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**FORFEITURE UNDER ART. 44 AND ART. 45  
OF THE PENAL CODE *DE LEGE LATA*  
AND *DE LEGE FERENDA***

**I. General remarks**

The term ‘forfeiture’ used in the Penal Code covers several penal measures of different contents and functions which involve takeover by the State Treasury of the ownership of certain assets that are in the possession of perpetrators of criminal offenses.<sup>1</sup> This issue is of particular importance in the case of offenders who are members of organized criminal groups, due to the high value of the assets they acquire as a result of their crimes and the difficulties in proving that the assets have originated from their criminal offenses. The original structure of the articles mentioned in the title of the present paper was far from perfect and, therefore, they have undergone a series of legislative changes.

According to art. 44 of the Penal Code (PC)<sup>2</sup> there are three categories of forfeiture of objects:

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<sup>1</sup> More information on this subject can be found in: E. M. Guzik-Makaruk, ed., *Przepadek przedmiotów i korzyści pochodzących z przestępstwa* [Forfeiture of objects and gains originating from crimes], Wydawnictwo Wolters Kluwer, Warsaw 2012; also, see K. Postulski, M. Siwek, *Przepadek w polskim prawie karnym* [Forfeiture in the Polish criminal law], Kantor Wydawniczy Zakamycze, Kraków 2004; and J. Raglewski, “Przepadek (§18)”, in: M. Melezini, ed., *Kary i środki karne. Poddanie sprawcy próbie. System prawa karnego* [Penalties and penal measures. Subjecting the offenders to a test. The system of criminal law], vol. 6, Warsaw 2010.

<sup>2</sup> This article has been given the following wording:

Article 44. §1. The court shall impose the forfeiture of items directly derived from an offence.

§2. The court may decide, and in cases enumerated in law must decide, on the forfeiture of the items which served or were designed for committing the offence.

§3. The forfeiture described in § 2 shall not be applied if its imposition would not be commensurate with the severity of the offence committed and instead the court may impose a supplementary payment to the State Treasury.

§4. In the event that the forfeiture described in §1 or §2 is not possible, the court may

- forfeiture of objects originating directly from a criminal offense;
- forfeiture of objects that were used or intended for use in order to commit a criminal offense; and
- forfeiture of objects whose production, possession, trade, sending, carrying, or transport are forbidden under a statute.

Art. 44 (1) of the PC applies to forfeiture of objects originating directly from criminal offenses, i.e. objects that have been acquired as a result of implementation of a specific criminal offense. Thus, before the court makes a decision to adjudicate this form of forfeiture, the court always has to determine the existence of a direct relation between the object to be forfeited and the committed criminal offense constituting the subject matter of the court case.<sup>3</sup>

Of note is the fact that art. 44 (1) of the PC provides for an exception to the obligatory forfeiture for the benefit of the State Treasury of objects originating directly from a criminal offense, which pertains to situations where such objects “are to be returned to the victim or to another entity.” Also, forfeiture of objects may not apply to objects whose legality of origin raises factual doubts.

Court verdicts regarding forfeiture of objects must indicate on whom and for what acts the penal measure is inflicted. This is particularly important in the case of offenders who are members of organized criminal groups. What sets organized groups whose aim is to commit crimes from other groups of criminals is the fact that the former groups are organized, i.e. have permanent structures, either vertical with a leader who manages the group’s activities, or horizontal with a permanent group of members who coordinate the group’s activity in accordance with a certain set of rules. Also, organized criminal groups are not established solely to commit

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adjudicate forfeiture of an equivalent of the objects originating directly from the offense or the objects that were used or intended for perpetration of the offense.

§5. The court shall not adjudicate forfeiture of the objects described in §1 or §2 if they are subject to restitution to the victim or to another entitled body.

§6. In the event that the conviction has pertained to an offence of violating a prohibition of production, possession or dealing in or transporting specific items, the court may, and in cases enumerated in law must, decide on the forfeiture thereof.

§7. If the items referred to in §1 or §6 are not the property of the perpetrator, the forfeiture may be decided by the court only in the cases provided for in law; in the case of co-ownership, the decision shall cover only the forfeiture of the share owned by the perpetrator, or the forfeiture of an equivalent of this share.

§8. Objects that are subject to forfeiture shall be transferred to the ownership of the State Treasury at the time the sentence becomes final and valid.

<sup>3</sup> See: verdicts of the Supreme courts: dated 31 March 2005, file no. IV KK 75/05, LEX no. 148222., and dated 15 April 2008, file no. II KK 29/08, LEX no. 388435.

a single crime but rather their members assume that the groups will commit many crimes. A group of acquaintances who get together only to conduct ad-hoc criminal commercial transactions does not constitute an organized criminal group. Also, a group of people who conduct the same criminal activities is not an organized criminal group if the people do not maintain contacts within an organization.<sup>4</sup>

According to the new wording of art. 45 (1) of the PC, courts are required to inflict forfeiture of a financial gain if the following two conditions are met:

1. the offender has acquired a financial gain from the criminal offense, even indirectly; and
2. the gain is not subject to restitution under art. 44 (1) or (6) of the PC.

Let us start by briefly recounting the legislative changes that have resulted in the current wording of art. 45 of the PC.<sup>5</sup>

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<sup>4</sup> More information on this matter, including information on the literature and the case law, can be found in: E. W. Pływaczewski, E. Zatyka, in: E. W. Pływaczewski, ed., *Przestępczość zorganizowana* [Organized crime], Wydawnictwo C. H. Beck, Warsaw 2011, p. 35 ff and p. 220 ff.

<sup>5</sup> This article has been given the following wording:

Art. 45. §1. If the offender has acquired from an offense, even indirectly, a financial gain that is not subject to the forfeiture of objects enumerated in art. 44 §1 or §6, the court shall adjudicate forfeiture of such a gain or its equivalent. The forfeiture shall not be adjudicated in whole or in part if the gain or its equivalent is subject to restitution to the victim or another entity.

§2. In the event of a conviction for a crime from which the offender has, even indirectly, obtained a financial gain of significant value, it is considered that the property that the offender took into his possession or to which he has obtained any title during the perpetration of the offense or after its perpetration, until a sentence, even not final, is pronounced constitutes a gain originating from the offense, unless the offender or another affected person presents an evidence to the contrary.

§3. If the circumstances of a case indicate a high likelihood that the offender mentioned in §2 has transferred to a natural or legal person or an organizational unit without legal personality the property that constitutes a gain acquired as a result of perpetration of an offense, then it is considered that the items that are in the autonomous possession of this person or unit and their property rights belong to the perpetrator, unless the affected person or organizational unit presents evidence of their legal acquisition.

§4. The provisions of §1 or §2 shall apply also in the event of seizure pursuant to art. 292 (2) of the Code of Criminal Procedure to secure potential forfeiture of gains or at the time of enforcement of this measure. The person or unit affected by the assumption defined in §3 may sue the State Treasury to rebut this assumption; until the valid and final decision in the case the enforcement procedure shall be suspended.

§5. In the case of co-ownership, forfeiture shall be adjudicated in relation to the share owned by the offender or to an equivalent of this share.

§6. The financial gain subject to forfeiture shall become the property of the State Treasury at the time the verdict becomes final and in the case mentioned in the second sentence of §4 – at the time the verdict dismissing the suit against the State Treasury.

## II. The amendments to art. 45 of the PC

The first amendment of art. 45 of the PC was made in the Act of 9 September 2000<sup>6</sup> in connection with the implementation of the Convention on Fighting Bribery of Foreign Public Officials in International Business Transactions. The results of this amendment include enlargement of the list of persons subject to forfeiture of gains originating directly from crimes to include all criminal offenders. Moreover, the amendment introduced the provision that in the case of professional criminals and members of organized criminal groups or criminal gangs (art. 65 of the PC) who have acquired financial gains of significant value from a crime, courts are required to inflict forfeiture of the gain or its equivalent.<sup>7</sup>

The next amendment was required due to the rather self-evident needs related to the judicial practice and included adoption of the assumptions made in legal systems of other democratic countries related to the fact that the property of offenders convicted for their involvement in organized crime has originated from criminal offenses.<sup>8</sup> The provisions related to such an assumption were introduced in the Act of 13 June 2003.<sup>9</sup> The first assumption is that property that an offender acquired or to which the offender acquired any title at the time of perpetration of an offense or after completion of the offense and before a court sentence, even not final, constitutes a gain acquired as a result of the offense. This assumption applies only to cases where the offender has committed a crime from which he or she has acquired, even indirectly, a financial gain of significant value (art. 45 (2) of the PC).

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<sup>6</sup> On amending the Penal Code statute, the Code of Criminal Procedure statute, the Act on Suppression of Unfair Competition, the Act on Public Procurement, and the Bank Law statute, Journal of Laws of 2000, no. 93, item 1027. See: R. A. Stefański, “Przepadek korzyści majątkowej uzyskanej przez sprawcę z przestępstwa” [Forfeiture of financial gains acquired by offenders as a result of crimes], *Prokuratura i Prawo*, 2001, no. 3, p. 156 ff.

<sup>7</sup> See: J. Brylak, “Instytucja przepadku korzyści w walce z przestępczością zorganizowaną” [Institution of forfeiture of gains in the fight against organized crime], *Wojskowy Przegląd Prawniczy*, 2009, no. 2, p. 63 ff.

<sup>8</sup> This was emphasized, among others by A. Marek (*Komentarz do kodeksu karnego, Część ogólna* [A commentary to the Penal Code. General Part], Warsaw 1998, p. 138). Also, see: A. Marek, “Problemy penalizacji przestępczości zorganizowanej” [Problems of penalization of organized crime], in: L. Tyszkiewicz, ed., *Problemy nauk penalnych. Prace ofiarowane Pani Profesor Oktawii Górniok* [Problems of penal sciences. Works dedicated to Professor Oktawia Górniok], Katowice 1996, p. 128 ff.

<sup>9</sup> On amending the Penal Code statute and certain other statutes, Journal of Laws no. 111, item 1061. More information on this subject can be found in: M. Szewczyk, “Przepadek korzyści majątkowych po zmianach kodeksu karnego” [Forfeiture of financial gains after the amendments to the Penal Code], in: T. Bojarski, E. Skrętowicz, eds., *Nowe prawo karne po zmianach* [The new penal law after the amendments], Lubelskie Towarzystwo Naukowe, Lublin 2002, p. 17 ff.

In other words, this breach of the principle of presumption of innocence and introduction into Polish criminal law of the institution of reverse burden of proof is limited only to serious cases (e.g. economic offenses, tax offenses, and offenses connected with organized crime).

The other assumption concerns the group of persons who are subject to forfeiture. If the circumstances of a case indicate that it is highly likely that the offender has transferred to a natural person, a legal person, or an organizational entity without legal personality, in fact or under any legal title, property that constitutes a gain acquired as a result of a criminal offense, then it is considered that the objects that are in the autonomous possession of such a person or entity as well as their ownership rights belong in fact to the offender.

Both of these legal assumptions are opposable because there are provisions that enable making them void by presenting counterevidence. The affected person may demonstrate that he or she has acquired the property legally and from a legal source. Forfeiture of benefits originating directly or indirectly from criminal offenses is obligatory in all cases.

The above assumptions have led to a debate among the representatives of criminal law doctrine. Some of them allege that the assumptions violate the procedural principle of the burden of proof, defined in art. 5 (1) of the Code of Criminal Procedure (CCP), which rests on the agency conducting the trial, and may raise doubts concerning their compliance with the principle of assumption of innocence provided for in the Polish Constitution and in international law. Moreover, it is not clear why the assumption was limited only to financial gains of significant value (i.e. in excess of 200,000 zlotys), even though it could be very useful in other cases.<sup>10</sup> There are also examples of full approval of the assumptions<sup>11</sup> and the authors of such opinions admit that “(...) in spite of such reservations, the new approach to forfeiture of financial gains to a much greater extent enables implementation of the fundamental assumption of the new penal polity, namely that offenders should be deprived of the benefits resulting from the crimes they have committed.”<sup>12</sup>

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<sup>10</sup> See: Z. Sienkiewicz, “Przepadek przedmiotów” [Forfeiture of objects], in: M. Bojarski, ed., J. Giezek, Z. Sienkiewicz, *Prawo karne materialne. Część ogólna i szczególna* [Substantive penal law. General and specific part], LexisNexis, Warsaw 2010, p. 335.

<sup>11</sup> See: W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna* [Polish penal law. General part], Wydawnictwo Zak, Kraków 2010, pp. 460–461; A. Grześkowiak, *Prawo karne* [Penal law], 2<sup>nd</sup> edition, Wydawnictwo C. H. Beck, Warsaw 2009, pp. 208–2009.

<sup>12</sup> Z. Sienkiewicz, op. cit., p. 335.

### III. Forfeiture in court verdicts

The issue of interpretation of the term ‘objects’ in accordance with art. 44 of the PC has been present in many court verdicts. One of the conclusions is that “traces secured at the crime scene on worthless objects (...) are not objects pursuant to art. 44 of the PC or objects that can be disposed of in ways defined in art. 230–232 of the Code of Criminal Procedure. These are objects that have preserved traces of a crime and, as such, can be used as evidence to find the perpetrator of the crime, while constituting an integral part of the files or an enclosure to the files. Thus, this type of material evidence must be regarded as a part of the case’s files or as an enclosure to the files.”<sup>13</sup>

In its verdict of 12 September 2009, with reference to a prior resolution of the Supreme Court composed of 7 judges,<sup>14</sup> the Supreme Court pointed out that “(...) an object of an action performed, in the meaning of art. 44 (2) of the PC, is not intended for committing a criminal offense but is one of the objects that determine the very essence of the type of the criminal offense. Consequently, a vehicle used by a drunk driver who commits a criminal offense does not belong to the category of objects that are used or intended, in the meaning of art. 44 (2) of the PC, for committing a crime under art. 178a (1) of the PC.<sup>15</sup> Nevertheless, in one of its later verdicts, the Supreme Court found that “(...) also, a car is not, as a result of forgery or modification of the data tag, an ‘object of a performed crime’ under art. 306 of the PC. In such a case, the ‘object of a performed crime’ is the ‘identification tag’ of the car and not the car itself.”<sup>16</sup> Last but not least, in its most recent verdict, the Supreme Court clearly indicated that “The object used for perpetrating a criminal offence is an object whose use is the prerequisite of perpetration of the offense.”<sup>17</sup>

Some important verdicts made references to art. 45 of the PC, in its new wording. Of particular importance is the verdict where the Appeals Court in Kraków found to be erroneous its earlier opinion that<sup>18</sup> the financial gain

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<sup>13</sup> Decision of the Appeals Court in Białystok of 17 July 2008, file no. II AKz 226/08, *Orzecznictwo Sądowe Apelacji Białostockiej 2008*, no. 2–3, item 58.

<sup>14</sup> I KZP 20/08, OSNW 2008, no. 11, item 88.

<sup>15</sup> IV KK 110/09, LEX no. 507953.

<sup>16</sup> Verdict of the Supreme Court of 27 June 2012, file no. V KK 100/12, *Biuletyn Prawa Karnego 2012*, no. 7, p. 28.

<sup>17</sup> Verdict of the Supreme Court of 27 June 2012, file no. V KK 100/12, insert to *Prokuratura i Prawo*, 2012, no. 10, item 2.

<sup>18</sup> Included in the not published resolution no. II AKa 41/06.

of a person who illegally sells narcotics is the price he charges minus the amount spent to purchase the narcotics. This time, the Court found that the gain is all the assets obtained while committing the criminal offense of selling narcotics, not just the profit earned.<sup>19</sup> As a result, the Court confirmed the correctness of the earlier verdicts issued by the Appeals Courts in Katowice<sup>20</sup> and in Lublin.<sup>21</sup>

In line with the above interpretation is the decision of the Appeals Court in Kraków which found that “(...) the financial gain subject to forfeiture originating from the defendants’ criminal offense is the sum of all the amounts that the defendants earned by selling the narcotics smuggled into Poland, without the costs of purchase of the narcotics and other expenses, such as costs of travel to the place of purchase of the narcotics and the sums paid to the couriers. Crimes are not business activities where profit is calculated by subtracting costs from revenues.”<sup>22</sup>

Many court verdicts concern situations where forfeiture cannot be imposed in any form. As has been mentioned, art. 45 (1) of the PC includes a clause that provides for the priority of the rights of third parties in relation to forfeiture of financial gains or their equivalents to the benefit of the State Treasury. In other words, a financial gain or its equivalent cannot be forfeited if the gain is subject to restitution to the victim or another entitled person. Thus, it appears to be rather self-evident that objects originating from crimes and gains mentioned in art. 45 (1) of the PC must first be returned to the victim or another entitled person. Only when there is no such entitled person or when such person cannot be identified, such objects can be forfeited to the benefit of the State Treasury. If the objects have characteristics enumerated in art. 44 (1) and art. 45 (1) of the PC, then their forfeiture is obligatory. Also, their placement in a court deposit requires the court to undertake appropriate activities aimed to identify the person entitled to collect the objects and, if there is no such person, to determine the nature of the objects in order to pronounce a verdict regarding forfeiture of the objects.<sup>23</sup>

Of particular importance in this regard is the verdict of the Supreme Court of 14 May 2008 where the Court extensively explains that “forfei-

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<sup>19</sup> Verdict of the Appeals Court in Kraków, file no. I AKa 255/07, not published.

<sup>20</sup> KZS 5/07, items 57 and 97, not published.

<sup>21</sup> KZS 2/07, item 53, not published.

<sup>22</sup> Dated 16 February 2012, file no. II Akz 409/112, not published. Such rules, as the Court emphasized, can be used only in legal activities.

<sup>23</sup> See: Verdict of the Appeals court in Wrocław of 24 November 2006, file no. II AKz 560/06, *Orzecznictwo Sądów Apelacyjnych 2007*, no. 4, item 15.

ture of objects originating directly from criminal offenses and forfeiture of the equivalents of such objects, and forfeiture of financial gain earned as a result of a criminal offense or its equivalent, cannot be adjudicated if the objects (or gain) originate from (or was earned as a result of) a criminal offense (perpetration of a criminal offense) against property. This is because in situations where the value of the financial gain earned as a result of perpetration of a criminal offense is greater than the value of the harm caused by the offense (...) forfeiture of the gain – pursuant to art. 45 (1), sentence II, of the PC – shall not be adjudicated in the part that is subject to restitution. However, forfeiture of the remaining part of such a gain or its equivalent is subject to obligatory forfeiture. The prohibition regarding adjudication of forfeiture applies irrespective of whether the object originating directly from a criminal offense or the financial gain earned as a result of a criminal offense has been returned to the victim or another entitled person. The wording of the aforementioned provisions, in particular the way the words “is subject to” were used, leads to the clear conclusion that application of the exception to the rule regarding adjudication of forfeiture of objects or gain does not require determination whether the object or gain has already been restituted.”<sup>24</sup>

In another verdict, the Supreme Court made reference to the application of art. 412 of the Civil Code (CC) by saying that “(...) if the criminal court adjudicates forfeiture of a gain earned as a result of a criminal offense under art. 45 of the PC (...), then claims regarding forfeiture under art. 412 of the CC are void because the object of forfeiture no longer exists. However, a civil court will be competent if forfeiture is not adjudicated in the criminal proceedings for any reason.”<sup>25</sup>

As far as art. 45 (3) of the PC is concerned, the Supreme Court has stated that this regulation is of mixed substantive-procedural nature. The procedural nature of the regulation is due to the fact that it defines the procedure to follow regarding the relevant legal assumption and the method of

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<sup>24</sup> WK 11/08, insert to *Prokuratura i Prawo*, 2008/12/3.

<sup>25</sup> Verdict of the Supreme Court of 23 March 2007, file no. CSK 60/07, LEX no. 315405. In the opinion of the Court, it is possible that in a civil procedure the scope of forfeiture will be broader. Adjudication of forfeiture of a gain under art. 412 of the Civil Code is facultative but not arbitrary; consequently, the refusal of a court requires justification, with indication on the criteria of rejection. The petitioner is required to indicate the reasons for applying art. 412 of the Civil Code and is not required to indicate the circumstances that justify a decision not to adjudicate forfeiture as this is in the interest of the respondent (art. 6 of the Civil Code). Cf.: E. Pływaczewski, “Paserstwo a instytucja przypadku świadczenia na rzecz Skarbu Państwa w trybie art. 412 k.c.” [Handling of stolen goods versus the institution of forfeiture to the benefit of the State Treasury under art. 412 of the Civil Code], *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1987, no. 2, p. 97 ff.

its rebuttal, while the substantive nature results from the prerequisites for application of the assumption (perpetration of a criminal offense mentioned in art. 45 (2) of the PC, high likelihood of transfer of the gain resulting from the criminal offense by the perpetrator to another person) and the conclusion from the regulation (an asset that is in the possession of another person belongs to the perpetrator). The regulation in question is not subject to exclusion from the *lex mitior agit* rule provided for in art. 4 (1) of the PC.<sup>26</sup>

Appeal courts point at the fact that forfeiture of financial gains obtained as a result of sale of narcotics in the meaning of art. 45 (1) of the PC pertains to the profits that should not in any case be reduced by subtracting the costs borne to earn the profit.<sup>27</sup> It is not possible to demand remittance of a sum of money that is subject to forfeiture because the regulations do not provide for such a possibility. The fact that the convict does not have the entire sum is insignificant. The fact that the convict sold psychotropic and intoxicating substances for which he earned specific sums of money means that the convict made a financial gain. Another insignificant fact is that at the time of conviction the offenders have no financial gains or their equivalent because the regulations do not restrict adjudication of the penal measure to situations where the offenders are still in position of the financial gain they have obtained.<sup>28</sup>

Some court verdicts pertain to the issue of desistance from inflicting the penalty of forfeiture of objects. It is emphasized that due to the obligatory nature of adjudication of forfeiture of financial gains from criminal offenses or their equivalents under art. 45 (1) of the PC desistance from adjudication of this penal measure is allowed only in exceptional cases provided for in the statute. The contents of art. 45 (1) of the PC *in fine* indicate that forfeiture must not be adjudicated if the gain or its equivalent is subject to restitution to the victim or another person. On the other hand, the provisions of art. 61 (2) of the PC allow for desisting from adjudicating the penal measure in question only in cases where the court desists from inflicting a penalty. A ‘bad’ material situation of the defendant may lead to the

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<sup>26</sup> Resolution of the Supreme Court of 17 March 2005, file no. I KZP 4/05, *OSNKW*, 2005, no. 3, item 27.

<sup>27</sup> See, for example: verdict of the Appeals Court in Katowice of 21 December 2006, file no. II AKa 394/06, *KZS* 2007/5/57; and verdict of the same Court of 15 January 2009, file no. II AKa 294/08, *LEX*, no. 491184.

<sup>28</sup> See: verdict of the Appeals Court in Katowice of 26 April 2007, file no. II AKa 64/07, insert to *Prokuratura i Prawo*, 2008, no. 1, item 34; and resolution of the same Court of 12 December 2007, file no. II AKz 815/07, *LEX* no. 578201.

court's decision to desist from adjudicating reimbursement of costs if it is too onerous to the defendant and not only when his income, property, or earning potential substantiates the belief that he will not pay the costs and they will not be enforceable.<sup>29</sup>

#### **IV. Proposals *de lege ferenda* of 2007**

Lack of adequate effectiveness in the practical application of forfeiture of objects, gains, and their equivalents has become the basis both for assessment of the applicable laws and for formulation of proposals aimed at expanding the scope of this penal measure.<sup>30</sup> This is because the amendments to the Penal Code introduced by the Act of 13 June 2003 turned out to be too 'soft'. Thus, reform of the applicable laws is absolutely necessary if we are to improve the effectiveness of the system aimed at depriving perpetrators of the most dangerous categories of crimes of the money that forms the economic basis for their continued criminal activity.

In 2007, on the basis of the discussion pertaining to the aforementioned proposal to change the provisions of art. 45 of the PC,<sup>31</sup> a new thoroughly revised proposal was elaborated that took into account the earlier critical and polemical opinions.<sup>32</sup> The proposed instrument is referred to as 'expanded

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<sup>29</sup> See, in particular: verdict of the Appeals Court in Szczecin of 26 July 2006, file no. II AKa 93/06, *LEX* no. 283409.

<sup>30</sup> See: E. W. Pływaczewski, "Przestępczość zorganizowana z punktu widzenia teorii, polityki i praktyki" [Organized crime from the point of view of theory, politics, and practice], in: E. W. Pływaczewski, ed. *Przestępczość zorganizowana – Świadek koronny – Terroryzm: w ujęciu praktycznym* [Organized crime – immunity witness – terrorism: a practical approach], Kantor Wydawniczy Zakamycze, Kraków 2005; E. W. Pływaczewski, W. Filipkowski, Z. Rau, "Odbieranie sprawcom przestępstw wartości majątkowych. Ocena proponowanych zmian art. 45 Kodeksu karnego (wersja projektu na dzień 18 września 2006 r.)" [Deprivation of offenders of financial gains. Evaluation of the recommended changes to art. 45 of the Penal Code (version of the draft as of 18 September 2006)], in: A. Szymaniak, W. Ciepela, eds., *Policja w Polsce. Stan obecny i perspektywy* [Police in Poland. Current situation and the prospects], vol. 2, Wydawnictwo Naukowe INPiD, Poznań 2007, p. 125 ff.

<sup>31</sup> More information can be found in: E. W. Pływaczewski, "Wokół postulatu tzw. konfiskaty rozszerzonej (rozszerzonego przypadku mienia) [On the proposed so-called expanded confiscation (expanded forfeiture of property)], in: Łukasz Pohl, ed., *Aktualne problemy prawa karnego: księga pamiątkowa z okazji Jubileuszu 70. Urodzin Profesora Andrzeja J. Szwarca* [Current problems of penal law. A commemorative book on the 70<sup>th</sup> birthday of Professor Andrzej J. Szwarz], Wydawnictwo Naukowe UAM, Poznań 2009.

<sup>32</sup> See, in particular: C. Kulesza, P. Starzyński, "Powrót do konfiskaty mienia?" [Return to confiscation of property?], *Prokuratura i Prawo*, 2008, no. 3, p. 37 ff; Also, cf.: K. Laskowska, "Kara konfiskaty mienia w kodeksie karnym z 1969 r. i w projekcie nowego kodeksu karnego" [The penalty of confiscation of property in the Penal Code

confiscation’ or ‘expanded forfeiture of property’. During the 5<sup>th</sup> term of the lower chamber of the Polish parliament (Sejm), the proposal was incorporated into the draft *Act on amending the Penal Code statute, the Penal Fiscal Code statute, the Code of Criminal Procedure statute, the Executive Penal Code statute, and the Press Law statute*. It should be mentioned that, as a part of the public consultations, numerous comments to the draft were made by the Penal and Civil Law Codification Committee, the Supreme Court, the National Judicial Council, the Polish Bar Council, the National Council of Legal Counsels, the ‘Iustitia’ Association of Polish Judges, and the Association of Public Prosecutors of the Republic of Poland.

In the substantiation for the draft instrument of ‘expanded confiscation’/‘expanded forfeiture of property’, the authors pointed at the fact that the need for intensifying the efforts aimed at suppressing both organized crime and terrorism have led to interest in forfeiture of gains from criminal offenses as both a repressive and a preventive measure. Deprivation of perpetrators of such crimes of the money that constitutes an economic basis for continued criminal activity may be a much more effective means of suppression than even a long prison sentence. Thus, it was necessary to abandon the traditional approach to some instruments of penal law. The new approach is manifested in the elaboration of the so-called ‘expanded confiscation’/‘expanded forfeiture of property’.

The proposed changes are based on application of a set of legal assumptions that result in a shift of the burden of proof. The prerequisites for application of the assumptions include, among others, proving that the offender has committed forbidden acts as a member of an organized criminal group. The conclusion of the assumption is most often the criminal origins of the entire property in the possession of the offender, or of a part of the property. The instrument is often supplemented with solutions that enable adjudicating forfeiture against third parties to whom the offender transferred his property. In this regard, the currently applicable assumption that property that is subject to forfeiture and that has been transferred to a third party in fact belongs to the offender is expanded to cover also situations where numerous transfers have taken place. This is because, pursuant to the applicable law, this assumption applies only to the first transfer of property by the offender to a third party and successive transfers preclude the possibility to adjudicate forfeiture of such gains.

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of 1969 and in the draft of the new Penal Code], *Prokuratura i Prawo*, 1996, no. 11, p. 37 ff.

In order to effectively counter formation of chains of persons who act as intermediaries in the transfer of financial gains, the draft introduces the principle of joint and several responsibility of persons participating in the transfer of property that is subject to forfeiture for restitution of the property. Consequently, restitution of a gain originating from a criminal offense could be demanded not only from the offender but also from persons who participated in further transfer of the gain, unless such persons acted in good faith.

The authors of the draft emphasize that despite the customary (in particular in English-language literature) term of ‘expanded confiscation’, this institution has little in common with the additional penalty of confiscation of property, which was provided for in the Penal Code of 1969. This is because that penalty covered property originating from all sources, both legal and illegal. On the other hand, expanded forfeiture of property covers only the property that is assumed to have originated from a criminal offense. The consequence of the application of the aforementioned legal assumption is the possibility to rebut it. In the meaning of the previous penal code, confiscation was of an absolute nature. On the other hand, the objective scope of application of the expanded forfeiture of property is much narrower than the objective scope of application of the confiscation provisions in the Penal Code of 1969. It is basically limited to terrorist crimes and to serious criminal offenses committed by organized criminal groups.

This argumentation of the authors of the draft should only be supplemented by the conclusion that elimination of the penalty of confiscation of property was equal to throwing out the baby with the bath water. The use of penal law to purposes other than protection of values important to society from crime, if limited to practice, should not be used as grounds for eliminating a given instrument from the catalog of penalties and penal measures without thorough analysis of whether it is advisable and safe in specific conditions.<sup>33</sup>

The authors of the draft discussed here are fully aware that it is not always possible in criminal proceedings to demonstrate the connections between the crimes committed and the property of the offender and his or her relatives and business partners participating in transfers of property originating from crimes. This is because offenders who are members of organized criminal groups are often in possession of property of huge value whose origins cannot be connected with any specific criminal offense. Consequently,

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<sup>33</sup> E. W. Pływaczewski, “Wokół postulatów tzw. konfiskaty rozszerzonej...” [On the proposed so-called expanded confiscation...], p. 123.

the only solution is to use the proposed instrument, which of course does not deprive the offender and the persons assumed to benefit from the proceeds from criminal offenses of adequate means of defense that consists in demonstrating the legality of their property, thus removing from the scope of the adjudicated penal measure those assets that have been acquired legally and have no links to the offender's criminal activity.

Such a structure of assumptions and means of defense does not lead to excessive difficulties in producing evidence to the affected persons. Thus, the assumptions do not violate, as the authors of the draft have concluded, the principle of proportionality *sensu stricto*. In other words, tests regarding compliance of the draft with art. 31 (3) of the Constitution of the Republic of Poland lead to the conclusion that the solutions proposed in the draft do not violate the principle of proportionality in any of its aspects.

Another important element of the draft's substantiation is the results of the earlier comparative law analysis which covered the legal solutions adopted in other countries pertaining to expanded forfeiture of property, on the background of the international standards of suppression of organized crime and terrorism, which are becoming more and more universal in the area of fight against the most important crimes of this type.

Even though the solutions adopted in different countries vary according to local legal traditions, all of them include expansion of the standard model of forfeiture. Such expansion involves, in particular, the use of the aforementioned legal assumption of illegal origin of property. The structures of the assumptions adopted in the analyzed legal systems are usually more extensive than those provided for in art. 45 of the PC in the wording included in the aforementioned Act of 13 June 2003. This is true of both the grounds for and the conclusions from the assumption.

Introduction of the aforementioned provisions would certainly require appropriate amendments to other statutes, in particular in the Penal Fiscal Code of 10 September 1999 and in some provisions of the Code of Criminal Procedure. The key objective of the amendments to the Code of Criminal Procedure is to enable forfeiture of financial gains that are suspected of having originated from a crime in the event that a condemnatory sentence is lacking because the suspect is hiding, dead, or insane, or because the crime is subject to the statute of limitations. Like in other cases, in this situation the affected persons can demonstrate the legality of the property's origin.

The authors of the draft have also prepared recommendations regarding changes in the press law and the Executive Penal Code, with the latter being mostly of an accommodating nature and resulting from changes in

the structure of art. 45 and art. 33 of the Penal Fiscal Code. The key change in the press law would result from the new wording of art. 37a which would expand the current scope of forfeiture to cover objects that constitute information carriers intended for the preparation of press materials.<sup>34</sup>

Thus, unlike previous amendments in this area, the proposed changes constitute a serious legislative project of a very comprehensive nature due to both the complexity of the problem and the gravity of the threat.

The proposed amendments to art. 45 of the PC presented above have been presented and discussed during the international conference organized under the auspices of the Ministry of Justice held in October 2007.<sup>35</sup> In the light of the presentations given by foreign experts, who discussed both the legal mechanisms and the practice of deprivation of the perpetrators of the most serious crimes of their proceeds, the Polish proposals regarding the so-called expanded confiscation could be considered as far from 'revolutionary', especially that the participants of the conference were also presented a critical analysis of the current legal solutions pertaining to recovery of property and proceeds from criminal offenses. Moreover, comparison of the laws demonstrated that Poland only intends to implement the standards of suppression of the most serious crimes by 'cutting their economic roots' that have been in place for a long time and are becoming more and more universal. The draft discussed here has been adopted by the Council of Ministers and forwarded to the Sejm but, due to the shortened term of the Sejm, work on the draft was not completed.

During the 6<sup>th</sup> term of the lower chamber of the Sejm, the proposal took the form of a parliamentary *bill on amending the Penal Code statute, the Penal Fiscal Code statute, the Code of Criminal Procedure statute, the Executive Penal Code statute, and the Press Law statute*.<sup>36</sup> The assumptions of the bill are comprehensive and originate from the standard solutions implemented in a number of member countries of the European Union. In particular, enlargement of the scope of application of the legal assumptions to include perpetrators of terrorist crimes and crimes committed by organized criminal groups or criminal gangs definitely deserves support, due to

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<sup>34</sup> Consequently, these will include not only the matrix but also the hard drive and any other objects containing a recording of the material in a way that prevents its distribution.

<sup>35</sup> Conference titled "Expanded Confiscation as a Modern Measure in the Fight against Organized Crime," Warsaw, Belweder Palace, 18 October 2007.

<sup>36</sup> See: A. Sakowicz, *Opinia o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy oraz ustawy – Prawo prasowe (druk nr 640) z dnia 30 października 2008 r.* [Opinion on the amendment to the Code of Criminal Procedure statute, the Executive Penal Code statute, and the Press Law statute (print no. 640) of 30 October 2008], not published.

its merits and its similarity to solutions adopted in other legal systems (the institution of expanded forfeiture has been implemented in about a dozen European countries).<sup>37</sup> What one can expect in this area is that the works that have been initiated will be completed and not started anew in a way that will resemble reinventing the wheel, especially that in the field in question there are still no solutions that guarantee the maximum 'neutralization' of the incarcerated members of organized criminal groups who today reap benefits from the proceeds of their earlier crimes.

Of course, the effectiveness of the proposed amendments to the criminal law should not be overestimated. Certainly, in the absence of effective work of tax offices and court executive officers and various organizational and technical instruments, they will be futile and will not effectively prevent transfers of property by criminals to third parties in order to avoid its forfeiture.

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<sup>37</sup> More information on this subject can be found in: M. Kotowska, E. Jurgielewicz, K. Laskowska, E. Zatyka, J. Wiśniewski, A. M. Michałowska, M. Perkowska, J. Arciszewski, in: E. M. Guzik-Makaruk, ed., *Przepadek przedmiotów i korzyści...* [Forfeiture of objects and gains...], op. cit., pp. 54–210.

