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THE LEGAL FRAMEWORK FOR  
RECOGNISING PROPERTY AS  
CRIMINALLY ACQUIRED AND  
THE ISSUES RELATED TO IT

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## INTRODUCTION

The preventing and combating of crime is a fundamental task of any democratic state. In 2017, 44,250 crimes were recorded, including 27,047 criminal offences against property and 4484 criminal offences related to the national economy, accounting for 71% of the total.<sup>1</sup> As an integral part of transnational organised crime, it is estimate that about 70% of illegal profits may have been spent in the financial system. However, less than 1% of this wasted revenue is intercepted and confiscated.<sup>2</sup>

**The topic is relevant** for the following reasons.

Professor A. Vilks points out that crime and other infringements of the law undermine the stability of any public system, causing irreparable harm to individual members of the society, as well as to the society and civilisation as a whole.<sup>3</sup> Illicit circulation of cash brings great financial returns and prosperity to transnational organised crime, allowing its entry into government structures, legitimate commercial business and society at all levels.<sup>4</sup> At the moment, cybercrime is at the core of the underground economy.<sup>5</sup> The question of cryptocurrencies and to what extent they are to be considered legal means of payment, has not yet been globally solved. As the financial technology sector,

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<sup>1</sup> Statistics of the Information Centre of the Ministry of the Interior. Obtained from: <http://www.ic.iem.gov.lv/node/109> (viewed 22.08.2018).

<sup>2</sup> *Transnational organized crime: the globalized illegal economy*. Obtained from: <https://www.unodc.org/toc/en/crimes/organized-crime.html> (viewed 28.08.2018.).

<sup>3</sup> Vilks A. *Krimināltiesiskā politika: diskursa analīze un attīstības perspektīvas* [Criminal law policy: discourse analysis and development prospects]. Rīga: Drukātava, 2013, p. 5

<sup>4</sup> *Model legislation on money laundering and financing of terrorism*. Obtained from: [https://www.unodc.org/documents/legal-tools/AML\\_MLawEnglish.pdf](https://www.unodc.org/documents/legal-tools/AML_MLawEnglish.pdf) (viewed 22.08.2018.).

<sup>5</sup> Ķiniš U. *Kibernoziedzība, kibernoziēgumi un jurisdikcija* [Cybercrime and jurisdiction]. Rīga: Jumava, 2015, p. 33

whose turnover grows 30 times faster than the rest of the economy, grows and as the size of financial transactions in it also increase, it is possible to hide increasingly bigger cash flows from the supervision of national authorities.

In 2016, the experts of the Organisation for Economic Co-operation and Development (*OECD*) pointed out that Latvia needs to communicate progress regarding money laundering prevention to the Working Group on Bribery in International Business Transactions.

The relevance of the topic is also confirmed by the recent extensive and significant amendments to the Criminal Law and Criminal Procedure Law, which came into force on 1 August 2017. One of the reasons for amending these laws was that the persons implementing the law did not comprehend the essence of the criminally acquired property, as evidenced by the very small number of cases when criminally acquired property was seized and confiscated during criminal proceedings. The need for a special procedure was also determined by the huge amount of proceeds from crime in the world economy. "According to UN estimates, in 2009, the total amount of proceeds from crime was about \$ 2.1 trillion, or 3.6% of the world GDP that year. Although most of this dirty money is legalised and re-invested in the legal economy, currently less than 1% of the proceeds of crime have been frozen and confiscated. In the EU, significant profits are made from organised crime. For example, about 100 billion euros a year are made from illicit drug trade in the EU".<sup>6</sup> According to the estimates made by the United Nations Office on Drugs and Crime (*UNODC*), the revenue from human trafficking is about \$ 3 billion per year and involves 140,000 victims of trafficking.<sup>7</sup>

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<sup>6</sup> Litvins G. *Noziedzība nedrīkst būt ienesīga* [Crime should not be profitable]. *Jurista Vārds*, No. 12 (711), 20.03.2012.

<sup>7</sup> *The Globalization of Crime, A transnational Organized Crime Threat Assessment*, *UNODC, Vienna, 2010*, p. 4.

In August 2018, the experts of the “Moneyval”<sup>8</sup> committee of the Council of Europe pointed out that Latvia needs to improve its understanding of money laundering and terrorist financing risks, therefore “Moneyval” recommended that Latvia take a number of priority measures.

**The aim of the doctoral thesis** is to research the theoretical understanding and significance of the recognition of property as criminally acquired during an investigation in criminal law relations, offering propositions for the improvement of the criminal law framework and development of the proceedings regarding criminally acquired property.

To achieve the aim of the doctoral thesis, the following **tasks** were set:

1. To research and theoretically evaluate the criminal law framework related to criminally acquired property.
2. To analyse the legal framework of individual EU Member States.
3. To research the peculiarities of proceedings regarding criminally acquired property and to find out the challenges of the criminal law framework.
4. To research and analyse the rights, obligations and opportunities for realising the interests of persons involved in the proceedings regarding criminally acquired property.
5. To analyse aspects of international cooperation in combating the circulation of criminally acquired property.

Research questions:

1. What is the legal framework and the possibilities of improving that framework in Latvia?
2. What are the differences and similarities of the legal frameworks of individual Member States of the European Union?

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<sup>8</sup> “Moneyval” is the supervisory authority of the Council of Europe which evaluates the measures to prevent money laundering and terrorist financing in Member States.

3. What are the challenges related to the proceedings regarding criminally acquired property?

4. What are the challenges of international cooperation related to combating the circulation of criminally acquired property?

**The object of research** is criminal law relations related to the circulation of criminally acquired property.

**The subject of research** is the legal framework related to criminally acquired property.

**Methods.** The doctoral thesis is based upon the results of the analytical method, analysing legislation, case law of different courts and legal literature regarding the understanding of criminally acquired property and the aspects of the implementation of this legal concept.

The comparative method has been used to compare changes in Latvian legislation, as well as to compare the legal framework related to criminally acquired property in different countries of the European Union.

The inductive method allowed analysing individual cases when property was recognised or not recognised as criminally acquired property, to identify and formulate general similarities, draw conclusions and formulate general principles.

The deductive method provided an opportunity to draw a conclusion on separate elements and individual aspects from theoretical knowledge, the legal framework related to the proceedings regarding criminally acquired property and the established interconnections.

By applying the historical translation method, that is, by clarifying the meaning of the legal provision taking into account the circumstances on the basis of which it was drafted, annotations of laws and regulations, arguments expressed during the adoption of laws and regulations and the justification of the necessity of the provision were analysed. The historical method has been

used to study the preconditions and reasons for criminally acquired property, as well as the development of legislation and the qualitative changes in it. Using the historic method allowed to find out and evaluate the reasons for the changes in the legislation, the drivers of the development of society and the legal relationship.

Using the grammatical (philological) method of translation, the meaning of the legal provision from the linguistic point of view was clarified, the applied terminology was evaluated, and the understanding and application of the terms and concepts in law was explained.

The provisions of law form a system in which all provisions interact and affect one another, therefore, in order to clarify the content of the provision, the systematic method of interpretation was used in the thesis, that is, clarifying the meaning of the provision in connection to other provisions of law.

Using the teleological (meaning and aim) method of interpretation, clarifying the meaning of the provision on the basis of a useful and fair objective, which should be achieved by the relevant provision, the results were used to assess the conformity of the implementation of the provision with the content thereof.

The interpretation of a legal text, as recognised by one of the most significant interpretation theoreticians of modern times, Friedrich Carl Savigny (1779-1861) is a scientific activity as well as an art form. It is the most methodically and theoretically saturated action of the person implementing the provision.<sup>9</sup>

An important factor to be taken into account when interpreting provisions of criminal law is that the interpretation of criminal law as a process

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<sup>9</sup> Meļķis E. *Tiesību normu iztulkošana* [Interpretation of provisions of law]. Riga: University of Latvia, 2000, p. 11.

and its result is a tool for discovering the content and meaning of provisions<sup>10</sup>, which is within the competences of the court of general jurisdiction, and the results are reflected in court rulings.

The Latvian legal framework for the recognition of property as criminally acquired is connected to the implementation of Latvia's international obligations and the implementation of requirements of the European Union laws. Therefore, during the writing of the work, the nuances of analysing international law and the law of the European Union were respected.

### **Novelty, theoretical significance and practical application of the doctoral thesis**

The scientific novelty of the doctoral thesis is based on the conclusions and proposals which are based on the research and can serve as the basis for the future development of criminal law and criminal procedure law by upgrading and improving the legal framework aimed at reducing the circulation of criminally acquired property, ensuring the effective realisation of the legal relationship based on the principles of human rights. The thesis is a complete study on the legal concept - criminally acquired property - which is based on the study of legal literature, the historical and current legal framework and case law.

The scientific and theoretical significance of the thesis is based on discovering the essence of the recognition of property as criminally acquired, the establishing of concepts and contents and understanding thereof, problem identification and theoretical analysis. The scientific and theoretical significance of the work is also based on the fact that it analyses and evaluates the constitutional issue of law, that is, the fundamental rights of a person - the

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<sup>10</sup> Baumanis J. *Ieskats krimināltiesību normu interpretācijas problemātikā* [Insight into the issues related to the interpretation of criminal law]. *Jurista Vārds*, 01.09.2015., No. 34 (886), p. 22.

right to property, as defined in Article 105 of the Constitution of the Republic of Latvia.

The work accomplished provides practical possibilities for the person implementing the law as well as for any person to comprehensively and fully understand the essence and content of the legal concept of criminally acquired property, to clearly understand the meaning and implementation aspects of the legal provisions, and to comprehensively understand the rights and possibilities for realising the interests of persons involved in the proceedings regarding criminally acquired property. To the person who implements the law - the opportunity to ensure a uniform application of legal provisions under the same legal and factual circumstances and different treatment in different circumstances. The accomplished work provides anyone with the opportunity to discover and defend the fundamental rights of a person guaranteed in the Constitution of the Republic of Latvia, including the right to know their rights, the rights to defend their rights and legitimate interests in a fair trial.

**The structure of the doctoral thesis** consists of five chapters with subchapters.

In the first chapter the understanding of the concept of criminally acquired property, the historical development of this concept of law and its role in the criminal legal relationship has been described and the framework of the legal concept in the laws and regulations of Latvia has been analysed. Directions and perspectives for the framework of criminally acquired property.

The second chapter analyses the framework of the legal concept in the laws and regulations of different countries of the European Union. The author analysed the legal framework of 18 Member States of the European Union: Croatia, Poland, Slovenia, France, Malta, the Czech Republic, Germany, Sweden, Lithuania, Estonia, Ireland, Spain, Denmark, Italy, Belgium, Finland, Greece and Hungary.

The third chapter deals with the proceedings regarding criminally acquired property. The essence and importance of the process in the fair resolution of criminal legal relations. Research of the concept of criminally acquired property and aspects of improvement thereof. Conditions for the application of proceedings regarding criminally acquired property and its effectiveness.

The fourth chapter explores the opportunities for the parties involved in the process to realise their rights. Obligations and rights of parties in the proceedings regarding criminally acquired property. Research regarding issues of realising participants' obligations and rights and possibilities of improvement thereof.

The fifth chapter deals with the aspects of international cooperation in identifying and confiscating criminally acquired property. The international obligations of Latvia in cooperation between countries for combating the circulation of criminally acquired property have been analysed.

#### **An overview of the bibliography and sources of law**

The issue of criminally acquired property has not previously been studied in Latvia from a comprehensive and scientific aspect, as the contemporary perception and content of this legal concept is new both for legal scholars and the enforcers of law. The doctoral thesis examines international law as well as legislations of Latvia and several countries in the European Union. The thesis uses author's findings from previous publications. The theoretical basis of the work consists of scientific articles and publications on the subject of the research, as well as scientific literature on the theory of law, criminal law, criminal procedure law, civil law and international law, which is indicated in the list of bibliography and sources used in the work. The results of case law analysis have also been used in the work. The empirical basis of the

work consists of rulings of the courts of general jurisdiction of Latvia, as well as decisions of the Constitutional Court and international courts.

### **Approbation of the results of the doctoral thesis**

The results of the thesis, presenting some issues and possible solutions thereof, have been approbated at both local and international scientific conferences and publications:

Stukāns J. 2016. *Tiesību pārsūdzēt lēmumu realizācijas problemātika procesā par noziedzīgi iegūtu mantu* [Issues regarding the right to appeal decisions in the proceedings regarding criminally acquired property], p. 77-85. Electronic journal of legal scientific articles "Socrates", Faculty of Law, Riga Stradiņš University. Riga: RSU, 2016, No. 1(4). Article published on the website:

[https://www.rsu.lv/sites/default/files/imce/Dokumenti/izdevumi/socrates\\_4\\_2016.pdf](https://www.rsu.lv/sites/default/files/imce/Dokumenti/izdevumi/socrates_4_2016.pdf).

Stukāns J. 2014. *Procesuālie aspekti mantas atzīšanai par noziedzīgi iegūtu* [Procedural aspects in recognising property as criminally acquired], p. 220-226. Collection of articles from the University of Daugavpils' 56th international scientific conference. Daugavpils: Daugavpils University Academic Press "Saule".

Stukāns J. 2014. *Procesa par noziedzīgi iegūtu mantu būtība un procesuālie aspekti* [The essence and procedural aspects of proceedings regarding criminally acquired property], p. 39-45. In the journal "*Administratīvā un Kriminālā Justīcija* [Administrative and Criminal Justice]" no. 2(67).

Stukāns J. 2014. *Rakstveida pierādījumu un dokumentu pārbaude tiesas izmeklēšanā* [Examination of written evidence and documents in court investigations], p. 49-54. In the collection of articles from the international scientifically practical conference "The transformation process of law, the

regional economy and economic policy: the relevant economic and political and legal issues" (BSA Riga, 10 December 2013). Riga: Baltic International Academy.

Stukāns J. "*Tiesiskās stabilitātes nodrošināšana – tiesas pienākuma kriminālprocesa pabeigšana saprātīgā termiņā realizācijas tiesiskie aspekti* [Ensuring legal stability - the obligation of the court to complete criminal proceedings in a court of law within a reasonable term and the legal aspects of its realisation]", p. 80-82. Theses of the international scientific conference "Topical problems of security reinforcement: political, social, legal aspects" (Riga, 23 April 2015). Riga: RSU 2015. - ISBN 978-9984-793-72-6.

Stukāns J. "*Noziedzīgi iegūtas mantas konfiskācijas nodrošināšanas tendences* [Trends in ensuring the confiscation of criminally acquired property]", p. 408. 2015 scientific conferences in Riga Stradiņš University: Theses (Riga, 26-27 March 2015). Riga: RSU, 2015. ISBN 978-9984-793-69-6.

Stukāns J. "*Procesuālie aspekti mantas atzīšanai par noziedzīgi iegūtu* [Procedural aspects in recognising property as criminally acquired]", p. 88. Theses from the University of Daugavpils' 56th international scientific conference. 2014. Daugavpils University Academic Press "Saule".

Stukāns J. "*Pierādījumi un to pārbaude iztiesāšanā – krimināltiesiskās politikas attīstība* [Evidence and its verification during the proceedings - the evolution of criminal law policy]", p. 43-44. Theses from the international scientific conference "Legal policy for the development of society" (Riga, 23 April 2014). Riga: RSU, 2014.

Stukāns J. "Proceedings regarding criminally acquired property", p. 429. Theses of the Riga Stradiņš University 2014 scientific conference (Riga, 10 and 11 April 2014). Riga: RSU, 2014.

Stukāns J. "*Noziedzīgi iegūtas mantas konfiskācijas nošķiršana no soda – mantas konfiskācija problemātika: teorija un prakse* [Separating the

confiscation of criminally acquired property from punishment - issues of the confiscation of property: theory and practice]", p. 57. Theses from the international scientific conference "Topical problems of innovation law" (Riga, 25 April 2013). Riga: RSU, 2013.

Speaking at international scientific conferences with a report:

In the international scientifically practical conference "Legal issues in the centenary of Latvia: retrospective and perspective" on 25 April 2018 in Riga with the report "*Latvijas starptautiskās saistības noziedzīgi iegūtas mantas aprites ierobežošanā* [Latvia's international obligations in limiting the circulation of criminally acquired property]".

In the international scientifically practical conference "New challenges of modern society for strengthening security: real situation and prospects" on 20 April 2016 in Riga with the report "*Tiesību pārsūdzēt lēmumu realizācijas problemātika procesā par noziedzīgi iegūtu mantu* [Issues with realising the right to appeal a decision in the proceedings regarding criminally acquired property]".

In the international scientific conference "Topical problems of security reinforcement: political, social, legal aspects" on 23 April 2015 in Riga, with the report "*Tiesiskās stabilitātes nodrošināšana - tiesas pienākuma kriminālprocesa pabeigšana saprātīgā termiņā realizācijas tiesiskie aspekti* [Ensuring legal stability - the obligation of the court to complete criminal proceedings within a reasonable term and the legal aspects of its realisation]".

In the Riga Stradiņš University 2015 scientific conference on 26-27 March 2015 in Riga with the report "*Noziedzīgi iegūtas mantas konfiskācijas nodrošināšanas tendences* [Trends in ensuring the confiscation of criminally acquired property]".

In the international research conference "The enhancement of combating money laundering and financing of terrorism: financial investigation

techniques” organised by the Odessa State University of Internal Affairs and European Police College on 27-31 October 2014 in Odessa, Ukraine with reports "Search, seizure and confiscation of criminal assets in Latvia; Problems related to proving illicit origin of funds and legal base for bringing in verdict of guilty for money laundering without conviction for predicate offence (Latvia)".

In the conference organised by the European Commission and Ukraine's Financial Monitoring Service "International practice in establishing the special agency on asset confiscation and managing the confiscated assets. Legal framework for the special confiscation procedure, the seized/confiscated assets management practice in the EU countries, mutual legal assistance and the institutional mechanism for recovering assets" on 3-4 July 2014, in Kiev, Ukraine, with presentation of the report "Search, seizure and confiscation of criminal assets in Latvia".

In a conference organised by the European Commission and Ukraine's Financial Monitoring Service "Money Laundering and other financial crimes. Identifying and investigating financial crimes in the stock market, foreign exchange and insurance sector" on 1-2 July 2014, in Kiev, Ukraine with a presentation of the report "Problems related to proving illicit origin of funds and legal base for bringing in verdict of guilty for money laundering without conviction for predicate offence (Latvia)".

In the international scientifically practical conference "Science. Law. Stability" in Riga on 24 April 2014 with the report "*Procesa par noziedzīgi iegūtu mantu būtība un procesuālie aspekti* [The essence and procedural aspects of the proceedings for criminally acquired property]".

In the international scientific conference "Legal policy for the development of society" in Riga on 23 April 2014, with the report "*Pierādījumi un to pārbaude iztiesāšanā – krimināltiesiskās politikas attīstība* [Evidence and its verification during the proceedings - the evolution of criminal law policy]".

In a conference organised by the Central Asia Division of the United Nations on 2-3 April 2014 in Ashgabat, Turkmenistan, with the report "*Судебное рассмотрение дел по легализации преступных доходов опыт Латвии* [Judicial examination of cases related to the legalisation of criminally acquired property - the experience of Latvia]".

In the international scientifically practical conference "The transformation process of law, the regional economy and economic policy: the relevant issues of economically-political and legal relations" in Riga, on 10 December 2013 with the report "*Rakstveida pierādījumu un dokumentu pārbaude tiesas izmeklēšanā* [Examination of written evidence and documents in court investigations]".

In the Riga Stradiņš University's 13th scientific conference in Riga, on 11 April 2014, with the report "*Process par noziedzīgi iegūtu mantu* [Proceedings regarding criminally acquired property]".

In the international scientific conference "Topical problems of innovation law" in Riga, 25 April 2013 with the report "*Noziedzīgi iegūtas mantas konfiskācijas nošķiršana no soda – mantas konfiskācija problemātika: teorija un prakse* [Separating the confiscation of criminally acquired property from punishment - issues of the confiscation of property: theory and practice]".

In the international scientific conference on 17-18 October 2012 in Riga, as part of the European Commission's Special Program "Criminal Justice" in 2010, No. JUST/2010/JPEN/1546 "Current problems of restorative justice and perspectives for solving them in the European Union" with reports: "*Noziedzīgi iegūtas mantas konfiskācijas nošķiršana no soda – mantas konfiskācija problemātika: teorija un prakse* [Separating the confiscation of criminally acquired property from punishment - issues of the confiscation of property: theory and practice]"; "*Process par noziedzīgi iegūtu mantu* [Proceedings regarding criminally acquired property]"; "*Lietisko pierādījumu, rīku un mantas*

*konfiskācijas izpildes Latvijā praktiskā problemātika. Starptautiskās sadarbības aspekti mantas konfiskācijas izpildes jomā. [Practical issues regarding the confiscation of material evidence, instrumentalities and property. Aspects of international cooperation in the field of confiscation of property]*".

The results of the doctoral thesis have also been practically approbated. The author of the work is a member of the permanent working group on evaluating the amendments of Criminal law in the Ministry of Justice.

The results of the doctoral thesis are also approbated by the author of the paper providing the Constitutional Court with an opinion on the compliance of the contested provision with the first sentence of Article 92 of the Constitution in the case No. 2016-13-01 "On the compliance of Section 629, Paragraph five of the Criminal Procedure Law with the first sentence of Article 92 of the Constitution of the Republic of Latvia", as well as by providing an opinion on the compliance of the contested provisions with the first sentence of Article 92 and first sentence of Article 91 of the Constitution in the case No. 2017-10-01 "On the compliance of Section 629, Paragraph five of the Criminal Procedure Law with the first sentence of Article 92 of the Constitution of the Republic of Latvia and of the compliance of Section 631, Paragraph three of the Criminal Procedure Law with the first sentence of Article 91 of the Constitution".

# 1. LEGAL CONCEPT – CRIMINALLY ACQUIRED PROPERTY

## 1.1. The understanding and historical development of the concept

The legal concept - criminally acquired property - has been known in the Latvian legal system since the time when the Penal Law came into force on 24 April 1933. Penal Law is the first criminal law of the independent state of Latvia and it was one of the first steps in the process of creating a new legal framework in Latvia.

The Penal Law of 24 April 1933 stipulated that "1. Seizing criminally acquired property (*producta sceleris*) and instrumentalities of crime (*instrumenta sceleris*) for the benefit of the state should be regarded as a security measure. 2. Objects obtained by crime shall also be taken in good faith from the third parties who have acquired them (Sections 421 and 789 of the Criminal Procedure Law). According to the prevailing opinion, in this case only the existing property is to be seized, but not whatever has been acquired by realising it, unless it is clearly stated in the law."<sup>11</sup> The aforementioned framework of the Penal Law clearly stipulates that the criminally acquired property is not left to the perpetrator also in the cases when the property has been given over to third parties.

It is clear from the provisions of the Penal Law that the issue of criminally acquired property was resolved in order to restore the legal status existing before the offence as much as possible and to compensate the victim for the harm caused by the criminal offence. In turn, the perception of the

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<sup>11</sup> The Penal Law of 24 April 1933 with legislative motives and detailed comments, as well as alphabetical and other indicators. Drafted by: Mincs P., Ehlerss H., Jakobi P., Lauva J. Riga: Valsts tipogrāfija, 1934, p. 17.

criminally acquired property was related to the rights and the objects against which the offence was committed. Currently the framework is constantly being improved with the aim to withdraw from circulation not only the property directly criminally acquired but also the property indirectly criminally acquired by the person who has committed the criminal offence, but not related to the offence for which the person is found guilty.

When comparing and contrasting the historical and modern legal frameworks, it is important to take into account the changing factors, first of all, the fact that society, as well as its limits of consciousness and reason, have changed, thus the legal relationships have become more complex and complicated. The criminal schemes involve a large number of people from different countries and the development of information technology has created unlimited opportunities for crime.

Until 1 August 2017, Section 355, Paragraph one of the Criminal Procedure Law contained a basic definition of the characteristics of criminally acquired property, i.e., property is to be considered as criminally acquired if it has directly or indirectly passed into the ownership or possession of the person as a result of a criminal offence. By contrast, Section 355, Paragraph two of the Criminal Procedure Law provided for a presumption, stating that, if it is not proved otherwise, also the financial assets owned by a person who: is a member of an organised criminal group or supports it; has been himself involved in terrorist activities, human trafficking, criminal activities with narcotic or psychotropic substances, criminal activities with counterfeit money, public financial instruments, criminal activities for crossing the state border or facilitating the transfer of another person across the state border or to ensure the possibility for other persons to illegally stay in the Republic of Latvia, criminal activities related to child pornography or child sexual abuse, or maintains a

permanent relationship with a person involved in the above activities, are to be considered criminally acquired property.

Also, Section 4, Paragraph one of the Law on the prevention of money laundering and terrorism financing (hereinafter - the Law) provides a basic definition, namely that funds are to be recognised as proceeds of crime: 1) if they have come into the ownership or possession of a person as a direct or indirect result of a criminal offence; 2) in other cases laid down in the Criminal Procedure Law (until the amendments in which the Criminal Procedure Law was replaced by the Criminal Law).

In addition to the provisions of the Criminal Law, Section 4, Paragraph three of the Law on the prevention of money laundering and terrorism financing contains a presumption with three more cases in which the funds shall also be considered proceeds of crime, providing that proceeds of crime are also funds which belong to the following person or are directly or indirectly controlled by the following person:

1) who is included on any list of persons suspected of being involved in terrorist activities or the production, possession, transportation, use or distribution of weapons of mass destruction compiled by the states or international organisations laid down by the Cabinet;

2) who is included on the list of subjects of sanctions drawn up by the Cabinet on the basis of the Law on International Sanctions and National Sanctions of the Republic of Latvia with the view to combat the involvement in terrorist activity or production, possession, transportation, use or distribution of weapons of mass destruction;

3) on whom bodies performing operational activities, pre-trial investigating institutions, the Office of the Prosecutor or a court have information which forms sufficient basis for suspecting such person of committing a criminal offence related to terrorism or participation therein.

Section 4, Paragraph five of the Law provides that funds shall be declared to be proceeds of crime in accordance with the procedures specified in the Criminal Procedure Law. Firstly, according to the criminal procedure, in order to initiate the question about recognising property as criminally acquired, criminal proceedings related to a committed criminal offence have to be initiated, but, as it can be seen from Section 4, Paragraph three, Clauses 1 and 2 of the Law, it is sufficient that the person is included in the list of another country or international organisations. The Criminal Procedure Law does not provide for a procedure of reviewing the aforementioned situation when criminal proceedings are not initiated. Secondly, Section 4, Paragraph three, Clause 3 of the Law provides that it is sufficient to hold a person suspected of committing a crime that is related to terrorism or participating in such a crime. The Criminal Procedure Law also does not provide for the possibility to recognise property as criminally acquired when the person is only held suspect for committing a criminal offence. Thirdly, the legislator has not regulated in the Criminal Procedure Law what conditions would be used to conclude when a person directly or indirectly controls the funds, nor a situation where the funds directly or indirectly controlled by a person can be recognised as proceeds of crime.

One can not forget either one of the most important general principles of law - *nullum crimen, nulla poena sine lege* (no crime, no punishment without law), the current understanding of which has been explained by the European Court of Human Rights.<sup>12</sup>

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<sup>12</sup> Peristeridou Ch. The Principle of Legality in European Criminal Law. Cambridge: Intersentia, 2015, p. 96.

## 1.2. Legal framework in Latvia

On 1 August 2017, amendments to the Criminal Law and the Criminal Procedure Law came into force. The substantive legal provisions regulating the criminal law content of criminally acquired property were included in the Criminal Law, also creating a new legal concept in criminal law - the special confiscation of property.

Property owned or possessed by a person **directly** as a result of a criminal offence means objects, funds, substances, rights, any benefits and the like, against which or in relation to which a criminal offence has been committed. For example, stolen property, a received bribe, an unjustified insurance indemnity etc., that is, a benefit acquired directly from a criminal offence.

Property owned or possessed by a person **indirectly** as a result of a criminal offence, is the income and any benefit derived from the use, turnover, investment, transformation, combination, and similar resources and profit gained from the use of directly criminally acquired property.

Also *presumed*<sup>13</sup> property can be recognised as criminally acquired, e.g. extended confiscation may be applied. Section 70<sup>11</sup>, Paragraphs two and three of the Criminal Law provide a presumption in which cases it can be presumed that the property was acquired criminally, unless it is proved otherwise. It is important that property can only be recognised as criminally acquired, thus implementing the extended confiscation, when deciding the question of a person's guilt in the criminal proceedings. Extended confiscation can also be applied to the property of another person - one that has not committed a

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<sup>13</sup> Presumption (lat. *praesumptio*) is a finding of a legal fact, conclusion or statement beyond doubt unless proved to the contrary. Svešvārdu vārdnīca [Dictionary of foreign words]. Riga: Jumava, 1999, p. 625.

criminal offence. "In order to apply the confiscation of property set forth in Section 70<sup>11</sup>, Paragraph three of the Criminal Law, the person is not obliged to know or be aware of the crime committed by the person with whom he/she maintains the aforementioned relationship. "<sup>14</sup>

Only in cases when the accused has committed a crime that by its nature is aimed at material or other gain, if the accused is a member of an organised group or supports it or is related to terrorism and the person who maintains with the accused a permanent family, economic or other property relations, the value of whose property is not commensurate with their legal income, extended confiscation can be extended also to the property of that person. But the question of who will determine the value of that person's property and according to what criteria, is not regulated. The proportionality between the property belonging to a person and the legitimate income is not defined. There is also no procedure or criteria for determining the amount of a person's legal income.

The author of the thesis believes that a certain amount must be specified in the law, providing when it is justified to recognise that the property belonging to a person is not proportionate to the person's legal income. For example, the significant amount provided in Section 23.<sup>1</sup>, Paragraph one of the law<sup>15</sup> "On the procedures for the coming into force and application of the criminal law", that is, the total amount of ten minimum monthly wages established in the Republic of Latvia, can be used as a basis. It would be erroneous to assume that it is sufficient to question the disproportionality of the property belonging to a person with the legitimate income of a person and that

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<sup>14</sup> Krastiņš U., Liholaja V. *Krimināllikuma komentāri. Pirmā daļa (I–VIII<sup>2</sup> nodaļa)* [Commentary on the Criminal Law. Part one (chapters I-VIII<sup>2</sup>)]. Riga: Tiesu namu aģentūra, 2018, p. 301.

<sup>15</sup> Law "On the procedures for the coming into force and application of the criminal law". Obtained from: <https://likumi.lv/doc.php?id=50539> (viewed 22.08.2018).

this automatically imposes an obligation on a person to prove the acquisition of the property in a lawful way. The person directing the proceedings is obliged to prove that the property is likely to be of criminal, not legal origin, and only then the person claiming the opposite is obliged to prove the legal origin of the property.

The framework on the replacement of the criminally acquired property in cases when the criminally acquired property has disappeared, has also been changed. Section 70.<sup>14</sup>, Paragraph two of the Criminal Law stipulates that if the criminally acquired property has been alienated, destroyed, concealed or disguised, and the confiscation of such property is not possible, the value of the property being confiscated can be recovered. But if the perpetrator of the criminal offence does not have any other property against which the recovery proceedings could be brought, the property of other people that have a relation to the perpetrator of the criminal offence, that is, the property which the person has alienated after the commencement of the criminal offence free of charge or for a value which is significantly lower or higher than the market value; the property of the perpetrator of a criminal offence and the joint property of a spouse thereof, unless separate ownership of the property of the spouses has been specified at least one year before the commencement of the criminal offence; the property which belongs to another person with whom the perpetrator of a criminal offence has a joint (single) household, if this property has been acquired after the commencement of the criminal offence, may be confiscated.

It is important that the confiscation of property belonging to another person is possible only in the context of criminal proceedings in court regarding the culpability of a person. Because the framework provides for the association of the person who owns the property with the person who has committed a criminal offence.

The legislator does not regulate the criteria for the concepts of "significantly lower" or "significantly higher" value of a property with respect to the market value. The legislator also leaves ample opportunity for the person directing the proceeding to judge whether a person who has committed a criminal offence has a joint (single) household with another person.

Only by solving particular cases, finding a fair solution and ensuring a uniform application of the legal framework will it be possible to draw conclusions about the positive impact of legal provisions on public relations, preventing the committing of violations.

## **2. THE UNDERSTANDING OF CRIMINALLY ACQUIRED PROPERTY IN DIFFERENT COUNTRIES OF THE EUROPEAN UNION**

### **2.1. The legal framework in different countries of the European Union**

In this subsection the author analysed the legal framework of 18 Member States of the European Union: Croatia, Poland, Slovenia, France, Malta, the Czech Republic, Germany, Sweden, Lithuania, Estonia, Ireland, Spain, Denmark, Italy, Belgium, Finland, Greece and Hungary. The information was obtained using the information provided by the officials of the Ministries of Justice of the Member States of the European Union in the legislative cooperation network of the Ministries of Justice of the Member States of the European Union (*Legicoop*).

The legal framework of Ireland, Italy, Slovenia and Greece provides for a model of confiscating property based on civil law, that is, the state initiates the confiscation of property (*in rem*). The legal framework of Ireland, Italy, Slovenia and Greece in the following cases provides that the issue of confiscating criminally acquired property can be dealt with separately, without being bound to the decision to convict the person as guilty of a criminal offence.

If there is reason to admit that the property is criminally acquired and is related to money laundering, a special law in the Republic of Estonia provides that the property may be seized and the issue of confiscation can be decided without an individual's conviction in the administrative procedure.

In Croatia, Poland, France, Malta, the Czech Republic, Germany, Sweden, Lithuania, Denmark, Belgium, Spain, Finland, and Hungary, it is possible to decide, within criminal proceedings, on the issue of recognising

property as criminally acquired if the person who committed the criminal offence has been found, but there is no possibility of a trial due to a person's illness or avoidance of investigation. The law also allows for a decision to be made on the issue of confiscating the criminally acquired property, if the criminal proceedings are terminated due to a limitation period or because of the person's incapacity or release from punishment. But in all cases the confiscation of criminally acquired property is related to the identification of the person who committed the criminal offence.

Upon analysing the legal framework of various Member States of the European Union, one can conclude that there is a similar understanding of criminally acquired property, and all regulations clearly and explicitly define that criminally acquired property is to be confiscated.

## **2.2. Confiscation patterns for criminally acquired property**

In the legal literature<sup>16</sup>, as well as in several countries of the European Union (for example, in the Irish and Italian legal framework), it is recognised that without the confiscation of property imposed by the conviction (conviction-based confiscation), the legal framework also provides for a non-conviction-based confiscation, that is, the issue of the confiscation of property is decided without being linked to the consideration of the issue of the person's guilt of committing a criminal offence. Confiscation of property not related to conviction is understood as confiscation of property without the need for a

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<sup>16</sup> Greenberg, Theodore S.; Samuel, Linda M.; Grant, Wingate; Gray, Larissa. 2009. *Stolen asset recovery : a good practices guide for non-conviction based asset forfeiture. Stolen Asset Recovery (StAR) initiative. Washington, DC: World Bank Group.* <http://documents.worldbank.org/curated/en/133221468326414495/pdf/480920PUB0Stol101OFFICIAL0USE0ONLY1.pdf> (viewed 25.08.2018.).

person to be found guilty, by submitting a civil claim against the property itself.<sup>17</sup>

In her study, F. Alanga<sup>18</sup> pointed out the fact that the Member States of the European Union could have taken a major step towards combating crime and that Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 could have been a turning point in the harmonisation of the rules on non-conviction based confiscation. However, the 2014 directive has been approved without the inclusion of effective measures for non-conviction based confiscation, and therefore this is the next opportunity for the European Union to take a step forward in combating organised crime. The need for this kind of legal policy stems from the difficulty of confiscating criminally acquired property if it is first necessary to prove the person guilty of committing the crime, although the evidence gathered provides the basis for the conclusion that the property has been criminally acquired and the person is unable to explain and justify the legal origin of the property. In regards to proceeds of illegal activity, the court is called upon to investigate the origin of the property.<sup>19</sup> In such cases, a state takes action against property (*in rem*) rather than against individuals.

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<sup>17</sup> Rui J.P. *Non-conviction based confiscation in the European Union—an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union*. Obtained from: <https://link.springer.com/article/10.1007/s12027-012-0269-5> (viewed 25.08.2018.).

<sup>18</sup> Alagna F. *Non-conviction Based Confiscation: Why the EU Directive is a Missed Opportunity*. *Eur J Crim Policy Res*. DOI 10.1007/s10610-014-9252-8. Springer Science+Business Media Dordrecht, 2014. p. 448.

<sup>19</sup> *Civil Forfeiture of Criminal Property*. Legal Measures for Targeting the Proceeds of Crime. Cheltenham/Nothampton (2009). p. 13. Obtained from: [https://books.google.lv/books?hl=lv&lr=&id=BcsuwB\\_2BiAC&oi=fnd&pg=PR1&dq=%0AMcKenna,+F.J.,+Egan,+K.:+Ireland:+a+multi-disciplinary+approach+to+proceeds+of+crime.+In:+Young,+S.N.M.,+Civil+Forfeiture+of+Criminal+Property.+Legal+Measures+for+Targeting+the+Proceeds+of+Crime.+Che](https://books.google.lv/books?hl=lv&lr=&id=BcsuwB_2BiAC&oi=fnd&pg=PR1&dq=%0AMcKenna,+F.J.,+Egan,+K.:+Ireland:+a+multi-disciplinary+approach+to+proceeds+of+crime.+In:+Young,+S.N.M.,+Civil+Forfeiture+of+Criminal+Property.+Legal+Measures+for+Targeting+the+Proceeds+of+Crime.+Che)

At present, outside the European Union, several countries' laws and regulations provide for non-conviction based confiscation, such as the United States, South Africa, Albania, Colombia, Liechtenstein, Switzerland, Thailand<sup>20</sup>, Canada and several Caribbean countries<sup>21</sup>. Already in 1986, the European Commission on Human Rights<sup>22</sup> stated that non-conviction based confiscation is in line with the presumption of innocence and does not affect the right to property. It has also been stated in the case law of the European Court of Human Rights<sup>23</sup> that the regulation on non-conviction based confiscation meets the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Conviction-based confiscation requires a criminal proceeding and a judgment proving a person guilty of committing a criminal offence, which is a much more time-consuming and lengthy process. Criminal proceedings are

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ltenham/Nothampton+(2009)%0A&ots=qaNzpddegz&sig=Is0yZ8WM5DEIrnH0\_A39QIrCohQ&redir\_esc=y#v=onepage&q&f=false (viewed 25.08.2018.).

<sup>20</sup> Greenberg, Theodore S.; Samuel, Linda M.; Grant, Wingate; Gray, Larissa. 2009. *Stolen asset recovery : a good practices guide for non-conviction based asset forfeiture. Stolen Asset Recovery (StAR) initiative. Washington, DC: World Bank Group.* <http://documents.worldbank.org/curated/en/133221468326414495/pdf/480920PUB0Stol101OFFICIAL0USE0ONLY1.pdf> (viewed 25.08.2018.).

<sup>21</sup> Rui J.P. *Non-conviction based confiscation in the European Union—an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union.* Obtained from: <https://link.springer.com/article/10.1007/s12027-012-0269-5> (viewed 25.08.2018.).

<sup>22</sup> *European Human Rights Commission, No. 12386/1986.* Obtained from: [https://books.google.lv/books?id=ef5Hi9HwobMC&pg=PA21&lpq=PA21&dq=European+Human+Rights+Commission,+No.+12386/1986.&source=bl&ots=J4JcziN5Sa&sig=7i3De2LmljRu0J5BvzzRIKmvTXk&hl=lv&sa=X&ved=2ahUKEwjVuqv5sIXeAhWk\\_CoKHfsEB8AQ6AEWAHoECAkQAQ#v=onepage&q=European%20Human%20Rights%20Commission%2C%20No.%2012386%2F1986.&f=false](https://books.google.lv/books?id=ef5Hi9HwobMC&pg=PA21&lpq=PA21&dq=European+Human+Rights+Commission,+No.+12386/1986.&source=bl&ots=J4JcziN5Sa&sig=7i3De2LmljRu0J5BvzzRIKmvTXk&hl=lv&sa=X&ved=2ahUKEwjVuqv5sIXeAhWk_CoKHfsEB8AQ6AEWAHoECAkQAQ#v=onepage&q=European%20Human%20Rights%20Commission%2C%20No.%2012386%2F1986.&f=false) (viewed 25.08.2018.).

<sup>23</sup> *Case of Dassa Foundation and Others v. Liechtenstein, European Court of Human Rights, Application no. 696/05 (July 10, 2007).* Obtained from: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?docu mentId=09000016806ebe42> (viewed 24.08.2018.).

initiated against a person, and the authority must first prove, excluding all reasonable doubt, the person's guilt and the criminal origin of the property, that is, an objective process.

The process of non-conviction-based confiscation is directed against property, and during the process either its criminal nature or connection with a criminal offence must be proven. The judgment is based on the probability of the origin of the property, which is a lower standard. However, the probability of the criminal origin of the property must be reasonable and convincing. When assessing the amount of evidence, national standards provide different standards of proof. There are legal frameworks that stipulate that conclusions are based on reasonable assumptions that are reliable when compared with the suspicion of the opposite. At the same time, in other countries, the legal framework provides that evidence beyond reasonable doubt or such evidence that convincingly convinces the judge is necessary. There are also frameworks that are more in line with civil standards when there is a preponderance of evidence or a standard probability balance that is usually similar, it is likely that it is true, not false, or the possibility that this statement is more than 50 percent true. Preference should be given to civil standards lower than the standard of proof for convicting a person guilty of committing a criminal offence. In Latvia, as of 1 August 2017, for the recognition of property as criminally acquired, the "reasonable prospect of prosecution" standard of proof is used.

<sup>24</sup>Recommendation 4 "Confiscation and provisional measures"<sup>25</sup> of the Intergovernmental organisation "Financial Transaction Task Force" (FATF)

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<sup>24</sup> The Financial Transaction Task Force (FATF) is an independent intergovernmental organisation that develops and promotes standards to protect the global financial system from money laundering, terrorist financing and the financing of the distribution of weapons of mass destruction. FATF's recommendations are considered the world standard in the field of anti money laundering (AML) and combating the financing of terrorism (CFT).

stipulates that countries should consider adopting measures for the confiscation of the proceeds of crime without requiring a criminal conviction (non-conviction based confiscation).

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<sup>25</sup> To prevent the laundering of money and to prevent the financing of terrorism and distribution of weapons of mass destruction. Recommendations of the Financial Action Task Force (FATF). International standards. Obtained from: [https://www.vid.gov.lv/sites/default/files/fatf\\_rekomendacijas\\_lv.pdf](https://www.vid.gov.lv/sites/default/files/fatf_rekomendacijas_lv.pdf) (viewed 26.08.2018).

### **3. CHARACTERISTICS OF THE PROCEEDINGS REGARDING CRIMINALLY ACQUIRED PROPERTY**

#### **3.1. Terms for restricting a person's right to handle property**

State actions against a person by involving them in a pre-trial criminal proceeding or denying the right to freely handle their property can not be unlimited. The right to property is classified as a fundamental human right, therefore any restriction imposed upon it must be based only on law and such restriction may only be made in the public interest.

Deadlines imposed upon a criminal procedure are a guarantee for ensuring the exercise of the legitimate interests and rights of those involved in the process.<sup>26</sup> According to the classification of criminal offences, the restriction periods for rights are different.

Before 25 October 2018, when the amendments made after the initiative of the author of the thesis entered into force, Section 389, Paragraph one of the Criminal Procedure Law provided that, from the moment when a person who has the right to defence, or a person whose rights to handle his or her property have been restricted with procedural actions, becomes involved in pre-trial criminal proceedings, the pre-trial criminal proceedings shall be terminated or all security measures suspended, as well as the restrictions of rights, in relation to the property within the following term: 1) regarding a criminal violation – within six months; 2) regarding a less serious crime – within nine months; 3) regarding a serious crime – within twelve months; 4) regarding a particularly serious crime – within twenty two months; Currently, the Criminal Procedure

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<sup>26</sup> Terms for criminal proceedings in pre-trial investigations. Authors collective. Riga: printing house "Petrovskis un Ko", 2006, p. 30.

Law does not provide for a limitation on the length of criminal proceedings in court. Therefore, after passing the criminal case to the court, if the property has been seized or arrested in a criminal proceeding, the time at which the person is restricted in the rights in relation to the property, is not limited, but is related to the consideration of the criminal matter on the merits and the moment when the final ruling comes into effect.

Pre-trial criminal procedure often involves cases where the set of evidence provides grounds for involving a person in criminal proceedings, therefore the period for limiting the rights of a person begins, but the property acquired in or associated with a criminal offence is discovered much later. In practice, there are different cases in which it is recognised that the time limit is the same and cases in which the time limit in relation to the property is set separately from the time when the right to handle the property is limited to procedural actions. In practice, there is also the view that each individual property has its own restriction period from the moment when the right to handle the particular property is restricted by procedural action. It must be admitted that each opinion is justified.

Involving a person who has a right to defence in a criminal procedure or restricting a person's right in relation to property, the introductory part of Section 389, Paragraph one of the Criminal Procedure Law determines two possible courses of action. The first - once the restriction period of the person's rights expires, the criminal proceeding must be completed, and the second - the security measures and restrictions in relation to the property must be revoked. The simplest case is to count the deadlines for the restriction of the rights of a person as one common deadline, that is, for example, if property has been arrested in the course of an investigation of a criminal offence, six months have passed and there is no reason to complete pre-trial criminal procedure, then a security measure against a person can no longer be applied. Or vice versa, if the

appropriate security measure, for example, notification of a change of residence or something else, has been applied, property can not be arrested. Such an explanation can significantly impede or even jeopardise the purpose of criminal proceedings, as a person may ignore the inquiries of the person directing the proceedings and avoid the investigations or it will not be possible to ensure the timely or any realisation of the victim's rights, since the perpetrator will have alienated all of the property. However, this approach may also be called into question, taking into account that the grounds and objectives of restricting the rights of a person are different. The grounds for the application of a security measure is a person's opposition to the purpose of the criminal proceedings, failure to fulfil its procedural obligations or improper fulfilment thereof. But, for example, applying arrest to the property, is done to ensure the recovery of damages to the victim.

The individual's rights are most restricted in the case when the term of a security measure and deadlines for each restriction of property are set separately. Such restrictions would be possible during the entire investigation period of the criminal procedure, until the period of limitation of criminal liability has come to an end, which may be long lasting – even fifteen and more years. Taking into account the abovementioned facts, the author of the thesis believes that the restriction of persons rights in relation to security measures and a set of property should be considered separately, thus ensuring a reasonable restriction of the person's rights, taking into account the public interest, accomplishing the task of punishing the guilty party and the victim's opportunity to receive compensation.

Researching the case law in situations where the maximum terms of restricting a person's rights to handle property set forth in Section 389 of the Criminal Procedure Law have been violated, it was concluded that in all cases the courts recognised that a person, despite the fact that there is no direct

regulation in accordance with the third sentence of Article 92 of the Constitution of Latvia that states a person's rights to an appropriate indemnity for property loss, is entitled to defend his or her rights and lawful interests in the court of general jurisdiction if the actions of the person directing the proceedings have violated the principle of proportionality and have unjustifiably violated their rights. The fact that the realisation of the right to compensation for unlawful loss caused by a public authority (the state's liability) is problematic has long been pointed out by *Dr. iur.* E. Levits<sup>27</sup>, but currently the legislator has not regulated this issue with regard to the damage caused to a legal person.

On 30 November 2017, the Saeima adopted a new law "On compensation for damage caused in criminal proceedings and administrative violation cases"<sup>28</sup>, which came into force on 1 March 2018, however, the new law does not apply to the rights of legal persons.

### **3.2. Reasons for initiating a proceeding regarding criminally acquired property**

Taking into account the complexity of the criminal procedure and the number of parties involved, the scope and duration of the necessary investigative activities, there may be cases when it is objectively impossible to complete the criminal proceedings within the time limits specified in the law, therefore, in order to prevent the return of proceeds of crime or criminally acquired property to illicit circulation, it is justifiable to decide the issue of

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<sup>27</sup>Levits E. *Eiropas Kopienas tiesību principi un to ieviešana Latvijas tiesību sistēmā* [Principles of European Community law and implementation thereof in the legal system of Latvia] Riga: BO VSIA "Latvijas Vēstnesis", 2000, p. 29.

<sup>28</sup> Law on compensation for damage caused in criminal proceedings and administrative violations. Obtained from: <https://likumi.lv/doc.php?id=295926> (viewed 22.08.2018.).

further action with the property seized or arrested in the criminal proceeding during pre-trial criminal proceedings.

The basic principle for property to be recognised as criminally acquired is the final decision in a criminal proceeding when deciding on the issue of the person's guilt of committing a criminal offence. The implementation of the aforementioned principle is to be regarded as a fair resolution of criminal law relations, but in the objective reality, in all cases where there is a basis for recognising that the property found has a criminal origin or is linked to a criminal offence, there is the possibility of discovering the person who committed the criminal offence or the completing of the criminal procedure in the terms, stated in the law, of the restrictions to the rights of the person who has the right to handle the property.

Section 356, Paragraph two of the Criminal Procedure Law provides for two possibilities during the pre-trial criminal procedure to decide on the issue of recognising property as criminally acquired. In the first case, the issue of recognising the property as criminally acquired shall be decided by the district (city) court in accordance with the procedure specified in Chapter 59 of the Criminal Procedure Law. In the second case, the issue of recognising the property as criminally acquired is decided by the person directing the proceedings. In each case, the law provides for the existence of the necessary conditions in order to be able to decide on the issue of criminally acquired property during the pre-trial investigation.

Section 626 of the Criminal Procedure Law provides that materials regarding criminally acquired property can be separated from the criminal case and new proceedings can be initiated if the following conditions exist: 1) the totality of evidence provides grounds to believe that the property that has been seized, or upon which an attachment has been imposed, is criminally acquired or related to a criminal offence; 2) due to objective reasons, the transferal of the

criminal case to court is not possible in the near future (in a reasonable term), or such transferal may cause substantial unjustified expenses. The person directing the proceedings regarding criminally acquired property must also provide proof of the existence of a criminal offence, and the court must decide whether there has been a criminal offence.

Section 356, Paragraph two, Clause 2 of the Criminal Procedure Law permits the person directing the proceedings (investigator or prosecutor) to decide on the issue of the recognition of property as criminally acquired, when the owner or lawful possessor, after finding the previously lost property, has proven his or her rights to such property, eliminating any reasonable doubt, to which the right is registered in a public register and has not been amended after the commission of the criminal offence. Consequently, there is no doubt about the origin and belonging of the property.

On 22 June 2017, the Saeima adopted amendments to the Criminal Procedure Law, which came into force on 1 August 2017 and supplemented Section 356, with Paragraphs three, four and five, defining another case when property can be recognised as criminally acquired. Section 356, Paragraph three of the Criminal Procedure Law stated that after the termination of criminal proceedings for reasons other than exoneration, the property may be recognised as criminally acquired in accordance with the procedures laid down in Chapter 59 of the Criminal Procedure Law. Taking into account that the entry in the Land Register<sup>29</sup> may be amended only on the basis of a court ruling, and in order to ensure the reliability of the data of other public registers, the legislator established in Part IV of the Criminal Procedure Law that during the pre-trial

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<sup>29</sup> According to Section 44 of the Land Register Law, in the form of entries in immovable property, rights to immovable property are based on a lawful transaction, a judgment or a decision of a court or a statement of administrative authorities, or exist on the basis of the law itself (Land Register Law. *Ziņotājs* [Reporter], 16/17, 29.04.1993.).

criminal procedure or after the termination of criminal proceedings for reasons other than exoneration, only in accordance with Chapter 59 of Criminal Procedure Law, a property whose rights are registered in the public register and whose entry in this register has been amended after the commission of the criminal offence, may be recognised as a criminally acquired property.

Making amendments to the Criminal Procedure Law also changed the standard of proof regarding the recognition of property as criminally acquired. Section 124, Paragraph six of the Criminal Procedure Law stated that the conditions included for an object of evidence in relation to the criminal origins of the property shall be considered proven, if there are grounds to recognise during the course of proving that a property is, most likely, of criminal rather than lawful origin. By adding Paragraph five to Section 356 of the Criminal Procedure Law, the legislator also laid down the moment when, if the person directing the proceedings expresses an assumption that the property is criminally acquired or related to a criminal offence, a person has the right to prove the lawful origin of the property from the moment when his or her right to act with his or her property has been restricted with procedural actions. The Criminal Procedure Law was supplemented by the obligation of the person who claims that the property is not to be considered criminally acquired, to prove the legality of the origin of the property concerned, the obligation also corresponds to those specified in international documents.

An essential fact that may lead to incorrect practice is that if the person directing proceedings asks for the recognition of a property as criminally acquired, he or she must prove the criminal origin of the property, taking into account the standard set forth in Section 124, Paragraph six of the Criminal Procedure Law. The criminal procedure does not presuppose the unlawfulness of the origin of the property. In all cases, when there is a basis for the person directing the proceedings to initiate a proceeding for criminally acquired

property, eliminating all reasonable doubt<sup>30</sup> and the occurrence of a criminal offence must be proven.

### **3.3. The content of the decision to initiate the proceedings regarding criminally acquired property**

Article 627, Paragraph two of the Criminal Procedure Law provides that the person directing the proceedings shall indicate the following in a decision: 1) information regarding the facts justifying the relation of the property to a criminal offence or the criminal origin of the property, as well as regarding the materials that have been separated from the criminal case regarding a criminal offence currently in investigation into the case regarding the criminally acquired property; 2) the persons that are related to the particular property; 3) the actions with the criminally acquired property that he or she proposes; 4) the victim, if any.

In the proceeding of a criminally acquired property, the decision to initiate proceedings is the only document indicating the circumstances and the grounds for claiming that the property has been criminally acquired. Therefore, it depends on the content of the decision whether the rights of the person associated with the property will not be violated and whether the person will have a real and not an apparent opportunity to pursue his or her interests. In the proceedings regarding criminally acquired property, the rights of the parties must be fairly balanced<sup>31</sup>, providing the person associated with the property the

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<sup>30</sup> Stukāns J. *Pierādījumi un to pārbaude iztiesāšanā – krimināltiesiskās politikas attīstība* [Evidence and its verification during the proceedings - the evolution of criminal law policy]. *Tiesiskā politika sabiedrības attīstībai* [Legal policy for the development of society]. Theses of the international scientific conference (Riga, 23 April 2014). Riga: RSU, 2014, p. 44.

<sup>31</sup> Ovey C., White R. *Jacobs and White, The European Convention on Human Rights. Fourth Edition. Oxford: Oxford University Press, 2006, p. 176.*

possibility to know the circumstances why it is alleged that the property has been obtained from crime.

The decision to initiate the proceedings by the person directing the proceedings must clearly and in detail identify the facts which constitute the basis for the conclusion of the property being criminally acquired, so that the person associated with the property can provide an explanation and rebut the statements of the person directing the proceedings. The decision on the origin of the property depends on the reliability of these explanations.

It should be taken into account that, in assessing the right to a fair trial, it is recognised that a fair trial is also understood as the requirement for the direct verification of evidence submitted to a court.<sup>32</sup> In the proceedings regarding criminally acquired property, procedural equality must be ensured, giving equal access to the case files<sup>33</sup>, as well as providing an opportunity to speak about them. By providing the materials to the person associated with the property, it is ensured that the parties involved in the proceedings regarding criminally acquired property base their arguments and conclusions on the same evidence<sup>34</sup>, eliminating the arguments about an unequal possibility of exercising their right to express themselves about the evidence of the other parties.

The unavailability of the materials of a criminal case for a person, about the restriction of whose rights a decision is being made, is recognised as a violation of Article 5 (4) of the Convention for the Protection of Human Rights

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<sup>32</sup> Reid K. *A practitioner's guide to the European Convention of Human Rights*, 3<sup>rd</sup> Ed. London: Sweet&Maxwell, 2008, p. 67.

<sup>33</sup> *Theory and Practice of the European Convention on Human Rights: Fourth Edition*. Edited by Van Dijk F., Van Hoof F., Van Rijn A., Zwaak L. Oxford: Interesentia, 2006, p. 580.

<sup>34</sup> Summers S.J., Jackson J.D. *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions*. Cambridge: Cambridge University Press, 2012, p. 301.

and Fundamental Freedoms (European Court of Human Rights, Miķelsons v. Latvia, judgment of 3 November 2015<sup>35</sup> (Application No. 46413/10)).

It follows from the findings of the European Court of Human Rights that, in cases where the court decides on fundamental restrictions to human rights, the parties to the proceedings must ensure the principle of a hearing and always ensure the equality of the procedural rights between the parties. Access to those documents of the investigation that are essential for evaluating the legality, has to be ensured. There should be effective access to the evidence on which the decision of the court is based.

### **3.4. Framework of the court proceedings regarding criminally acquired property**

On 8 July 2011, the Saeima adopted amendments to Section 629 of the Criminal Procedure Law, which came into force on 11 August 2011, and provided that the person directing the proceeding, the prosecutor, other persons invited and present, their defence counsels or representatives are heard at the hearing; at the hearing the parties involved in the trial have the same right to express rejections or requests, to submit evidence, submit written explanations to the court, and to take part in the examination of other issues arising during the trial; the materials in the proceeding concerning the criminally acquired property are a secret of the investigation and may be read by the person directing the proceeding, the prosecutor and the court hearing the case. The persons referred to in Section 628 of the Criminal Procedure Law may get acquainted with the materials of the case upon the permission of the person

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<sup>35</sup> Case of Miķelsons v. Latvia, European Court of Human Rights (Application no. 46413/10) 3 November 2015. Obtained from: <http://hudoc.echr.coe.int/eng?i=001-158350> (viewed 22.08.2018.).

directing the proceeding and to the extent specified by the person directing the proceeding.<sup>36</sup>

The European Court of Human Rights has acknowledged that under certain circumstances the rights of a person may be restricted if there is a substantial public interest, such as national security, the need to keep certain police investigation methods secret or to protect the fundamental rights of another person.<sup>37</sup>

However, the provision stipulates that the person directing the proceeding determines the extent to which he or she permits access to the materials, thus it can be concluded that the amount of materials accessed by the court may differ from the amount presented to the person. It is also important to take into account the fact that it is subjective and therefore influences the amount of material to be presented to a person who has connection with the property, that "the determination of the limits of the evidence is individual in each specific criminal case and depends to a large extent on the subjective perception of the subject of the evidence"<sup>38</sup>.

The wording of the current law restricts the parties' ability to get acquainted with written evidence and documents, and thus might arise the impression that without revealing the evidence on the basis of which the issue of the origin of the property will be decided, the realisation of the rights of the aforementioned persons is difficult or impossible.

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<sup>36</sup> Amendments to the Criminal Procedure Law. Latvijas Vēstnesis [Latvian Herald], No. 117, 28.07.2011.

<sup>37</sup> Schabas W. A. *The European Convention on Human Rights. A Commentary*. Oxford University Press, 2015, p. 288.

<sup>38</sup> Strada-Rozenberga K. *Pierādīšanas teorija kriminālprocesā* [Theory of proof in criminal proceedings]. General part. Riga: SIA "Biznesa augstskola Turība", 2002, p. 159.

However, account should be taken of the fact that the participants in the proceedings regarding criminally acquired property have the right to submit requests, evidence, to provide explanations, that is, to participate in the proceedings and to provide evidence of the origin and legality of the property. Thus, all parties are guaranteed equal enjoyment of rights, that is, an adequate opportunity to use procedural means in the implementation of the principle of equality, which is a central element of the right to a fair trial.<sup>39</sup> The parties need not refute the arguments of the other party, but must submit evidence to the court so that the court can objectively assess the origin of the property.

The results of the assessment of the case law give reason to conclude that in all cases the existing case law can be considered to be in line with the criminal procedure in the part about the necessity to indicate in the decision the information about the facts justifying the connection of the property with the criminal offence or the criminal origin of the property. It is the Court's responsibility to directly assess and specifically point out the evidence, so that the person associated with the property would have the opportunity to defend itself against the findings of the court and to oppose them, also exercising the right to appeal the decision of the court of first instance. The Court, when providing evidence analysis and its assessment, must ensure the presentation of facts in a way that does not jeopardise further criminal proceedings or the interests of the persons involved in the criminal proceedings, but so that the person associated with the property would have the opportunity to pursue his or her interests.

In Latvia, law enforcement authorities insufficiently use the Law on declaring the financial situation and the undeclared income of natural persons

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<sup>39</sup> *Matscher F. The right to a fair trial in the case law of the organs of the European Convention on Human Rights. The right to a fair trial. Strasbourg: Council of Europe publishing, p. 12.*

adopted on 1 December 2011<sup>40</sup>, which came into force on 15 December 2011. The purpose of the Law on declaring the financial situation and the undeclared income of natural persons is to facilitate the possibilities of controlling the financial situation, compliance of income and expenses and, accordingly, the payment of taxes as well as the legality of income of natural persons. The law provided a reference point for following, checking and understanding the funds available to a person.

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<sup>40</sup>Law on declaring the financial situation and undeclared income of natural persons. Obtained from: <https://likumi.lv/doc.php?id=241275> (viewed 22.08.2018).

## **4. THE OPPORTUNITIES OF THE PARTIES INVOLVED IN THE PROCEEDINGS TO REALISE THEIR RIGHTS**

### **4.1. The rights and obligations of the parties involved in the proceedings**

The person directing the process informs the suspect or the accused, the person whose property was removed or arrested, if there are such persons in the relevant criminal proceedings, as well as the person entitled to the property, about the initiation of the proceeding regarding criminally acquired property. The aforementioned persons have the right to participate personally or through a defence counsel or representative in the proceedings regarding the criminally acquired property; to express their attitude towards the decision to initiate the proceedings regarding criminally acquired property in court orally or in writing; to submit applications to the court. Section 631, Paragraph one of the Criminal Procedure Law provides that a court decision may be appealed within 10 days in a regional court by submitting a complaint or protest to a district (city) court.

The international law binding to Latvia sets forth an obligation to provide a person whose interest is impacted by proceedings regarding criminally acquired property, with a possibility to effectively defend their interests. Thus, it is necessary to provide particular defence measures and legal remedies in order to ensure the protection of the person's fundamental rights. This includes the right of third parties who claim to own the property in

question or who claim they have other forms of property rights ("real rights", "*ius in re*"), such as usage rights, to be heard.<sup>41</sup>

There is no framework in the case when the person directing the proceeding has not notified the person regarding his or her decision regarding the particular property, but the person believes that it has the right to the particular property and wishes to be involved in the proceedings at the time when the materials are already in court.

However, the author believes that the effectiveness of the scope of rights can be discussed, since, as the content of legal provisions shows, individuals are given the opportunity to actively defend their interests, and the legislator has provided for both the conditions and the procedure of proceedings, therefore the scope and intensity of the realisation of interests depends on the person itself. Here, however, it must be taken into account that proceedings regarding criminally acquired property are special proceedings.

## 4.2. Realisation of third party rights

The criminal procedural framework provides: "If criminally acquired property has been found with a third person, such property shall be returned, on the basis of ownership, to the owner or lawful possessor thereof."<sup>42</sup>

In Roman law, one of the postulates of the law is that the property is to be returned by every possessor, including a benevolent possessor, since no one can confer more rights on him than he owns himself, therefore, all subsequent

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<sup>41</sup>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. Obtained from: <http://register.consilium.europa.eu/doc/srv?l=LV&t=PDF&f=PE+121+2013+REV+2> (viewed 19.03.2018).

<sup>42</sup>Section 360, Paragraph one of the Criminal Procedure Law. 13th edition. Riga: Tiesu namu aģentūra, 2017, p. 177.

transactions are cancelled and it does not matter that the last beneficiary is *bona fide*.<sup>43</sup> The above-mentioned postulate has also acquired the form of a legal provision. Section 360, Paragraph two of the Criminal Procedure Law states that if criminally acquired property has been returned to the owner or lawful possessor thereof, the third person who acquired such property, or pledge, in good faith has the right to submit a claim, in accordance with civil procedures, regarding compensation for the loss, including against an accused or convicted person.<sup>44</sup>

In case law, when reviewing civil cases, there are several cases when the court ruled contrary to the provisions of criminal procedure, recognising that the property of the benevolent possessor may not be recovered if the transferor of the real estate was registered as the owner in the Land Register.<sup>45</sup> Such case law is to be regarded as erroneous, taking into account the postulates of the Roman law already described above and the fact that the recognition of such an act as a case when a person loses property rights as incompatible with the provisions of Sections 1032-1035 of the Civil Law<sup>46</sup> that regulate the cases of

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<sup>43</sup>Švemberga A. *Zemesgrāmatu publiskās ticamības dažādas izpratnes. Aktuālie tiesību problēmu jautājumi*. [Different understanding of public credibility of land registers. Current legal issues.] Riga: Tiesu namu aģentūra, 2008, p. 16.

<sup>44</sup>Criminal Procedure Law. Obtained from: <https://likumi.lv/doc.php?id=107820> (viewed 20.08.2018).

<sup>45</sup>Supreme Court judgment of 18 April 2012 in case no. SKC-136/2012, obtained from: <http://www.at.gov.lv/downloadlawfile/3100> (viewed 20.08.2018.); Judgment of the Civil Division of the Riga Court of Appeal of 18 December 2013 in case No. C04414311 (viewed 20.08.2018.).

<sup>46</sup>Civil Law. Termination of ownership

1032. Ownership rights to a property are terminated by the intentional act of the owner, where the owner abandons a property without transferring it to another person, as well as where the owner transfers the ownership rights to another person.

1033. Ownership rights are terminated without the intentional act of the owner:

- 1) where property is destroyed;
- 2) where ownership passes to another person through joining or through prescription;
- 3) pursuant to the judgment of a court, in which property is awarded to another person, or by way of sentence, its confiscation to the benefit of the State is stipulated;

the termination of property, without providing for a situation in which property can be lost as a result of unlawful activity.

Significant and relevant is the judgment of the Constitutional Court of 8 March 2017 in case No. 2016-07-01. The Constitutional Court has found that a similar case has been reviewed by the Constitutional Court of Lithuania. It has indicated that a situation may arise that a person who is legally seeking to purchase a property acquires property, the owner of which has lost it due to a criminal offence committed by another person, but the person, that is, the buyer, does not know and could not have known it. In this regard, it should be noted that even if a person acquires property without knowing and without any possibility of knowing that the owner of the property has lost his or her property as a result of a crime, it can not be assumed that it, e.g.m the buyer, would acquire ownership. As the Constitutional Court of Lithuania has repeatedly acknowledged, rights can not arise from unlawful activities (see: Judgment of the Constitutional Court of Lithuania of 30 October 2008 in case No. 16/06-69/06-10/07, Sections 3.3 and 4.3, available at: <http://www.lrkt.lt/>).

An effective and preventive measure would be to establish that a criminal offence can not modify property rights, and the rights can not arise from unlawful activities. Taking into account the aforementioned, a unified

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- 4) where ownership is acquired only for a specific period or by a resolutive condition, upon the period elapsing or the condition coming into effect;
  - 5) in regard to an acquired wild animal - upon it escaping the supervision of its owner or losing the habit of returning home; and
  - 6) the alienation of ownership for State or public needs, by procedures provided for by law.
1034. Upon the death of an owner, ownership rights devolve to the heirs of the owner.
1035. If a person loses those personal attributes which are required for the acquisition of certain immovable property, he or she and his or her heirs by intestacy do not, due to this circumstance, lose the immovable property that already belongs to them.
- Obtained from: <https://likumi.lv/doc.php?id=225418> (viewed 22.08.2018).

case law that will prevent the possibility to benefit from criminally acquired property, will make crime financially unprofitable.

## 5. ASPECTS OF INTERNATIONAL COOPERATION RELATED TO CRIMINALLY ACQUIRED PROPERTY

### 5.1. Aspects of international cooperation regarding combating the circulation of criminally acquired property

"The globalisation of law is the unification of rights on a global scale, bringing national legal systems and whole systems of law closer to each other. It is the consequence of economic globalisation and at the same time its necessary prerequisite."<sup>47</sup> Therefore, global societies need to find tools and methods to effectively combat the circulation of criminally acquired property, that is, by actively targeting unwanted processes in society.

International documents: The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, in force in Latvia since 25 May 1994 (Vienna Convention);<sup>48</sup> The United Nations Convention against Transnational Organized Crime, in force in Latvia from 29 September 2003;<sup>49</sup> The United Nations Convention against Corruption, which has been in force in Latvia since 3 February 2006;<sup>50</sup> The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which has been in force in Latvia since 23 July 1998 (Strasbourg

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<sup>47</sup> Plotnieks A. *Tiesību teorija & juridiskā metode* [Theory of law & the legal method]. Riga: SIA "N.I.M.S.", 2013, p. 55.

<sup>48</sup> The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention). Obtained from: <https://likumi.lv/ta/lv/starptautiskie-ligumi/id/1203> (viewed 20.08.2018.).

<sup>49</sup> The United Nations Convention against Transnational Organized Crime. Obtained from: <https://likumi.lv/ta/lv/starptautiskie-ligumi/id/1474> (viewed 20.08.2018.).

<sup>50</sup> The United Nations Convention Against Corruption. Obtained from: <https://likumi.lv/ta/lv/starptautiskie-ligumi/id/1531> (viewed 20.08.2018.).

Convention);<sup>51</sup> The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, which has been in force in Latvia as of 31 December 2009 (the Warsaw Convention)<sup>52</sup> regulate international cooperation regarding criminally acquired property. Comparing the content of the abovementioned documents, it can be concluded that over time, attempts have been made to make the framework wider and more comprehensive.

An important point is that the wording of Article 31 of the United Nations Convention against Corruption differs from that previously used in international relations, since it provides that national rules on the member states have **to match** the measures provided in the Convention. The Convention provides that each Member State, *to the maximum extent consistent with their national laws and regulations*, has to introduce the necessary measures for the confiscation of proceeds of crime obtained while committing offences that have been established as such in accordance with the Convention or of property whose value corresponds to the value of those assets. Such an approach is to be considered progressive because the countries, upon joining the convention, cannot refuse the confiscation on the grounds of specific national laws and regulations.

The Vienna Convention, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption provide similar conditions for the recognition of a property as criminally acquired. By providing that criminally acquired property (funds)

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<sup>51</sup> The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Obtained from: <https://likumi.lv/doc.php?id=50293> (viewed 20.08.2018).

<sup>52</sup> The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention). Obtained from: <https://likumi.lv/doc.php?id=203016> (viewed 20.08.2018).

means every property (objects of any kind, both corporeal and incorporeal, movable or immovable, and legal documents or acts that confirm the rights to these objects or the interest related to it) which has directly or indirectly arisen or been acquired by committing the criminal offence.

In turn, the Strasbourg Convention defines criminally acquired property as **any economic benefits** from criminal offences and includes any property (any type of property, corporeal or incorporeal, movable or immovable, as well as legal documents or instruments that certify ownership or other rights to such property).

The Warsaw convention provides an even wider definition by providing that it is any economic advantage, *derived from* or *obtained*, directly or indirectly, from criminal offences and which may consist of any property and may be property of any kind and may also include legal documents or instruments that certify ownership or rights to parts of it.

An important aspect of international cooperation, which, unfortunately, prevents countries from cooperating fully, is the provision in all international instruments that nothing outlined in an international instrument shall affect the principle that the measures referred to therein shall be determined and implemented in accordance with the national laws and regulations of the respective Member State. International co-operation is also affected by the different methodology of the application of the principles of law in mainland Europe, which results from the understanding of the state subject to the rule of law principle.<sup>53</sup> This means that the differences between national frameworks and the content of legal provisions affect the opportunities for international cooperation.

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<sup>53</sup> Onževs M. *Tiesību normu laika aspekti tiesiskā un demokrātiskā valstī* [Time aspects of legal provisions in a democratic country governed by the rule of law]. Rīga: Latvijas Vēstnesis [Latvian Herald], 2016, p. 245.

All the international instruments listed above include the obligation for the Member States to take any necessary measures which, within their respective spheres of competence, allow the ordinary confiscation of criminally acquired property. The ordinary confiscation carried out on the basis of a conviction is one of the key mechanisms for confiscation along with the confiscation of instruments of criminal offence. Ordinary confiscation means that the person convicted with a final court ruling is deprived of the economic benefits it has acquired by committing a criminal offence.

The Vienna Convention, the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and The Warsaw Convention obliges the Member States to allow the confiscation of property in which the assets obtained as a result of a criminal offence are transformed or converted into another property and to facilitate the confiscation of the combined assets up to the value of the blended assets resulting from the criminal offence.

The proceeds of crime or property in which the said assets are converted or transformed may increase the income or other valuable benefits. It is indisputably important, that, where appropriate, confiscation applies to all such benefits. The Vienna Convention, the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and The Warsaw Convention stipulate that these incomes and benefits must be confiscated in the same way and to the same extent as the proceeds of crime.

An important aspect indirectly referred to by international instruments is the transfer of the burden of proof to the opposite party by providing that each Member State may consider the possibility of requiring the offender to prove the lawful origin of allegedly obtained proceeds of crime and other property that is to be confiscated to the extent that this requirement complies with the

principles of local law, the nature of legal proceedings and other procedures. The European Court of Human Rights has established that certain requirements under which the burden of proof is transferred to the opposite party are within the limits set by the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>54</sup> The European Court of Human Rights has ruled that the Member States have an obligation to include them within reasonable limits, taking into account the severity of the threat and ensuring the rights to defence.<sup>55</sup>

## **5.2. Cooperation aspects and legal framework in the European Union**

One of the priority objectives is to prevent criminals from using a no-border area to escape investigation or prosecution, and therefore the search for operational effectiveness should be a criterion for determining transnational cooperation. In the current circumstances, when the state border is no longer relevant in committing various criminal offences, but on the contrary, through the use of national regulatory systems and the specifics of the legal systems there are possibilities to prevent or even avoid the freezing and confiscation of the proceeds of crime (criminally acquired property), the Member States of the European Union are trying to approximate the legal framework of freezing and confiscation in the Member States. However, this *inter alia* makes it difficult to distinguish between the laws of the Member States adopted in this area.

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<sup>54</sup> Case of Grayson and Barnham v. the UK (Application no. 19955/05 and 15085/06 23 December 2008, obtained from: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ebe2c> (viewed 20.08.2018.).

<sup>55</sup> Case of Salabiaku v. France (Application no. 10519/83) 7 October 1988, obtained from: <https://www.legal-tools.org/doc/af3734/pdf/> (viewed 20.08.2018.).

Member States of the European Union recognise that, in the circumstances of the current globalisation, Member States must move towards the criminal policy of the European Union.<sup>56</sup> Criminal law is a sensitive policy area, in which there are still significant differences between national systems. European criminal law is being interpreted as a multi-level area of law in which the European Union has a regulatory impact on substantive criminal law, criminal proceedings and cooperation between Member States.<sup>57</sup>

Co-operation between Member States in criminal cases will help combat crime more effectively, preventing criminals from using the differences of legal systems for their benefit.<sup>58</sup> Adopting common criminal law measures, eliminating the gaps and weaknesses of national law will deprive criminals of the possibility of hiding behind borders and abusing the differences between national systems for criminal purposes.

One of the aims of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instruments and proceeds of crime in the European Union is to set forth a minimum set of rules concerning the confiscation of property within criminal cases.

The directive clarifies the concept of the proceeds of crime, including the funds that have been acquired directly by committing a criminal offence and all indirect benefits, including the subsequent reinvestment or conversion

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<sup>56</sup>Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Towards EU Criminal Policies: Ensuring effective implementation of EU policies through criminal law. Brussels, 20.09.2011. Obtained from: <https://eur-lex.europa.eu/legal-content/LV/TXT/?uri=CELEX%3A52011DC0573> (viewed 22.08.2018.).

<sup>57</sup> Klip A. *European Criminal Law: An Integrative Approach*. 3rd. Oxford: Intersentia, 2016.

<sup>58</sup> *Eiropas tiesības* [European Law]. Red. T. Jundzis. Rīga: Juridiskā koledža, 2004, p. 98.

of the proceeds of crime. Thus, proceeds of crime can include any property, including that which has been wholly or partly transformed or converted into another property, and that which has been combined with property from legitimate sources up to the estimated value of the combined proceeds of crime. They may also include the income or other benefits derived from proceeds of crime or from criminally acquired property in or with which the funds have been transformed or converted to or with which they are combined. The directive provides for a broad definition of property by establishing that property is understood to mean legal documents or instruments that certify ownership of a property or a part thereof.

An important step in the fight against crime is the extended confiscation provided for in the directive. Extended confiscation means the confiscation of property that is not related to the particular offence for which a person is convicted if the court is convinced that the property in question is derived from another criminal activity, but the process does not need to prove any particular criminal activity.

Property can be recognised as criminally acquired if there is reason to believe or assume that there is a greater chance that the property in question is derived from criminal activity than from other activities when assessing the facts and available evidence. The conclusion that a property has been obtained criminally may be justified by the fact that the person's property is disproportionate to their legal income.

Recovery of the proceeds of crime is increasingly seen as an independent issue that is not related to a specific type of crime. International cooperation is looking for ever new ways to combat against transnational crime, but in cooperation there are differences between legal frameworks concerning ensuring the rights of defence, differences in restrictions, the obligation to provide testimony or information, etc.

The development of each country's criminal law and the development of the criminal procedural law are influenced by many and varied factors, first of all, the geographical location of the country, secondly, the history and development of the countries of the world, and thirdly, the establishment and development of international and regional organisations.<sup>59</sup> Therefore, the world countries need to look for what is common, which will make it possible to agree on measures by setting one common goal in combating the circulation of criminally acquired property. In the world's globalisation processes, when people have become citizens of the world, crime also has a transnational character, which challenges the whole to seek solutions together that ensure rapid, effective cooperation between countries and an adequate response to the threat to the public interest which is continuously changing.

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<sup>59</sup> Liholaja V., Bērziņa B., Mekons K., Rupeiks J., Zalužinska L. *Krimināltiesības – attīstības tendences Eiropas un nacionālajās tiesībās, attiecības starp I un III pīlāru, ieviešanas metožu labākā prakse* [Criminal law - development tendencies in European and national law, the relations between the I and III pillar, the best practices of implementation]. Riga: Ministry of Justice, 2009, p. 101.

## CONCLUSION

As a result of the development of the doctoral thesis, the goal was achieved, a comprehensive theoretical, practical study on the recognition of property as a criminal offence was made. The doctoral thesis answers all the questions of the research. The doctoral thesis examines the content of the criminal law framework related to criminally acquired property, the rights and obligations of persons involved in the proceedings regarding criminally acquired property, as well as the peculiarities and challenges of the criminal law framework related to proceedings regarding criminally acquired property. The doctoral thesis analyses the recognition of the property as criminally acquired in 18 Member States of the European Union. The doctoral thesis analyses aspects of international cooperation. The results of the doctoral thesis show that the framework of the recognition of property as criminally acquired and confiscation in Latvia is progressive and ensures the implementation of international obligations. As a result of the research, it has been found that improvements and amendments to the regulatory enactments are needed, thus ensuring a more effective opportunity for law enforcement authorities to combat the circulation of the criminally acquired property. The author of the thesis summarises the main conclusions and proposals aimed at ensuring a uniform understanding of legal provisions and a uniform case law by proposing solutions for ensuring a more effective application of legal provisions in the legal practice in Latvia.

### **Conclusions and Proposals**

1. The proceedings regarding criminally acquired property are a way for the state to confiscate property from a person, so the state must ensure that the person who is entitled to said property is given the opportunity to defend his or her rights to the property in a fair and impartial court. Criminal Procedure Law

does not have a framework for the restoration of proceedings regarding criminally acquired property in relation to the termination of criminal proceedings from which materials regarding recognition of the property as criminally acquired have been separated.

2. The criminal procedural framework ensures the efficiency and economy of the process without limiting the possibilities for the parties to exercise their fundamental rights, and also ensures that the case is fairly and impartially examined. The proceedings of criminally acquired property require special care and quality from the court, ensuring the realisation of the interests of all parties involved. All parties involved in the proceedings of criminally acquired property shall receive a fair exercise of rights.

In order to make the rights of a person, involved in a proceeding for criminally acquired property, to get acquainted with the procedural materials more efficient and to avoid arguments about the unequal possibility of exercising his or her rights to express an opinion about the other parties evidence, the following amendments to the Criminal Procedure Law should be made:

- 1) to express Section 627, Paragraph one, Clause 1 of the Criminal Procedure Law as follows: "information about the facts that justify the connection between the property and the criminal offence or the criminal origin of the property, as well as the case files which justify the existence of such information and are separated from the criminal proceeding regarding a criminal offence being investigated.”;
- 2) to express Section 627, Paragraph four of the Criminal Procedure Law as follows: "The parties involved may familiarise themselves with the materials in the decision to initiate proceedings regarding criminally acquired property, ensuring the protection of the fundamental rights of the persons mentioned in the evidence, and the

protection of the public interest, without compromising the objective of the criminal proceedings from which the materials have been separated, as well as preventing any copying or reproduction of material in any way.";

3) to exclude Section 627, Paragraph five of the Criminal Procedure Law.

3. The Criminal Procedure Law does not provide for limitation of the term for judicial proceedings in court. The legislator has to consider the possibility of establishing in a law a specific term within which the court is to adjudicate the criminal case on the basis of its merits, otherwise the court shall be obliged to determine the possibility of continuing the examination of the criminal case.

4. In order to raise the question of recognising the property as criminally acquired the person directing the proceedings must have initiated a criminal proceeding in connection with a criminal offence. The proceeding is only possible if the fact of commission of a criminal offence is proven beyond reasonable doubt.

5. An essential circumstance, the ignoring of which may lead to wrong practice, is that if the person directing the proceedings asks to recognise a property as criminally acquired, it is required to prove the criminal origin of the property on the assumption that the set of evidence gives reason to believe that the property is most likely of criminal, not legal origin. The criminal procedure does not presuppose the unlawfulness of the origin of the property. Only if the person directing the proceedings puts forth an evidence-based assumption of the criminal origin of the property, then the person has the right to object and then prove the legality of the origin of the property.

6. Property owned or possessed by a person **directly** as a result of a criminal offence means objects, funds, substances, rights, any benefits and the

like, against which or in relation to which a criminal offence has been committed. For example, stolen property, a received bribe, an unjustified insurance indemnity etc., that is, a benefit acquired directly from a criminal offence.

In order to ensure the uniform application of the law, Section 70.<sup>11</sup> of The Criminal Law should provide a definition of property which has come into the ownership or possession of a person as a direct result of a criminal offence, as follows: property which has come into a person's ownership or possession as a direct result of criminal offence is items, funds, substances, rights, any benefits and such, against or in connection with which a criminal offence has been committed.

7. Property that has been in the possession or ownership of a person as an **indirect** result of a criminal offence should be understood as income and any benefit derived from the use, turnover, investing, transformation, combination and similar gains and profits derived from the direct use of criminally acquired property.

To ensure a uniform application of the law:

- 1) to express Section 70.<sup>11</sup>, Paragraph four of the Criminal Law as follows: "Property that has come into the possession or ownership of a person as an indirect result of a criminal offence is any benefit obtained through the direct use of criminally acquired property, including the gains and profits resulting from the use of criminally acquired property.";
- 2) to add Paragraph five of the following wording to Section 70.<sup>11</sup> of The Criminal Law: "Criminally acquired property is confiscated, if it is not to be returned to the owner or possessor."

8. Extended confiscation can only be applied for *committing* a crime. Extended confiscation can not be applied to a person who committed a criminal violation.

Property can only be recognised as criminally acquired by applying the extended confiscation, when deciding the question of a person's guilt during a criminal proceeding.

In the case of extended confiscation, the Criminal Law imposes several conditions which must exist simultaneously for it to be possible to recognise the property as criminally acquired: a) there must be evidence in the proceedings that the value of the property is not proportionate to the legitimate income of the person; b) the convicted has not proven that the property was acquired in a legitimate way; c) the crime for which the person is being convicted in its nature is focused on gaining financial or other kind of benefit, the person is a member of an organised group or supports such group or is connected with terrorism.

9. The legal framework provides for different definitions of criminally acquired property in the Criminal Law and the Law on the Prevention of Money Laundering and Terrorism Financing. There are no procedural rules for recognising property as criminally acquired in presumption cases stated in the Law on the Prevention of Money Laundering and Terrorism Financing.

To eliminate the difference and to make the legal framework clearer and more precise, to amend the law:

- 1) to express Section 4, Paragraph one of the Law on the Prevention of Money Laundering and Terrorism Financing as follows: "The proceeds shall be recognised as criminally acquired in the cases provided for in the Criminal Law.";
- 2) to add the following wording to Section 626, Paragraph four of the Criminal Procedure Law: "The investigator shall have the right to

initiate a proceeding on criminally acquired property in the cases provided for in Section 4, Paragraph three, Clauses 1 and 2 of the Law on the Prevention of Money Laundering and Terrorism Financing";

- 3) to add the following wording to the Section 626, Paragraph five of the Criminal Procedure Law: "The investigator, when initiating a proceeding for criminally acquired property, has the right to investigate the circumstances of the case in accordance with this law";
- 4) to add the following wording to Section 630, Paragraph four of the Criminal Procedure Law: "Proceeds recognised as criminally acquired in the cases specified in Section 4, Paragraph three, Clauses 1 and 2 of the Law on the Prevention of Money Laundering and Terrorism Financing, shall be confiscated".

10. The effectiveness of the scope of the rights of the parties involved in the proceeding can be debated, since it is clear from the content of the legal provisions that individuals are given the opportunity to actively defend their interests and the extent and intensity of the exercise of rights depends on the person itself.

11. The framework of the confiscation of criminally acquired property in Latvia is progressive and provides for the possibility of confiscating the criminally acquired property when criminal proceedings about a criminal offence are initiated, but the suspect or accused person is not known.

12. The property is repossessed from every possessor, also a *bona fide* one, because no one can confer more rights on others than he or she owns. Committing criminal acts which result in the acquisition of property and its subsequent disposal to third parties, does not constitute civil circulation. Unlawful action can not give rise to rights.

13. The framework of Chapter 59 of the Criminal Procedure Law allows pre-trial proceedings to decide on the issue of recognising property as criminally acquired on the grounds of criminal law principles, without making a connection with finding the person who committed the criminal offence. The framework of Section 59 of the Criminal Procedure Law is effective and complies with the principles set forth in international documents, ensuring combating the circulation of criminally acquired property.

14. The legal framework of Ireland, Italy, Slovenia and Greece provides for a model of confiscation of property based on civil law, that is, the state initiates the confiscation of the property (*in rem*). The legal framework of Ireland, Italy, Slovenia and Greece in the following cases provides that the issue of confiscating criminally acquired property can be dealt with separately, without being bound to the decision to convict the person as guilty of a criminal offence.

15. In Croatia, Poland, Germany, Sweden, Spain, Greece, Finland, and Hungary, it is possible to decide, within criminal proceedings, on the issue of recognising property as criminally acquired if the person who committed the criminal offence has been discovered, but there is no possibility of a trial due to the person's illness or avoidance of the investigation, the law also allows to decide on the issue of confiscation of the criminally acquired property, if the criminal proceedings are terminated due to a limitation period or because of the person's incapacity or release from punishment. But in all cases the confiscation of criminally acquired property is related to the identification of the person who committed the criminal offence.

16. Given the context of world globalisation and the cross-border aspects of crime (the “absence” of borders), it is necessary to change the principles of international cooperation regarding the matters on which Member States can agree. International documents should state actions that are

considered criminal offences in all Member States, such as terrorism, the circulation of narcotic drugs and psychotropic substances, human trafficking and the like, and the obligation to execute an order for freezing and confiscation of criminally acquired property issued by a competent authority of another state, without re-evaluation and recognitions, thereby simplifying the bureaucratic procedure.

17. It must be acknowledged that by failing to provide law enforcement authorities with adequate means for tracing, freezing, managing and confiscating the criminally acquired property, the objective of combating crime and the withdrawal of financial benefits from the criminal circulation will not be achieved.

18. In order to effectively combat the circulation of illicit property and to adequately respond to forms of crime in line with today's level of development of public relations, taking into account the technological opportunities and globalisation processes in the world, a new legal concept - financial investigation - has to be set up in Latvia.

When adopting the new law, to establish the legal concept - financial investigation - aimed at ascertaining the origin of the property of a person, with the aim of preventing the circulation of illicit property. Financial investigation is the verification of the compatibility of the value of the property belonging to a person and his or her family members or a person with whom he has a joint (single) household with the legal income of the person and his family members or the person with whom he has a joint (single) household, if in the course of the implementation of the functions of the state administration a public servant has an objective basis for assumptions about the disproportionality of personal expenses and incomes. A financial investigation would result in confiscation without the conviction of the person based on a civil procedural standard of proof.

19. Taking into account that the Law on Compensation for Damage Caused in Criminal Proceedings and Administrative violation cases does not apply to the right of legal persons to appropriate compensation for the loss of property in the event of a violation of interests in criminal proceedings and therefore the legal person must bring an action in court on the basis of Article 92 of the Constitution of the Republic of Latvia which is not in the law, it is necessary to establish a legal framework which provides for the possibility of realising the rights of a legal person to an appropriate reimbursement of property damage in the event of a violation of their interests in criminal proceedings.

20. Taking into account that only in rare cases are the proceedings regarding criminally acquired property used, the Criminal Procedure Law establishes one more case when the proceedings regarding criminally acquired property can be initiated already after the person has been convicted. In all cases when a person is found guilty of a crime, the person directing the proceeding instructs the State Revenue Service to perform a financial audit of the property of the accused (convicted) in order to assess the compliance of their personal expenses with their income if there is an objective reason to believe that the person's livelihoods or possessions are disproportionate to the person's legal income.

21. Criminal activities are often transnational and the assets of criminal groups are increasingly being invested outside of their country, so the confiscation of proceeds of crime without conviction has a decisive role in combating and preventing crime. Confiscation without a person's conviction is one of the most effective tools in the fight against crime and is absolutely legitimate and in line with human rights guarantees.

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