicitly listed in the law.

The very purpose of introducing the extended confiscation institute was the inability to prove a causal link between the property or proceeds and the specific criminal offense for which the perpetrator was prosecuted.

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confiscation of property derived from a criminal offense essentially represent special rules for proving the criminal origin of certain property. More precisely, we believe that this primarily concerns special rules for proving the fact that specific property was acquired through a criminal offense, as the very name of this legal institute suggests.".

39 J. Gluščević, R. Dragan, *op. cit.*, 143: "From all that has been stated, the permanent confiscation of property derived from a criminal offense is defined as a sui generis measure, which is not applied *ad personam*, but *in rem*.".

40 М. М. Ђорђевић, *Одузимање имовине учиниоцима кривичних дела* – Докторска дисертација, Правни факултет Универзитета у Београду, Београд, 2018, 403: „We conclude that the confiscation of property derived from a criminal offense is an institute of substantive criminal law of an objective nature. By objective character, we mean that this institute is really oriented (towards property), while its nature is based on a circle of facts belonging to substantive criminal law.".

41 For example, some of the criminal offenses that are not predicate offenses for extended confiscation in Croatia, but are included under Serbian law, include: aggravated murder (Article 114, paragraphs 1, points 4 and 5 of the Codification), offenses against public order and peace (Article 348, paragraph 3, and Article 350, paragraphs 2 and 3 of the Codification).

For that reason, a rebuttable presumption regarding the unlawful origin of the property was introduced, which effectively substitutes the need to prove a direct causal connection between the offense and the property obtained through it. In this sense, prosecution for one of the catalogued offenses may result in extended confiscation because, as has been stated, "Criminal proceedings for certain offenses here serve more as a trigger for examining the origin of the perpetrator's property."[42]

Unlike Croatian legislation, the Confiscation Act does not explicitly require that a predicate offense must have resulted in the acquisition of proceeds in order to initiate extended confiscation proceedings.

Nonetheless, as legal literature points out: "The precondition for extended confiscation of property is a criminal conviction for an offense that enables the offender to obtain a benefit."[43]

On the other hand, for certain offenses listed in Article 2 of the Confiscation Act, it is expressly provided that the law applies only if property benefit was obtained[44] from the criminal offense or if the value of the object of the offense exceeds one million and five hundred thousand dinars.

From this, it follows that for those specific predicate offenses, which are also explicitly listed, there is an additional requirement for extended confiscation, that the offense resulted in unlawfully obtained property benefit, and that the value exceeds a certain amount. Of course, for those criminal offenses where the acquisition of property benefit is an element of the offense itself, that requirement must be fulfilled in order for the perpetrator to be convicted in the first place.

It should also be emphasized that the Confiscation Act sets as a condition for temporary confiscation is the existence of reasonable suspicion that the owner's property is derived from a criminal offense, and that the value of that property exceeds one million and five hundred thousand dinars. However, this requirement applies only to temporary confiscation, and is not prescribed for permanent confiscation.

In its definition of property derived from a criminal offense, the Confiscation Act considers it to be property of the owner that is in obvious disproportion to their lawful income. In contrast, the Croatian legislator did not adopt this "obvious" standard for disproportionality.

Nonetheless, in both cases, the effectiveness of applying this standard depends primarily on the active role of the public prosecutor, who bears the responsibility for collecting data on income and assets and ultimately submitting the proposal

42 I. Vuković, "Oduzimanje imovine proistekle iz krivičnog dela: Evropski okvir i srpsko zakonodavstvo", *Crimen*, 7/2016, 4.

43 M. Matić Bošković, „Oduzimanje imovinske koristi proistekle iz krivičnog dela – uporednopravna rešenja i iskustva Srbije", *Finansijski kriminalitet* (eds. Kostić, J., Stevanović, A.), Institut za uporedno pravo i Institut za kriminološka i sociološka istraživanja, Beograd, 2018, 181.

44 The given formulation "property benefit obtained through a criminal offense" clearly indicates that it refers to ordinary confiscation of benefit, as regulated in Article 91, paragraph 1 of the Codification of the Republic of Serbia.

for confiscation. As I. Vuković points out: "In our judicial practice, it is considered that "obvious disproportion" exists when the portion of property whose origin remains unexplained "clearly and significantly" exceeds the portion of property whose sources have been clarified to the court."[45]

"The term "obviousness" is not further defined in the legal provisions and constitutes a factual issue, however, case law has accepted the position that the "obviousness" exists in most cases when the value of the owner's property is at least twice as high as his lawful income. It is also possible for this ratio to be lower than double, especially when the property in question is of exceptionally high value."[46]

In the Republic of Serbia, in order for the court to impose the measure of extended confiscation of benefit, "it must be convinced that the property subject to confiscation has a criminal origin."[47] Likewise, in Croatia, the court must be convinced that a perpetrator's property was acquired through "punishable conduct," i.e., that it has criminal origin.

Some Serbian legal scholars have also proposed introducing a temporal limitation to the application of the Confiscation Act, "so that it applies only to property acquired within a specific period prior to the commission of the criminal offense."[48]

3.4. Extended confiscation from third parties in the Republic of Serbia

The Confiscation Act provides in Article 4 that the parties to confiscation proceedings are the public prosecutor and the owner. Furthermore, in Article 3, paragraph 1, item 4 it is stipulated that the term owner includes: the defendant,[49] the defendant's associate,[50] the deceased,[51] the legal successor,[52] or a third party.[53] The following items of the same article (items 5-9) provide definitions for each of these terms.

45 I. Vuković, *op. cit.*, 27.

46 Н. Важић *et al.*, *Одузимање имовине проистекле из кривичног дела – Приручник за примену у пракси*, Мисија ОЕБС-а у Србији, Београд, 2021.

47 I. Vuković, *op. cit.*, 21.

48 M. Matić Bošković, *op. cit.*, 186.

49 A defendant is considered to be: a suspect, a person against whom criminal proceedings have been initiated, or a person convicted of a criminal offense under Article 2 of this Act.

50 A cooperating defendant is considered to be: a cooperating witness, a cooperating defendant, or a convicted associate.

51 A deceased is considered to be: a person against whom, due to death, criminal proceedings were not initiated or were terminated, and in criminal proceedings conducted against other persons it was established that the deceased committed a criminal offense from Article 2 of this Act together with those persons.

52 A legal successor is considered to be: the heir of a convicted person, cooperating witness, deceased, third party, or their respective heirs.

53 A third party is considered to be: a natural or legal person to whom property derived from a criminal offense has been transferred.

Of particular interest is the legislator's decision to prescribe that the deceased can be a party to the confiscation proceedings, given that a person loses legal capacity in the moment of death and thus cannot be a party in legal proceedings, which is precisely why Article 20 of the Criminal Procedure Act[54] stipulates that the death of the defendant during criminal proceedings leads to their termination.

The Confiscation Act introduces an additional condition for conducting proceedings against a deceased, against whom, due to death, a conviction cannot be issued: the condition is that criminal proceedings are simultaneously being conducted against other persons for a criminal offense covered by the law, and that these other persons are ultimately convicted, while it is established that the deceased co-committed that criminal offense with them.

Even though a conviction cannot be issued in relation to the deceased, it is nonetheless necessary to establish that the deceased committed an unlawful act, which in substance amounts to one of the predicate criminal offenses listed in Article 2 of the Confiscation Act.

However, this raises the question of whether such a solution is truly necessary and appropriate within a legal framework that already allows for the initiation of confiscation proceedings against the heirs of deceased.

4. CONCLUSION

Although legal theory has raised concerns about extended confiscation in relation to the fundamental principles of substantive and procedural criminal law, today, especially in light of the positions taken by the Supreme Courts, Constitutional Courts, and the European Court of Human Rights, many of these objections and criticisms have been rejected.

Nonetheless, this measure, which has a significant impact on the fundamental rights of the perpetrator as well as other persons, requires more precise and improved regulation to ensure the protection of all individuals involved in extended confiscation proceedings.

Vague legal provisions lead to divergent interpretations. In the author's view, the existence of multiple interpretations is not a problem in itself, as it reflects active engagement with the institute and, when supported by sound reasoning, contributes to the development of effective solutions, improved practices, and, ultimately, more precise and appropriate legal regulation. For this reason, it would be necessary in both countries to further refine the normative framework of this institute, as doing so would also enhance legal certainty.

Judicial practice cannot substitute for clear and well-crafted legal norms. In certain respects, the legal framework governing this institute should be amended, both in the Republic of Serbia and in the Republic of Croatia.

54 Criminal Procedure Act, *Official Gazette of the Republic of Serbia*, *Službeni glasnik,* no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 (Constitutional Court Decision) and 62/2021 (Constitutional Court Decision).

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HRVATSKA I SRBIJA: KOMPARATIVNI PREGLED OKVIRA PROŠIRENOG ODUZIMANJA IMOVINSKE KORISTI

Rezime

Ovaj rad analizira pravni okvir i primjenu proširenog oduzimanja imovine u Republici Hrvatskoj i Republici Srbiji. Iako obje države dijele zajedničko pravno nasljeđe ukorijenjeno u kaznenopravnom sustavu bivše Jugoslavije, odabrale su različite zakonodavne puteve u reguliranju ove sui generis kaznenopravne mjere, Hrvatska kroz Kazneni zakon, a Srbija putem posebnog „Zakona o oduzimanju imovine proistekle iz krivičnog dela". Unatoč razlikama u formi, materijalna osnova instituta je slična u oba sustava, ali svaka država zadržava specifične odredbe u odnosu na njegove određene aspekte ovog. Prošireno oduzimanje temelji se na načelu "zločin se ne isplati" i djeluje na oborivoj pretpostavci: kada postoji očit i značajan nerazmjer između imovine koju posjeduje počinitelj i njegovih zakonitih prihoda, teret dokazivanja zakonitog porijekla imovine prelazi na počinitelja. Važno je napomenuti da ovaj institut omogućava oduzimanje imovine kada se nezakonito stečena imovina ne može izravno povezati s konkretnim kaznenim djelom. Kao takvo, prošireno oduzimanje koristi se za ciljanje koristi od sveukupne kriminalne aktivnosti, što ga čini učinkovitijim sredstvom u borbi protiv organiziranog kriminala i korupcije. Rad ističe nekoliko problema uočenih u postojećim pravnim okvirima. Među najvažnijima su nejasne i nedosljedne zakonske odredbe, koje dovode do različitih tumačenja u praksi i pravne nesigurnosti. Nadalje, rad ukazuje na sličnosti i razlike između dvaju sustava, posebno u pogledu položaja proširenog oduzimanja u širem pravnom okviru i njegovog odnosa prema institutu običnog oduzimanja. Iako oba instituta proizlaze iz istog načela, običnom oduzimanju prethodi dokazivanje veze između koristi i konkretnog kaznenog djela, dok to kod proširenog oduzimanja ne postoji. Ova razlika rezultira razlikama u njihovoj pravnoj naravi, obično oduzimanje je pretežno restaurativne naravi, dok je prošireno oduzimanje više represivno. Ipak, obje ove mjere imaju i preventivni karakter.

Ključne riječi: prošireno oduzimanje, pravni okviri, normativna nekonzistentnost, specifične karakteristike.

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