

Confiscation Under Latvian Law

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Stefan D. Cassella

Asset Forfeiture Law, LLC

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Part I – Criminal Confiscation

In this presentation, I will discuss the types of property that may be confiscated in connection with a criminal offense,

- And the procedures for confiscating it

Basically, there are two ways of confiscating criminally-tainted property:

- As part of the defendant's sentence in a criminal case
- And separately, in a non-conviction-based (or NCB) forfeiture proceeding

The first part of my presentation will focus on Criminal Confiscation, and the second part on NCB Confiscation.

For the most part, my focus will be on explaining the law as it is today, and giving examples of how to use it.

- Where appropriate, however, I may point out where there are gaps in the law that you may want to address with additional legislation
- Or that may have to be filled in by courts interpreting the statutes

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Authority

The authority to confiscate property from a defendant who is convicted of a criminal offense in a criminal case is found in Sections 36 and 42 of the Criminal Law

- § 36 lists the confiscation of property as one of the “additional punishments” that may be imposed against a convicted person

Section 42 goes into more detail,

- among other things, it defines “confiscation”:
- it is the “compulsory alienation of the property owned by a convicted person to the State ownership without compensation”
- like § 36, it provides that confiscation of property may be specified as an additional punishment.
- And it provides that the property that may be confiscated includes property that has been transferred to another person

Finally, it provides that a court, in determining confiscation of property, shall specifically indicate which property is to be confiscated.

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Categories of Property Subject to Confiscation

Chapter VIII of the Criminal Law describes the categories of property that may be confiscated in a criminal case.

There are three:

- 1) Criminally acquired property,
- 2) Objects of the criminal offense, and
- 3) Property connected to a criminal offense
 - § 70¹⁰ (listing the three categories of property subject to confiscation)

Let me take a minute to discuss what each of these categories would include

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Criminally Acquired Property

Section 70¹¹ defines “criminally acquired property” broadly as property that the defendant obtained “as a direct result of a criminal offense”; § 70¹¹(1)

- Another term for “criminally acquired property” is the “proceeds” of the offense
- If the defendant robbed a bank, the money he stole is the proceeds
- If he committed fraud or sold drugs, the money he obtained is the proceeds
- If he accepted a bribe, the bribe money is the proceeds

The term, however, is quite broad

- If causality is established, then any property that the defendant was able to obtain – *directly or indirectly* -- because of the offense constitutes the proceeds

This is essentially a “but for” test

- What would the defendant not have but for having committed the criminal offense?

For example, if the defendant obtained a Government contract by paying a bribe, the contract – and all payments on the contract – would be the proceeds of the bribe

- Because he would not have gotten the contract but for having paid the bribe

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Traceable Property

There is no limit on the types of property that may be confiscated as criminally derived property

- it could be money or any other personal property, immovable property, or intangible property
- it also includes any property traceable to the criminally derived property

So, if the defendant is a corrupt public official who steals money from the public treasury,

- and he uses that money to buy a beach house on the Sea, the beach house is the proceeds
- and if he uses the beach house as the security for a loan, the loan money is the proceeds
- And if he uses the loan money to buy a boat, the boat is the proceeds, and so forth

No matter how much time passes, or how many times the property changes form, it remains proceeds and may be confiscated

Remember, too, that under § 42, proceeds includes property that the defendant has transferred to a third party

- So, for example, the defendant cannot insulate his property from confiscation by transferring it to a family member

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Rebuttable Presumption

As an aid to the Government in confiscating criminally acquired property, the statute also creates a rebuttable presumption

- any property of a defendant convicted of a crime committed for financial gain is considered criminally derived property if it is “not proportionate” to his legitimate income; § 70¹¹(2)
- this includes property held in the name of a family member; § 70¹¹(3)

The presumption is rebuttable:

- that is, the defendant may be able to establish that the money came from a legitimate source
- but the onus is on the defendant to do so
- and if he cannot, the property may be confiscated as the proceeds of his offense

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Gross v. Net

The statute does not make clear, however, whether it authorizes the confiscation of the gross receipts of an offense, or only the net profits

- Does a drug dealer get to deduct the cost of the drugs?
- Does a person who buys stock and sells it based on inside information deduct the cost of the stock?
- Does a contractor who bribes a Government official to get a contract deduct the bribe?
- What if he performs the work on the contract but would never have gotten the contract but for the bribe. Does he deduct the cost of doing the work on the contract?

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Objects of a Criminal Offense

The second category of property subject to confiscation includes the “objects” of the criminal offense

- § 70¹²(1) defines the objects of the offense as the “instrumentalities” which were used or intended to be used to commit the offense

Some obvious examples would include

- a gun used to commit a robbery,
- a boat or airplane used to smuggle drugs, or
- a computer used to create or distribute child pornography

All of those things are subject to confiscation because they are the *instruments* with which the crime was committed

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Facilitating Property

Some other types of property are less obviously regarded as property used to commit a crime.

For example:

- the place where criminals met to plan the offense or to hide the stolen goods
- the business through which criminal proceeds are laundered
- the untainted money in a bank account that is commingled with criminal proceeds to make them appear legitimate
- the money or residence used to create the appearance of wealth when applying for a loan or lulling the victims of fraud

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These things make the criminal offense easier to commit, but may not be considered the “instrumentalities” if that term is read narrowly

- For example, if someone is a shoemaker, the needle and thread that he uses to sew the shoes may be the instruments of his trade, but what about the shop where he works?
- The shop is not technically an instrument used to make shoes, but it is property used to make it possible to carry on the trade

For that reason, some countries use the term “property used to facilitate” the crime, rather than “instrumentality used to commit”

- such facilitating property is defined as anything that made the crime easier to commit or harder to detect

This may be an issue that your courts will have to address if they have not done so already

- I would urge you to read the term “property used to commit the offense” broadly to include not only instruments like the gun or the airplane, but anything that made the crime easier to commit

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Property Connected to the Offense

Section 70¹³(1) defines a third category of property subject to confiscation

— this is property “connected to the criminal offense”

I confess that I am not sure what this adds to the statute

— it is defined somewhat vaguely as property of the perpetrator which he should not be allowed to retain “due to the committed criminal offense”

— examples include animals and vehicles belonging to a person convicted of driving while intoxicated. § 70¹³(3) and (4)

Because I am not sure what it means, I am not going to say any more about it.

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Procedure

Some of the procedures pertaining to criminal confiscation are set forth in the Criminal Law and some are in Chapter 27 of the Criminal Procedure Law.

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Confiscation is mandatory

The Criminal Law provides that the confiscation of all three types of property **is mandatory** upon the conviction of the perpetrator:

- § 70¹¹(4) (providing that criminally acquired property “shall be confiscated”)
- § 70¹²(2) (providing that objects of the offense “shall be confiscated”)
- § 70¹³(2) (providing that property connected to the offense “shall be confiscated”)

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Indispensable Property

The only exception is in Section 42(4) which provides that the court must exempt property that is “indispensable” to the perpetrator or his dependents

- Annex 4 of the Law on Procedures for Coming into Force and Application of the Criminal Law sets forth a list of property that is apparently considered “indispensable”

- For example: home furnishings necessary to the convicted person or his family, everyday clothing, money in the amount of the minimum monthly wage, heating fuel, wedding rings, and pets.

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The court must say what property is to be confiscated

The Criminal Law is not clear as to the time and manner in which the court would make a confiscation order.

Section 42(3) and Section 70⁵ both provide, however, that the court, in determining the confiscation of property, “shall specifically indicate which property is to be confiscated”

- Presumably, this occurs once the defendant’s conviction is final and the court is imposing sentence

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Value-based judgments / substitute assets

It is often the case that the criminally-derived property is unavailable because the defendant has dissipated, concealed or transferred the property to a third party

- In the United States, courts often say that this is what happens when the defendant has spent his criminal proceeds on “wine, women and song”

If the criminally-acquired property is not available (*e.g.*, because it has been spent, destroyed, or concealed) that does not mean that he has avoided the possibility of forfeiture,

- Rather, the court may order the defendant to pay a judgment equal to the value of the missing property; § 70¹⁴(2)
- To satisfy the value-based judgment, the Government can recover a substitute asset having a value equal to value of the missing criminal proceeds; 70¹⁴(3)

Similarly, if the “object of the criminal offense” – *e.g.* the gun, vehicle or computer used to commit the crime – belongs to a third party, it may not be confiscated

- but in that case the Government is entitled to recover the value of that object from the defendant; § 70¹⁴(1)

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Recovering “proceeds” from third parties

If the defendant does not have any substitute property, the Government has several options under § 70¹⁴(4):

- 1) Recover the original proceeds from a third party who was not a bona fide purchaser for value
- 2) Recover property that the defendant jointly owns with his spouse; or
- 3) Recover property that belongs to a third party with whom the defendant has a joint household, if the property was acquired by the third party after the commission of the defendant’s offense

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Facilitating Property Held by a Third Party

Dealing with property held by third parties is an important part of criminal confiscation.

When the proceeds of the crime are in the hands of a third party, it is easy to see why the property should be recovered from the third party and confiscated

- No one has a right to retain criminal proceeds except for a bona fide purchaser for value who did not know that he was purchasing criminally-derived property
- But what about property used to commit the offense?

We have just seen that if the object of the offense belongs to a third party, the Government can recover the value of the property from the defendant.

- But what about recovering the property *from the third party*?

What matters in that case is when the third party became the owner of the instrumentality

- the law protects a third party who was the owner of the property when it was used to commit the crime, such as the defendant’s brother whose boat the defendant used to smuggle drugs

- in that case, the Government has to look to the defendant to recover the value of the property
- but what if the defendant used his own boat to smuggle drugs, and then to protect it from confiscation, gave it to his brother as a gift
- the statute simply says that the property of a third party may not be confiscated, but should that not be limited to cases where the third party owned the property at the time the crime occurred or acquired it later as a bona fide purchaser for value?
- The law should allow the recovery of facilitating property from a third party just as it allows the recover of proceeds from a third party
- Otherwise, defendants would be able to insulate the objects of the crime from confiscation by gifting them to family members and other third parties

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Cases involving multiple defendants

As mentioned, § 70¹⁴ allows the court to make the defendant liable for a value-based judgment if the criminally acquired property is unavailable

- but what if there are multiple defendants convicted of the same offense
- are they jointly and severally liable for the full amount of the judgment so that the Government could collect it from any one of them?
- Or is each defendant liable only for the property that he personally obtained?

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***Honeycutt* Issues**

If each defendant is only liable for what he personally obtained, how does that apply to people who act jointly, such as a husband and wife,

- or to the leader of a criminal organization, who “obtains” all of the property but allows his underlings to retain some for themselves?

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Rights of third parties

It is clear from some these provisions that the law contemplates protecting the rights of third parties

- I have mentioned some of them already (refer to slide)

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More rights of third parties

In addition, the statute says that the property of the defendant's spouse cannot be confiscated as substitute property if the property was separately owned at least one year before the commencement of the offense

- And similarly, that property of a third party with whom the defendant shares a joint household cannot be confiscated as substitute property if the third party acquired the property before the commencement of the offense

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Procedure: No ancillary proceeding

Nothing in the Criminal Law, however, says what the procedure is for determining if these conditions are met

- Do third parties have the right to intervene in the criminal trial to object to the confiscation of their property?
- Must they withhold their objections until the defendant is convicted and the court is contemplating making a confiscation order?
- Should there be a separate proceeding – apart from the criminal case – where third parties are given the opportunity to contest a confiscation order?

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Procedure: No ancillary proceeding (Part 2)

For example, exactly when does a third party get to object under § 70¹⁴(1) that the instrumentality belonged to him, not to the defendant?

- Or when does the defendant’s spouse get to object under § 70¹⁴(4) that the marital property that the Government wants to confiscate as substitute property was owned separated by her more than a year before the offense?

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Section 360

There is a provision in § 360 of the Criminal Procedures Law dealing with the restoration of stolen property to its rightful owner, and the compensation of a third party who may have acquired the property in good faith.

- But there does not appear to be anything in the Criminal Procedures Law that addresses the questions I have raised.

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Preservation of Property Pending Trial

In any case where the confiscation of property is contemplated, there must be a way of preserving the property pending trial

- Otherwise, it is likely to disappear
- There are several provisions in the Criminal Procedures Law that address this

Section 361(1) of the Criminal Procedures Law provides that to ensure the confiscation of criminally acquired property, such property “will be seized within criminal proceedings.”

Section 361(3) says that such seizure may be approved pre-trial by an investigating judge, or during trial by the court.

Section 361(4) also authorizes pre-trial seizures in emergency situations with the consent of a prosecutor and the post-seizure approval of the investigating judge.

Section 361(8) exempts “basic necessity objects” unless they were criminally acquired or were otherwise “related to a criminal offense.”

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Gaps in the Procedure

Once again, however, there are some gaps in the law as presently written

The statute does not say, for example, if the decisions on any or all of these issues is made *ex parte* – that is, without the participation of the property owner – or if the defendant or third party owner of the property has a right to make a post-seizure objection

- In particular, the law does not make any provision for objecting to the pre-trial seizure of the property on the ground that it is needed to pay attorney's fees

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Storage and Maintenance

Finally, there are other procedures in Chapter 27 of the Criminal Procedures Law, §§ 355 – 392, relating to the storage and maintenance of seized property and other procedural issues that we do not have time to discuss here.

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Part II – Non-Conviction-Based Confiscation

For the remainder of my time, we're going to talk about Non-conviction-based (NCB) confiscation.

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Introduction

If there is going to be a criminal case, it makes sense to confiscate the property as part of the criminal proceeding

- But sometimes bringing a criminal case is not possible or in the interests of justice

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NCB Confiscation in other countries

In the common law countries, and in an increasing number of civil law countries, the legislature has enacted a scheme for confiscating property without having first to obtain a criminal conviction

— this is called non-conviction-based or NCB confiscation.

In Latvia, Chapter 59 (§§ 626-31) of the Criminal Procedure Law sets forth the basic outlines of an NCB confiscation scheme

So, what are those basic outlines?

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When to use NCB confiscation

§ 626 provides that an NCB proceeding may be commenced to recover property derived from or otherwise related to a criminal offense if –

- (1) during pre-trial criminal proceedings, it appears that transferring the criminal case to the court is “not possible in the near future” or “may cause substantial unjustified expenses”; or
- (2) a criminal proceeding is terminated “for reasons other than exoneration”

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Commencement of NCB proceedings

§ 627 says if those conditions are met, the person directing the proceedings may take the case to court.

§ 628 says that notice of the proceeding must be sent to the person accused of the criminal offense, to the person from whom the property was seized, and any other person with a right to the property

— the notice must indicate that the recipient has the right to participate in the proceeding and to submit evidence

§ 629 says that the court must schedule and conduct a hearing within 10 days; the hearing must be closed to the public

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Judicial Decision

§ 630 provides that the court must decide if the property was derived from or is related to a criminal offense, if a person has lawful rights to the property, and what action to take regarding the property if it finds that it was criminally acquired.

§ 631 provides for a right of appeal.

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When to use NCB confiscation

It is important that Latvia has an NCB option

- among other things, it is necessary in the following situations:
 - 1) when the wrongdoer is dead, a fugitive, or incompetent to stand trial
 - 2) when the property is recovered, but the wrongdoer's identity is unknown
 - 3) when the property is in Latvia, but the underlying crime occurred in another country
 - 4) when the property is the object (*i.e.*, the instrumentality) of a crime but belonged to a third party (and so cannot be confiscated criminally under § 70¹⁴(1));

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When to use NCB confiscation (Part 2)

- 5) when, based on objective criteria, a criminal prosecution would not be in the interests of justice
 - *e.g.*, because the wrongdoer has already been convicted of another crime, or
 - because it makes no sense to invest the resources of the state to obtain a conviction if the recovery of the property is sufficient punishment and restores the property to victims

- 6) when the property is at hand, but it will take years to conclude a criminal prosecution

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“Barest rudiments”

It appears that any of these situations would satisfy the conditions in § 626

Nevertheless, Sections 626-31 provides only the barest rudiments of an NCB confiscation scheme

- the following are some of the issues that are not addressed:

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Standing

Who has standing to contest the confiscation?

- The law provides that a person with “lawful right” to the property may participate in the proceeding and present evidence
- But what is a “lawful right”?
- Does it include a marital interest? The secured interest of a lien holder? The unsecured interest of a creditor? The possessory interest of a bailee?

Can a person with possessory interest contest the proceeding if he is merely a courier with no real interest in the property?

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Standing (Part 2)

What if there are multiple victims of a fraud, only one of whom can trace his loss to the recovered property?

- Can that person prevail while the others cannot? Or are they all unsecured creditors?
- What if the person has title to the property but is really only a nominee or “straw owner”?

And what is the procedure for determining standing?

- Who has the burden of proof and when is that determined?

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NCB procedure

Most countries that have NCB confiscation schemes have enacted procedural rules or statutes that govern the way the proceeding is conducted

- But aside from what I mentioned in Sections 627-31, the Criminal Procedures Law does not say very much about NCB confiscation procedure
- And what it does say may not apply in all situations

Time for the hearing

For example, is holding a hearing within 10 days realistic?

- What if the case involves a complex fraud scheme, or the laundering of the proceeds of a foreign crime through a Latvian bank?

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Procedure at the hearing

Also, what is the procedure at the hearing?

- Who has the burden of establishing that the criteria in § 626 for commencing an NCB proceeding are met? Is that appealable?
- Who has the burden of establishing the merits – *i.e.*, that the property was criminally acquired or otherwise related to a criminal offense? See § 125 of the Criminal Procedure Law (creating presumptions)
- What is the standard of proof? Is it a balance of the probabilities?
- What does “related to a criminal offense mean”? Is this the same as an “object” of the offense, *i.e.*, an “instrumentality”

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Innocent Owners

What happens if the court determines both that the property was criminally acquired (or is an instrumentality) and that a third party has a lawful right to the property?

- For example, the court finds that the wrongdoer used a vehicle belonging to a third party to rob a bank, but the third party knew about it and did not object?
- Is the third party able to recover, or is recovery limited to innocent owners?

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Innocent Owners (Part 2)

Or suppose that the court finds that the property was derived from a crime but was given to a third party as a gift,

- or came to the third party in an inheritance,
- or became marital property when the wrongdoer married?
- Is the third party protected, or is recovery limited to bona fide purchasers who pay fair market value and are unaware that they are acquiring criminal proceeds or instrumentalities?

If the law protects innocent owners, who has the burden of proof on the innocent owner defense?

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Proportionality

Is there any requirement that the confiscation be proportional to the gravity of the underlying offense?

- Could, for example, the court order the forfeiture of a business used to launder criminal proceeds if the business were worth 1 million euros and but was used to launder only 100 euros?

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Proportionality (Part 2)

Could the confiscation of criminally-derived property ever be considered disproportional to an offense?

- What if the business was started with the investment of \$1000 euros in criminally-acquired property and is now worth much more?
- Is it still subject to confiscation as criminally-derived property?

If there is a proportionality requirement, what is the standard.

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Conclusion

Other countries, including the United States, have a well-developed body of law governing NCB confiscation that addresses these and a great many other issues.

- I don't raise these issues to discourage you from using NCB confiscation in Latvia
- To the contrary, I have tried to emphasize that NCB confiscation is a critically important law enforcement tool that is often the only way to recover criminally-tainted property

My point is only that there are gaps in the law, and that Latvia may want to consider adopting a comprehensive set of NCB provisions to address these questions and close these gaps before they become obstacles to enforcement.