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EXTENDED CONFISCATION OF A MATERIAL BENEFIT IN POLISH CRIMINAL LAW[1]

On 23 March 2017 the Sejm (the lower chamber of the Polish Parliament) passed the Act on Amending the Criminal Code and Numerous Other Acts[2]. In the reasons appended to the draft bill it was asserted that the law intended "to introduce into Polish substantive, executive and procedural criminal law amendments with a view to enhancing the effectiveness of mechanisms employed to deprive offenders of the benefits they accrued as a result of committing a crime". The legislator also noted that the projected law transposes into domestic law the 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[3].

As a consequence of the amendments, the provisions concerning forfeiture of material proceeds of crime were transformed, with the introduction of so-called extended confiscation. This paper sets out to present a construction of Article 45 of the Polish Criminal Code as amended and to assess the correctness of the amendment, particularly in the context of the Polish Constitution and the aforementioned 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. Notwithstanding, this is not to say that the regulation of extended confiscation is limited merely to Article 45 of the Criminal Code, yet it is indisputably the key pertinent provision.

1. CONTENT OF THE DIRECTIVE

Before the content of the draft bill is addressed, some comments will be made with regard to the Directive 2014/42/EU of the European Parliament and

[1] This paper takes further the comments by the author in: M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do art. 1–116*, Warszawa 2017.

[2] Polish Official Journal of Laws of 2017, item 768.

[3] Similar motivations were called upon by the legislator previously in respect of the Act of 20 February 2015 (Journal of Laws of 2015, item 398).

of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Pertinently, the Polish legislator explicitly noted that the law amending Article 45 of the Criminal Code implemented the said Directive.

It is the aim of the Directive to enhance the institutions of confiscation of instrumentalities used to commit crimes and proceeds thereof. Such legal instruments are grouped under the legal term of forfeiture. The Directive was clearly primarily intended against organized criminal groups as the first three recitals of the Directive pertain thereto. The European legislator starts with the assumption that it must take harmonized cooperation of Member States to enhance the fight against organized crime, especially considering the increasingly more transnational character thereof. As stated in recital 1, "effective prevention of and fight against organised crime should be achieved by neutralising the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature".

Recital 11 of the Directive claims that the concept of proceeds of crime shall include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. As clarified in the Directive's further provisions, all property, including property transformed – in its entirety or partially – into some other property as well as property connected to property acquired through legal means (up to the value of proceeds connected thereto), may qualify as proceeds of crime. Proceeds of crime may also encompass income or other revenue accrued from committing a crime or from property being involved in the said connection or transformation. In addition, the Directive provides for a broad definition of property that can be subject to freezing and confiscation. That definition includes legal documents or instruments evidencing title or interest in such property. Such documents or instruments could include, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures.

The crux and essence of extended confiscation may be found in recital 19 which, at the outset, notes that criminal groups engage in a wide range of criminal activities. Therefore, in order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. The European legislator notes further in recital 21 that extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is

substantially more probable, that the property in question has been obtained from criminal conduct rather than from other activities. The recital stipulates also that disproportionality of property belonging to a person to his lawful income could be among facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.

Furthermore, the Directive addresses confiscation of property transferred to a third party. Relevant here are situations where a third party acquired property – directly or indirectly, for instance through an intermediary – from a suspect or an accused, including cases of ordering or leading a crime or committing a prohibited act for the benefit of a suspect or an accused, or where an accused is not possessed of any property liable to confiscation. Recital 24 of the Directive provides that such confiscation should be possible at least in cases where third parties knew or ought to have known – based upon concrete facts and circumstances such as complimentary transfer or transfer for a price well below the property's market value – that the purpose of the transfer or acquisition was to avoid confiscation. It should be reserved, however, that the Directive does not allow for violating the rights of third parties acting in good faith.

The Directive explicitly indicates that its provisions are meant to only set minimal standards. Member States are free to introduce more elaborate regimes within their domestic systems.

Member States are obliged to implement the Directive to the extent delineated by the following enactments:

1) Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union;

2) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;

3) Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment;

4) Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;

5) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism;

6) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;

7) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking;

8) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime;

9) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA;

10) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

Pursuant to Article 5(2) of the Directive, extended confiscation shall be possible in respect of the following crimes:

1) active and passive corruption in the private sector, as provided for in Article 2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials;

2) offences relating to participation in a criminal organisation, as provided for in Article 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit;

3) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes if the child is over the age of sexual consent, as provided for in Article 4(2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided for in Article 5(4) of that Directive; offering, supplying or making available child pornography, as provided for in Article 5(5) of that Directive; production of child pornography, as provided for in Article 5(6) of that Directive;

4) illegal system interference and illegal data interference, as provided for in Articles 4 and 5 respectively of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, as provided for in Article 7 of that Directive, designed or adapted primarily for that purpose; the intentional production, sale, procurement for use, import, distribution or otherwise making available of tools used for committing offences, at least for cases which are not minor, as provided for in Article 7 of that Directive;

5) a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.

2. CONSTRUCTION OF EXTENDED CONFISCATION OF A MATERIAL BENEFIT

27 April 2017 saw the entry into force of the Act of 23 March 2017 on Amending the Criminal Code and Numerous Other Acts. One important amendment is the introduction of the concept of extended confiscation, for the first time, into Polish criminal law. The table below presents the wording of Article 45 of the Code before and after the amendments.

Article 45 of the Criminal Code

	Before 27 April 2017	**After 27 April 2017**
§ 1	If the perpetrator has even indirectly gained a material benefit from committing a crime that is not subject to the forfeiture of the items referred to in art. 44 § 1 or § 6, the court imposes the forfeiture of such benefit or of its equivalent-in-value. Forfeiture is not imposed with regard to the full benefit or with regard to a part of it, if the benefit or its equivalent-in-value is to be returned to a harmed party or another entity.	If the perpetrator has even indirectly gained a material benefit from committing a crime that is not subject to the forfeiture of the items referred to in art. 44 § 1 or § 6, the court imposes the forfeiture of such benefit or of its equivalent-in-value. Forfeiture is not imposed with regard to the full benefit or with regard to a part of it, if the benefit or its equivalent-in-value is to be returned to a harmed party or another entity.
§ 1a	*N/A*	A material benefit gained from committing a crime is deemed to include a thing's produce and rights constitutive of the benefit.
§ 2	While sentencing for a crime from the commission of which the perpetrator has even indirectly gained a material benefit of substantial value, it is deemed that the property which the perpetrator has taken possession of, or has acquired entitlement to, while committing a crime or afterwards, until the moment of passing of even a non-final sentence, constitutes a benefit derived from the commission of the crime, unless the perpetrator or another interested person proves otherwise.	While sentencing for a crime from the commission of which the perpetrator has even indirectly gained a material benefit of substantial value, or a crime from the commission of which the perpetrator gained or could have gained, even if indirectly, a material benefit, which is subjected to a sentence the upper limit of which is not less than 5 years, or which was committed within an organized group or association intent on committing a crime, it is deemed that the property which the perpetrator has taken possession of, or has acquired entitlement to, within 5 years before committing the crime until at least a non-final sentence has been rendered, constitutes a benefit derived from the commission of the crime, unless the perpetrator or another interested person proves otherwise.

§ 3	If a property constituting a benefit derived from committing a crime referred to in § 2 has been, effectively or under any legal title, transferred to another natural person, juridical person or organisational entity without a legal personality, it is deemed that the items remaining in the autonomous possession of that person or organisational entity, and other property rights that person is entitled to, belong to the perpetrator, unless the circumstances attendant to the acquisition of such property could not have given rise to the assumption that it has been even indirectly obtained by means of a prohibited act.	If a property constituting a benefit derived from committing a crime referred to in § 2 has been, effectively or under any legal title, transferred to another natural person, juridical person or organisational entity without a legal personality, it is deemed that the items remaining in the autonomous possession of that person or organisational entity, and other property rights that person is entitled to, belong to the perpetrator, unless the circumstances attendant to the acquisition of such property could not have given rise to the assumption that it has been even indirectly obtained by means of a prohibited act.
§ 4	*repealed*	*Repealed*
§ 5	In case of a joint ownership, the forfeiture applies to a share belonging to the perpetrator or its equivalent-in-value.	In case of a joint ownership, the forfeiture applies to a share belonging to the perpetrator or its equivalent-in-value.
§ 6	*repealed*	*Repealed*

A material benefit that warrants the application of forfeiture under Article 45 § 1 of the Criminal Code consists of assets gained, even if indirectly, by the perpetrator from committing a crime. As noted in the literature, by a "material benefit" one may understand a "benefit that fulfils, first and foremost, a material need the achievement of which changes the material standing of the perpetrator or the person to whom the benefit is transferred, and that change is not justified by entitlements belonging to the perpetrator in the name which stem from a legal relation in existence between him and a natural or legal person victimised by his actions"[4]. W. Zalewski has defined "indirect material benefit" as "an entirety of benefits gained from trade in things, material rights, receivables etc., originating from a crime, together with any profit accrued by the perpetrator"[5]. Therefore, a material benefit must be definable in monetary terms. It is a peculiar inconsistency to enclose within a definition of "material benefit" its criminal origin. For the notion, in and of itself, does not have a negative connotation. It is the circumstances of the acquisition or gaining of a benefit that lead to its classification as right or wrong. Otherwise it would not be necessary for the legislator to point to, in Article 45, a connection between a benefit subject to forfeiture with a committed crime. Consequently, it appears that there is a relation of synonymy

[4] O. Górniok, *O pojęciu "korzyści majątkowej" w kodeksie karnym (Problemy wybrane)*, "Państwo i Prawo" 1978, issue 4, p. 117; *cf.* also J. Raglewski, *Przepadek*, (in:) M. Melezini (ed.), *System Prawa Karnego. Tom 6. Kary i inne środki reakcji prawnokarnej*, Warszawa 2016, p. 798.

[5] W. Zalewski, *Komentarz do art. 45*, (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Tom II. Komentarz do artykułów 32–116*, Warszawa 2011, p. 205.

between the criminal term of "material benefit" and the civil "property", understood as an entirety of material rights.

This way of understanding forfeiture under Article 45 of the Criminal Code is based upon the assumption that perpetrators of crimes should not be awarded where they could multiply their profits stemming from committing a crime. This interpretation seems to be buttressed by the wording of § 1a which stipulates that "a material benefit gained from committing a crime is deemed to include a thing's produce and rights constitutive of the benefit". In support of this provision let me call upon Article 12(5) of the United Nations Convention against Transnational Organized Crime (Polish Official Journal of Laws of 2005, No. 18, item 158) which reads: "Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime". The metaphor of fruit of a poisonous tree is also pertinent here as it would be incompatible with the aim of forfeiture to allow the perpetrator of a crime to keep a benefit that would have been outside of his reach had it not been for his criminal activity.

Difficulties with applying Article 45 of the Criminal Code arise where the perpetrator connects a benefit originated from a crime with an asset acquired lawfully. The perpetrator could, for instance, purchase a car half of payment for which came from a legal source, the other half, however, constituted proceeds of a crime. A strict interpretation of Article 45 § 1 should, on its face, lead to a conclusion that only the half which originated, even if indirectly, from a criminal act shall be subject to forfeiture. If only a part of funds devoted to the purchase of a movable or immovable originated from a crime, it would be unwarranted to maintain that the entire thing purchased is a material benefit gained from committing a crime. One caveat to that would be property affected by Article 45 § 2, pursuant to which such property is presumptively subject to confiscation unless it is proven otherwise. Not without significance is Article 45 § 5 under which, in case of joint ownership, forfeiture applies to the share belonging to the perpetrator or its equivalent-in-value. The broad presumption in Article 45 § 2 undermines the previous legislative stance that the perpetrator shall be deprived of the benefits gained thereby from committing a crime, without imposing thereupon – at least not by means of confiscation – any additional material burdens, let alone imposing such burdens on third party co-owners of given property[6]. Problems arise where, for example, there is a bank account where both lawfully and unlawfully (within the meaning of Article 45 § 1) acquired assets are held. In such cases "the overstated value of financial assets (a number of abstract monetary units)

[6] J. Raglewski, *Przepadek*, (in:) M. Melezini (ed.), *System Prawa Karnego*..., pp. 840–841; K. Postulski, M. Siwek, *Przepadek w polskim prawie karnym*, Kraków 2004, p. 120; S. Śliwiński, *Polskie prawo karne materialne. Część ogólna*, Warszawa 1946, p. 461.

held in a bank account as against the balance, which should correctly reflect its true state, constitutes a benefit directly connected with a prohibited act"[7], unless the presumption in Article 45 § 2 applies.

The definition of a material benefit subject to confiscation in Article 45 § 1 of the Criminal Code includes not only the perpetrator's profit (gain), but also any costs sustained to achieve that profit. In other words, the entire income derived from committing a crime is potentially subject to forfeiture. As rightly noted by the Supreme Court, "The benefit represents the perpetrator's income. So if a narcotics factory sells their produce before they are confiscated on site, it is clear that the value of the price obtained through the sale will be subject to forfeiture. The sum should not be lessened by the value of costs, even if lawful, born to produce the narcotics. As a consequence, every subsequent transferee (trader) of the narcotics will be stripped of the material benefit representing the price paid (plus any "mark-up"), without lessening it by any costs born to buy the product"[8].

In the light of Article 45 § 1, the exercise of assessing the value of a material benefit subject to forfeiture necessitates relating it to a particular set of facts – the benefit actually gained by the perpetrator. The market value may only provide guidance and is not decisive. One value cannot be replaced by another, be it for the benefit or to the detriment of the perpetrator. It is necessary to distinguish between the notion of value of a thing, e.g. a psychotropic substance introduced to the market, from the benefit gained[9].

3. PRESUMPTIONS

The crux of the regulation of confiscation of a material benefit lies in the presumptions enshrined in Article 45 of the Criminal Code, particularly in the amended Article 45 § 2. The purpose of the presumptions is to switch the burden of proof where the criminal source of a material benefit is being established. If it was not for these presumptions, successful application of forfeiture/confiscation would be in some cases impossible as assets could have been transferred to third parties or it could be difficult to establish exactly which assets originated from

[7] Resolution of the Polish Supreme Court (7 judges) of 24 June 2015, I KZP 5/15, OSNKW 2015, No. 7, item 55.

[8] Decision of the Polish Supreme Court of 26 August 2010, I KZP 12/10, OSNKW 2010, No. 9, item 78; judgment of the Appellate Court for Łódź of 29 October 2012, II AKA 212/12, Legalis; judgment of the Appellate Court for Warsaw of 28 December 2012, II AKA 291/12, Legalis.

[9] Judgment of of the Polish Supreme Court of 21 November 2012, III KK 32/12, Legalis.

a crime. Therefore, to shield his assets from forfeiture, the perpetrator is obliged to prove that they were not gained from committing a crime[10].

In the literature one may encounter conflicting accounts of the presumptions pertaining to forfeiture of a material benefit[11]. In the light of the above, the view that portrays forfeiture as a necessary cost of an effective fight against crime appears convincing[12]. This is not to say, however, that the legislature should overlook the guaranteeing function of the criminal law and refuse to look for a compromise between conflicting goods without forgetting the constitutional context. The presumptions in Article 45 of the Criminal Code maybe applicable also as part of proprietary security in criminal proceedings, by virtue of Article 291 § 1 and § 2 of the Code of Criminal Procedure.

The reasons appended to the draft bill (Sejm paper No. 1186), which served as the starting point for the Act of 23 March 2017 on Amending the Criminal Code and Numerous Other Acts, stated that the proposed regulations are intended to introduce "into Polish substantive, executive and procedural criminal law amendments with a view to enhancing the effectiveness of mechanisms employed to deprive offenders of the benefits they accrued as a result of committing a crime. the proposals envisage a rise in the effectiveness of forfeiture". In other words, by reducing evidentiary standards and introducing a significantly broadened presumption pertaining to the criminal origin of benefits the legislator wants to prevent situations where the perpetrator could keep any unlawfully gained material benefit.

The scope of the presumption in Article 45 § 2 is very broad. For it covers property which the perpetrator has taken possession of, or has acquired entitlement to, within 5 years before committing the crime until at least a non-final sentence has been rendered, provided that:

1) the perpetrator has even indirectly gained a material benefit of substantial value, or

2) the perpetrator gained or could have gained, even if indirectly, a material benefit, which is subjected to a sentence the upper limit of which is not less than 5 years, or which was committed within an organized group or association intent on committing a crime.

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[10] J. Raglewski, *Materialnoprawna regulacja przepadku w polskim prawie karnym*, Kraków 2005, p. 105.

[11] N. Kłączyńska, R. Korczyński, *Kilka uwag o nowelizacji art. 45 k.k. (przepadek korzyści majątkowej)*, (in:) L. Bogunia (ed.), *Nowa kodyfikacja prawa karnego. Tom XV*, Wrocław 2004, p. 46 *et seq*; M. Prengel, *Odwrócenie ciężaru dowodu w przedmiocie przepadku mienia*, "Jurysta" 2003, issue 2, p. 39 *et seq*

[12] J. Raglewski, *Materialnoprawna*..., p. 112; L. Wilk, *Problem wartości majątkowych pochodzących ze źródeł nielegalnych lub nieujawnionych*, "Radca Prawny" 2002, issue 2, p. 71 *et seq.*

The presumption applies not only to property that the perpetrator has taken possession of, but to property he has gained any entitlement to. Therefore, even property of which the perpetrator is not the owner may be subject to forfeiture.

If the perpetrator gained property of substantial value from committing a crime, this alone triggers the presumption in Article 45 § 2. Two concepts of "property of substantial value" have been proffered in the literature. The dominant one relates to the definition of "property of substantial value" in Article 115 § 5 of the Criminal Code which classifies as such property whose value exceeds 200,000 PLN[13]. Opponents of this view claim Article 115 § 5 may only be used alternatively where there is no other indication on the facts of a given case[14].

A court may also order extended confiscation under Article 45 § 2 where the benefit gained, even if indirectly, was not substantial. It suffices that the perpetrator commits a crime which is subjected to a sentence the upper limit of which is not less than 5 years, from which he gained or could have gained a benefit, even if indirectly. Even if a benefit was not gained but, in the opinion of the court, could have been gained, the presumption of confiscation covers all property acquired within the period of 5 years before the commission of the crime. The 5-year threshold is not especially high as crimes such as theft, where the upper limit for sentencing is exactly 5 years, would qualify (Article 278 § 1 of the Criminal Code).

Contrary evidence to refute the presumption under Article 45 § 2 should prove the legality of the sources of ownership or other entitlement to the property in question. The evidence should disclose reliable information concerning the origin of an asset, and mere circumstantial evidence of legality is insufficient. As the legislator did not specify who is authorized to present contrary evidence, it may be the perpetrator or another interested person, one whose legal status may be affected by potential confiscation[15]. To prove the legal origin of an asset one need not always present a document directly pointing to a legal transaction or act that formed the basis for the acquisition of the property (for example, it is not absolutely necessary to produce an invoice or a bill). The evidence must undeniably prove that the asset in question was acquired lawfully. The law does not explicitly lay down any other requirements.

The presumption in Article 45 § 2 is meant to facilitate preventing the transfer of assets gained as a result of a crime to other persons in order to avoid its confiscation. In essence, this is an example of ostensible trade of an asset motivated

[13] J. Raglewski, *Przepadek*, (in:) M. Melezini (ed.), *System Prawa Karnego*..., p. 819; R. A. Stefański, *Przepadek korzyści majątkowej uzyskanej przez sprawcę z przestępstwa*, "Prokuratura i Prawo" 2001, issue 3, p. 160.

[14] D. Bunikowski, *Przepadek korzyści majątkowych pochodzących z popełnienia przestępstwa jako środek karny*, "Prokuratura i Prawo" 2008, issue 5, p. 68; N. Kłączyńska, R. Korczyński, *Kilka uwag o nowelizacji*..., (in:) L. Bogunia (ed.), *Nowa kodyfikacja*..., pp. 52–53.

[15] J. Raglewski, *Materialnoprawna*..., p. 123.

by the will to exempt it from the scope of application of criminal measures. For the presumption to apply property must have been transferred to a natural person, a legal person or an organisational unit without the status of a legal person, factually or under any legal title. In addition, the property must be in the inherent possession of that person or unit. By virtue of the presumption the property or other assets belonging to that person or unit are deemed to be owned by the perpetrator. A possible refutation would be to prove that, based upon the circumstances of the transfer, one could not have suspected that the property originated from a prohibited act, even if indirectly. Article 45 § 2 may give rise to doubts pertaining to the scope of property belonging to a natural person, a legal person or an organisational unit without the status of a legal person, which could be governed by the presumption. It appears that it covers all assets belonging to a person, and not only the assets which may originate from a crime, transferred by the perpetrator or another agent. The threshold, however, must be the value of the asset gained by the perpetrator by committing the crime. Therefore, a third party may not be stripped of all their assets if it exceeds in value the asset gained by committing the crime, even if the third party is unable to prove the origin of their assets[16].

Before the 2017 amendments, it was claimed that the presumption in Article 45 § 3 did not cover situations where a third party transferred an asset acquired from the perpetrator of a crime to another agent. In other words, the provision applied merely to relations between the perpetrator and the person to whom he transferred the asset. This restriction is no longer the law. Previously, in conjunction with § 2, § 3 referred to transfers by the perpetrator, however the current wording of the provision does not determine the transferor.

The presumption may be refuted by reference to good faith – one must point to circumstances surrounding a transfer which evince that one could not have suspected that the property originated from a crime. The legislator, it appears, attempted here to address criticisms levelled against the previous wording of the provision where a person attempting to refute the presumption had to present evidence of lawful acquisition of the disputed assets. One criticism was that this construction did not take into account the good faith of the transferee. The amended version necessitates devising a model of an objective reasonable bystander on the basis of which one may assess whether it is plausible to suppose that the property even if indirectly, originated from a crime. There is no need to single out a specific prohibited act, the commission of which the property must have been gained from[17]. M. Błaszczyk argues that it is, however, necessary to show "a connection between property covered by the presumption and a concrete crime attributed to the perpetrator, for which confiscation of a material benefit was imposed"[18].

[16] M. J. Szewczyk, *Przepadek korzyści majątkowej*, "Palestra" 2009, issue 3–4, pp. 83–84.

[17] J. Raglewski, *Przepadek*, (in:) M. Melezini (red.), *System Prawa Karnego*..., pp. 822–823.

[18] M. Błaszczyk, *Przepadek w znowelizowanym kodeksie karnym*, "Studia Iuridica" 2016, Vol. LXV, pp. 102–103.

Interpretation by reference to the ideal of a reasonable bystander has an objectivizing character – the assessment made is detached from the knowledge and skills of any particular person and the specific facts of the case[19]. The presumption is interpreted differently by M. Błaszczyk, who claims that the requirement of good faith dictates that "by reference to the circumstances surrounding the acquisition of property or material rights one could not have suspected that property acquired by a third party, even if indirectly, originated from a prohibited act (…) This condition necessitates objective reconstructing of the suspicion of a concrete transferee, based upon the circumstances surrounding the acquisition or its origin"[20].

4. ASSESSMENT OF THE PROVISIONS

Extended confiscation may be a useful tool in the fight against financially motivated and organized crime. However, effectiveness of it cannot be the sole measure of its correctness and reasonableness. It is necessary to, first and foremost, verify the new Criminal Code provisions from the constitutional perspective, taking into account the regulations of the EU directive which, according to the Polish legislature itself, the recent amendment attempted to implement.

The circumstances that justify the use of extended confiscation are cast very broadly. The legislator does not define the term "material benefit of substantial value". It is merely by analogy that one may compare it with "property of substantial value" which, under Article 115 § 5 of the Criminal Code, is property whose value exceeds PLN 200,000. More doubts are given rise to by the passage: "a crime from the commission of which the perpetrator gained or could have gained, even if indirectly, a material benefit, which is subjected to a sentence the upper limit of which is not less than 5 years". Here, it is not even necessary for the property to be of substantial value. The 5-year upper threshold is only ostensibly high as it covers, for instance, theft, which is subject to up to 5 years' imprisonment (Article 278 § 1 of the Criminal Code). Therefore, a person who stole PLN 1,000 could be subjected to forfeiture of property he gained or acquired any entitlement to within 5 years before committing the crime until a non-final sentence is rendered. This presumption could only be refuted if evidence to the opposite effect is presented. In other words, the person would have to prove that each and every of his assets throughout the previous 5 years was acquired lawfully.

It should also be noted that property forfeited under Article 45 § 2 need not be owned by the perpetrator. It suffices that he obtained any entitlement thereto. Therefore, an analysis of the provision shall take into consideration not only the

[19] J. Majewski, *Kodeks karny. Komentarz do zmian 2015*, Warszawa 2015, p. 136.
[20] M. Błaszczyk, *Przepadek w znowelizowanym*..., p. 103.

need to protect the perpetrator's property, but also that to which he has some entitlement but which is owned by third parties.

The institution of extended confiscation as transposed into Polish law goes far beyond the requirements imposed in Directive 2014/42/EU. This is not, in and of itself, impermissible because the Directive explicitly states it intends to merely lay down minimum standards. The problem is that such a broad brush approach to creating a presumption of forfeiture triggers doubts as to its compatibility with the Polish Constitution.

Academic writers have noted that Article 46 of the Constitution ("Property may be forfeited only in cases specified by statute, and only by virtue of a final judgment of a court"), which allows for limits to be placed upon the right enshrined in Article 64 ("Everyone shall have the right to ownership, other property rights and the right of succession"), pertains to things and not to property, which leads to the conclusion that it is impermissible to permit forfeiture of one's all assets. An exception may be where a thing subject to forfeiture (e.g. a tool used to commit a crime) constitutes all property of the perpetrator[21]. The doctrine has not worked out any uniform criteria to apply. It is certain, however, that the constitutionality of forfeiture cannot be interpreted extendedly and purposively as it constitutes an exception to the right to ownership. Ownership is not only regulated in Article 64(1) of the Constitution, but also its protection is one of the fundamental constitutional principles: "The Republic of Poland shall protect ownership and the right of succession" (Article 21(1) of the Polish Constitution).

Restrictions of the right to ownership are conceivable. As noted above, the Constitution itself envisages the possibility of forfeiture or confiscation. Also, it appears that introduction of the concept of extended confiscation could be defensible so long as an appropriate provision meets the criteria stemming from the principle of proportionality in Article 31(3) of the Constitution. As stated numerous times by the Constitutional Court, the proportionality principle demands, first, that all restrictions of the use of constitutional freedoms and rights be enacted by statute and not by means of secondary legislation. Second, such restrictions may not violate the essence of a given right or freedom and may be imposed only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or freedoms and rights of other persons. Pertinently, the scope of restrictions must be proportional to the goal pursued. Three criteria have been distilled on the basis of the above: utility, necessity and proportionality in its strict sense. Interference is lawful, therefore, if it is capable of achieving the goal pursued, is necessary to protect

[21] T. Sroka, *Komentarz do art. 46*, (in:) M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016, side No. 37. A similar view is espoused, it appears, by P. Sarnecki (*cf.* P. Sarnecki, *Komentarz do art. 46*, (in:) L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. II, Warszawa 2016, p. 247).

the public interest which it furthers, and its effects are proportional to the burden imposed thereby on citizens[22].

Since every law that broadens the scope of criminalization or the extent of activities of the government within criminal law imposes restrictions on the exercise of rights and freedoms, the criminal legislator should always prove that a proposed measure fulfils the criteria derived from the proportionality test. The legislator shall, first, establish the purpose of a projected norm, prove its necessity in the light of the goal pursued, its utility in the attainment of that goal, and decide between two conflicting goods: the one it intends to protect, and the one associated with the rights and freedoms that the proposed measure violates.

The part of Article 45 § 2 of the Criminal Code which penalizes perpetrators of crimes committed within an organized group or association intent on committing a crime is defensible in the light of the above. This is not to say that this catalogue may not be broadened. However, to that end the legislator shall not avail itself of a sanction but an objective criterion which would justify extending legal protection to some especially important legal goods. As already discussed, the threshold of 5 years' imprisonment does not constitute a sufficient criterion to justify extended confiscation. Take the example of Article 283 of the Criminal Code in conjunction with Article 279 § 1, pursuant to which the perpetrator of a larceny by breaking in, in cases of lesser gravity, is subject to the penalty of deprivation of liberty (imprisonment) of between 3 months and 5 years. It appears that in such said cases of lesser gravity extended confiscation could be enforced. In conclusion, extended confiscation as such deserves to stay in the Criminal Code, however it should be modified in line with principles demanding a proper level of ownership protection.

[22] Judgment of the Polish Constitutional Court of 3 June 2008, ref. number K 42/07, judgment of the Polish Constitutional Court of 29 September 2008, ref. number SK 52/05. *Cf.* also K. Wojtyczek, *Zasada proporcjonalności jako granica prawa karania*, (in:) A. Zoll (ed.), *Racjonalna reforma prawa karnego*, Warszawa 2001, p. 297; M. Piechowiak, *Klauzula limitacyjna a nienaruszalność praw i godności*, "Przegląd Sejmowy" 2009, Vol. 17, issue 2, pp. 56–57; A. Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej*, Warszawa 2010, p. 194; A. Zoll, *Konstytucyjne aspekty prawa karnego*, (in:) T. Bojarski (ed.), *System Prawa Karnego. Tom 2. Źródła prawa karnego*, Warszawa 2011, pp. 237–241.

EXTENDED CONFISCATION OF A MATERIAL BENEFIT IN POLISH CRIMINAL LAW

Summary

On 23 March 2017 the Sejm (the lower chamber of the Polish Parliament) passed the Act on Amending the Criminal Code and Numerous Other Acts[23]. In the reasons appended to the draft bill it was asserted that the law intended "to introduce into Polish substantive, executive and procedural criminal law amendments with a view to enhancing the effectiveness of mechanisms employed to deprive offenders of the benefits they accrued as a result of committing a crime". This paper sets out to present a construction of Article 45 of the Polish Criminal Code as amended and to assess the correctness of the amendment, particularly in the context of the Polish Constitution and the 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.

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[23] Polish Official Journal of Laws of 2017, item 768.

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KEYWORDS

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przepadek, prawo karne, postępowanie karne