

# IMPLEMENTATION OF MINIMAL EUROPEAN UNION REGULATIONS IN RELATION TO THE CONFISCATION OF MATERIAL GAIN RELATED TO CRIMINAL LAW IN CROATIA

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Colleagues, Dear Guests,

The subject of this short review will be the implementation of minimal European Union regulations in relation to the confiscation of material gain related to criminal law in Croatia. Broadly speaking, the Croatian Criminal Code of 2011 already fulfilled this requirement. However, regulations about confiscating material gain and confiscating assets were amended by changes to the Criminal Code, which the Croatian Parliament adopted on 8 May of this year, 2015, hence very recently. By virtue of these amendments, the Criminal Code is compliant with the European Parliament and Council directive, of 3 April 2014, on the freezing and confiscation of assets and material gain realised by criminal offences in the European Union (Directive 2014/42/EU of The European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union).

Art. 77 of the Criminal Code lays down the general conditions and the means of confiscating material gain, which apply to all criminal offences. The court is obligated to confiscate material gain not only from the offender, but also from a party to whom the gain has been transferred, where the transfer was not in good faith. The court should take such measures only where it has obligated the offender to reimburse damage to a victim in the amount that corresponds to the realised profit, or where the offender has already reimbursed such damage. The Code explicitly prescribes that the confiscated assets will not reduce the amount of assets invested in a criminal activity, i.e. the gross principle has been adopted, which resolves doubts both in the literature and the judiciary. The court is authorized to not confiscate material gain where it is insignificant.

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Despite doubts expressed in the literature about the constitutionality of extended powers of confiscation of material gain, the Croatian legislature has accepted the measure without hesitation. According to Art. 78 of the Code, even a material gain that has not been generated by the offence, which the offender has been found guilty of, can be confiscated. The condition merely stipulates that there be assets that are disproportionate to the offender's legitimate income; whereby it is assumed that such property has been derived from the offence, unless the offender can prove, on a balance of probabilities, that the property's origin was lawful. The Code specifically states that assets will be confiscated even when conjoined with legally obtained property, and authorizes the court to assess the proportion of illegally obtained property. Under the same conditions that apply to an offender, material gain may be confiscated from an offender's family (which term is defined in the Code), and even from another party who acquired the material gain from the offender, except where the party can prove, on a balance of probabilities, that the assets were gained in good faith and using reasonable judgment.

The extended powers of confiscation were, in the original law, limited to material gain acquired as a result of criminal offences within the jurisdiction of the Bureau for Combating Corruption and Organized Crime (well known by the acronym USKOK). This Bureau is a special state attorney's office responsible for criminal offences (specified in the Act) related to corruption and organized crime, a category of offences which has been shown to be too narrow. The directive cited in Art. 5 significantly expands the range of criminal offences to which extended confiscation of material gain applies. In accordance with this provision, the latest amendment to the Criminal Code also provides for the application of extended confiscation of material gain to gain derived from the criminal acts of sexual abuse and exploitation of children (Chapter XVII), and offences against computer systems, programs and data (Chapter XXV - Computer Crimes).

For the application of both forms of confiscation of material gain, the definition of material gain and of assets is also important. Material gain is already defined in the text of the Criminal Code (Art. 87, para. 22), whereby in addition to direct gain, indirect gain which is the result of direct gain (e.g. buying things with money obtained through crime) is also covered, and in addition to this, any other benefit arising from the direct or indirect gain (e.g. interest earned on money originating from the offence) is included. This is in line with the cited directive, which seeks to extend powers of confiscation of material gain to any asset generated by activities of a criminal nature. What is new about the amendment to the Criminal Code (Art. 87, para. 23) is the broad definition of assets to include "property of any kind, regardless of whether material or

immaterial, movable or immovable, including legal documents or instruments evidencing the right to, or interest in, such property.” This provision is taken in whole from Art. 2, para 2 of the directive.

The above shows that the Croatian Criminal Code is fully harmonised with the directive, i.e. that it complies with European Union law.

But how do things look in practice? According to the latest data from the Croatian Bureau of Statistics, in 2013 material gain was confiscated from 1,103 convicted persons (out of a total of 16,617 convicted persons), mainly for drug related and property related crimes. It is not shown in how many cases extended powers of confiscation were exercised. I am not familiar with any decision of the Croatian courts made in relation to extended confiscation. Does that mean that, in practice, the courts do not accept this new measure? And is this characteristic of Croatia only? The question is what to do to implement this measure in the fight against organized crime.