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THE REFORM OF CRIMINAL ASSET CONFISCATION IN TAIWAN: AN OVERVIEW

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ABSTRACT

In the end of 2015, the legislative yuan of Taiwan reformed the criminal confiscatory system in a significant way. The core idea of the new provision is to abolish the quality of subordinate sentence of criminal confiscation and make it an independent effect different from penalty and rehabilitative measure. The most important reforms are types the confiscation of criminal benefits a balanced measure quasi-unjustified enrichment, adds provisions about confiscating criminal incomes of third-party, and judges can announce confiscation independently, which are based on the spirit of depriving criminal benefits as far as possible. Besides, legislators also proclaimed the retroactive effect of the new provision. Nevertheless, this article will point out that the new provision promotes the modernization of criminal confiscatory system, but in some places violates the constitutional law.

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I. INTRODUCTION

Asset confiscation in criminal proceedings involves the confiscation of proceeds for or from criminal offences from offenders or third parties. It is true that, in addition to punishment, asset confiscation is regarded above all as an effective means of combating economic crime, drug-related crime and organized crime, protecting the legal interests of the general public. However, the levying of assets with the aim of over-coming difficulties of proof in the levying of assets under certain circumstances also represents an intensive encroachment on the property right of the person concerned, which quickly threatens to go beyond the constitutional limits of proportionality. In addition, a complete absorption of assets by the state would threaten the realization of claims for damages by the victims of the crime. However, taking into account the fundamental rights of the person concerned and the interests of victims in the process of asset recovery often leads to complex and difficult to manage legislation on asset recovery, making it difficult to fight crime effectively. Against this background, one of the most difficult tasks for the legislator in each state is to design the instrument of criminal property confiscation in such a way that the effectiveness of the fight against crime as well as property rights of the individual and the interests of the victims are optimally realized.

Asset confiscation was first introduced into law with the entry into force of the Taiwanese Penal Code in 1935. However, its importance for the fight against crime was so neglected that, despite the major changes in the manifestations of crime, the concept and content of the regulations on asset confiscation remained almost unchanged until 2015. Until then, the legislator had mainly used the means of advancing punishability and tightening penalties in order to ensure the protection of society against crime. It was only through a few cases of spectacular economic crimes that the inadequate regulatory structure and the difficulties in applying criminal asset confiscation have attracted attention in literature and practice since 2006. There was agreement that the previous law on criminal asset confiscation was so outdated and incomplete that an immediate re-form of criminal law by the legislator was required.

The reform of the criminal asset confiscation in Taiwan was finally implemented in 2015 and 2016 and consisted of the following three amendments to the law. First, the Criminal Code was extensively amended on 17 December 2015. The main objective of the legislator was to fill the gaps in the asset confiscation of the legislation in force until that point. The rules on confiscation of the instrumentalities, the product of the crime and the profit from the crime have therefore been largely revised. Secondly, the Code of Criminal Procedure was reformed on 27 May 2016. This has extended the powers of seizure to ensure the enforceability of confiscation. In addition, any third parties whose property or other rights are subject to confiscation were granted their own rights in the confiscation procedure. The two new laws entered into force on 1 July 2016. They have already been in use for two years. Thirdly, the extended confiscation of the proceeds from the crime was introduced by the amendment of the Anti-Money Laundering Act on 30 December 2016. This is a legal consequence specifically regulated for money laundering.

A complete representation of all law changes is not possible for space reasons at this place for me. What is more decisive is that the legislator has based the reformed law on a new concept of asset absorption, which had been developed based on German criminal law prior to the asset absorption reform of 2017. Therefore, this introductory contribution is limited to presenting[1] the background (under II.) and the main features of the newly conceived asset confiscation in substantive law (under III.). Finally, I will outline my own evaluation (under IV.).

II. THE INCOMPLETE ASSET CONFISCATION UNDER THE OLD LAW

A. Asset confiscation as secondary penalty

As indicated above, the main objective of the criminal law reform was to fill the gaps in the existing legislation on asset confiscation. It is therefore necessary to first provide an overview of the old legal position of the Criminal Code in this regard to clarify the situation.

In Taiwan, criminal sanctions are divided into three categories: Main penalties, secondary penalties and measures of improvement and security. The additional penalties included the loss of official capacity and the right to stand as a candidate (§ 36 tStGB), the confiscation of the instrumentalities, product and profit of the crime (§ 38 tStGB old version), as well as the confiscation of compensation (§ 40-1 tStGB old version). While the original confiscation applied to all offences, the confiscation of compensation was only applicable to certain offences regulated in the Secondary Criminal Law.

Since confiscation was assigned to the category of *secondary penalty*, the court order for confiscation generally presupposed the existence of a conviction of the offender. In practice, therefore, the principle of the so-called accessoriness of confiscation was developed, which, despite justified criticism from literature, always played a decisive role in the application of the law. Accordingly, the court was not allowed to order an asset confiscation from the accused if he had died after the crime or had eluded criminal proceedings because in these cases a conviction would not have been possible. In addition, the evaluation of confiscation as a secondary penalty consequently led to the fact that, in principle, only objects belonging to one of the offenders could be confiscated.

The independent ordering of confiscation and the confiscation of third parties were only possible if it was exceptionally permitted by law. The legislator made an exception to this generally for illegal objects, e.g. drugs and weapons (cf. § 40 I tStGB old version). On the other hand, there were very few special provisions on the independent ordering of confiscation and third party confiscation for instrumentalities, crime products and crime gains (e.g. § 200 tStGB for counterfeit money).

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1 Detailed information on the reform of the Code of Criminal Procedure: Chih-Jen Hsueh, *Procedural Law of Confiscation, the Right of Accessing to the Case Files in Detention Procedure and Evidential Rules*, NATIONAL TAIWAN UNIVERSITY LAW JOURNAl, Vol. 46 Special Issue, November 2017, pp. 1495-1512.

The fact that the legislator used the confiscation of assets as a means of punishment is not only expressed in the confiscation of the capital gain as a kind of secondary penalty. It can be recognized even more clearly in the fact that the court may impose the fine up to the height of the attained profit according to § 58 tStGB. In addition, the level of the offender's criminal gain is highlighted in[2] some secondary penal laws as a punishment-increasing characteristic. The perpetrator of certain offences is therefore punished with a very high fine in addition to imprisonment. The rules on confiscation of the proceeds of the crime continued to apply in such cases. It is obvious that the[3] accused's criminal gain was thus un-justifiably and twice revoked by the state.

B. The gaps in the absorption of assets using the example of two spectacular cases

The fact that the confiscation of the capital gain was classified as a secondary penalty and could therefore only be ordered against the convicted offender resulted in gaps in the confiscation of assets. Surprisingly, however, these gaps were only noticed by criminal lawyers, practitioners and the public a few years ago. Among other things, two spectacular cases played a role, which should not go unmentioned here.

The first is the case of the *La Fayette class frigate*. In this case the naval officer Li-Heng KUO and the arms broker Andrew WANG had received the kick back of approx. 34 million US dollars from the French company Thomson in 1993 on the occasion of the procurement of French frigates of the La Fayette class by the state. Years later KUO had been convicted of corruption. However, WANG could not be convicted, first because of his flight abroad and later because of his death. For this reason, the kickback that had been paid into the accounts of WANG and his family at a Swiss bank could not be confiscated.

The second case, which is considered the incentive for the reform of the Criminal Code at the end of 2015, is the *oil scandal of the company Tatung* from 2013, in which the company had produced and marketed "extra virgin olive oil" under the leadership of the managing director. These "olive oils" were actually mixed with either sunflower seed oil or cottonseed oil. The managing director was therefore sentenced, and fines were also imposed on the company. However, the court had not declared confiscation of the profits that had

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2 A representative example of this is SECTION 171 OF THE SECURITIES TRADING ACT: Whoever commits one of the listed crimes, e.g. insider trading and market manipulation, can be sentenced to 3 to 10 years imprisonment and a fine of 10 to 200 million NT dollars (para. 1). In addition, the fine may be imposed up to the amount corresponding to the value of the capital gain; if, in addition, the stability of the capital market was jeopardized by the offence, the fine must be increased by half again (para. 6). If the value of the capital gain is more than 100 million NT dollars, the penalty shall be a prison sentence of at least 7 years and a fine of 25 to 500 million NT dollars (para. 2).

3 Following the introduction of the new law on asset absorption, the fine should no longer be assigned the function of asset absorption. Legal policy considerations in this regard: Chih-Jen Hsueh, *Discussions on Reform of Fine Punishment in Taiwan*, NATIONAL TAIWAN UNIVERSITY LAW JOURNAL, 47(2), June 2018, pp. 761-838.

demonstrably accrued to the company. The court put forward two arguments in support of its action: First, the company is not a party to the offence within the meaning of the StGB because it did not commit the offence but is punished only for the offence committed by its managing director. On the other hand, the asset confiscation would affect[4] the numerous victims in the realization of their compensation claims against the company.

The two cases make very clear the gaps in the regulations at that time regarding the confiscation of assets. In the case of the *frigate of the La Fayette class*, the crime gains had not been confiscated solely because the accused could not be convicted due to his death and the independent order to confiscate the crime gains was impossible due to the lack of exceptions. In the case of the *oil scandal*, the profits remained with the company mainly because it was regarded as a third party not involved in the crime and there was no possibility of the profits being confiscated from third parties. The gaps in the absorption of assets under the old law thus resulted from the fact that the StGB lacked the possibility of an in-dependent ordering of confiscation and third party confiscation for the capital gains. Why were they missing? The reason for this was the basic decision of the legislator to assign confiscation to *secondary penalties*.

III. PRINCIPLES OF THE NEW CONFISCATION RIGHT OF THE STGB

The classification of confiscation as a secondary penalty and the resulting gaps in the confiscation of assets under the old law have prompted the legislature to thoroughly reform the entirety of confiscation laws of the StGB. In the reform of the StGB, the legislator started from the idea that crimes must not be worthwhile so that crime can be com-bated effectively. The purpose of confiscating the proceeds of the crime is not to punish the offender, but to restore the lawful property order disturbed by an unlawful act. In this respect, the confiscation of the proceeds of the crime is by its very nature not a punishment, but a quasi-conditional compensatory measure, outlining the basic idea of the legislator. Following the course of the legislative process, it cannot be denied that this idea has been adopted from German criminal law by some renowned criminal lawyers, although the differences between the two legal systems are obvious.

This basic idea was implemented in several steps in the new StGB. As a first step, the legislator has summarized all forms of confiscation in a separate section "Confiscation". Confiscation is thus excluded from the category of secondary punishment and qualified as a so-called "*legal consequence of its own kind*", which is neither part of the punishment nor part of the measures of rectification and safeguarding. Such a "*re-labelling*" by the new law does not only mean the renunciation of the accessoriness of confiscation to convict the accused. According to pre-vailing opinion, it strongly indicates the will of the legislator that confiscation of any form does not exhibit a punitive character anymore.

4 Decision of the Changhwa District Court, 103 Zu-Shang-Zhi No. 2.

Since this deprives confiscation of its punitive character, the next logical step was to introduce *third-party confiscation*. According to § 38 III tStGB n. F., the court may order the confiscation of the means or products belonging to a third party if the third party has received them without justifiable reasons from or acquired them from a party involved in the offence. Pursuant to § 38 a II tStGB n. F. (new version of the German tStGB), the gains accruing to a third party are subject to confiscation, but only under the following conditions: the third party has acquired them in the knowledge that the gains result from an unlawful act; it has acquired them free of charge or in return for a disproportionately low consideration; it has acquired them through an unlawful act which the person involved in the act has committed for it.

The fact that confiscation is no longer classified as a secondary penalty has the further consequence that the possibility of *ordering confiscation independently* has been extended in such a way that its application is no longer limited to the offence selected. Pursuant to § 40 III tStGB n. F., the court may order the confiscation of instrumentalities, products of the crime and profits from the crime even if the person involved in the crime cannot be prosecuted or sentenced for factual or legal reasons.

The legislator has also reformulated the conditions for the confiscation of the capital gain. For the confiscation of the capital gain, an *unlawful* commission of an offence is now sufficient (§ 38 a IV tStGB n. F.). The extent of the confiscation is explicitly determined by the *gross principle* according to the explanatory memorandum. If the confiscation of the original capital gain is either wholly or partly impossible or inappropriate, the *compensation* is to be confiscated (§ 38 a III tStGB n. F.). In order to overcome the difficulties in determining the scope and value of the benefit of the offence, the court is granted the power to make an *estimate* (§ 38 b I tStGB n. F.). A *hardness regulation* was also introduced. Accordingly, confiscation may be waived in whole or in part if it represents an unreasonable hardship for the person concerned or jeopardizes his or her livelihood, or if it appears insignificant under criminal law or if the value of the capital gain is very low (§ 38 b II tStGB n. F.). The legislator thus wishes to implement the principle of proportionality in confiscation and promote process economy[5].

It is noteworthy that the legislator has also taken into account and resolved the conflict between the confiscation of the proceeds from the crime and the victim's claim to compensation. He assumes that the victim's compensation claim takes precedence over confiscation. A kind of *compensation model* was chosen to resolve this conflict: The court must first refrain from confiscation to the extent that the victim has actually been compensated by the person involved in the offence or a third party (§ 38 a V tStGB n. F.). However, the legal existence of the victim's claim as such does not prevent confiscation. In this case, the victim of the crime can turn to the public prosecutor's office within one year of the judgment coming into legal effect in order to be compensated from the confiscated property (§ 473 I tStPO n. F.).

5 For further criticism see Chih-Jen Hsueh, *Review on the Hardness Regulation in the Criminal Law of Confiscation*, THE TAIWAN LAW REVIEW, No. 252, May 2016, pp. 63-83.

Finally, it remains to be shown what the final consequence of the "re-labelling" of confiscation is. Because according to § 2 II tStGB n. F. is to be decided over the confiscation after the law, which applies at the time of the decision. No ifs or buts! The prohibition of retroactive effect under criminal law shall be suspended in this respect.

Art. 307 of the German EGStGB is used as comparative legal evidence for this purpose, which can, however, be criticized as obviously false[6]. The legislator argues in the explanatory memorandum that confiscation is not a punishment, but a legal consequence of its own kind. Consequently, the absolute prohibition of retroactivity under criminal law does not apply to confiscation. In addition, it argues that the benefit of the offence does not fall within the scope of protection of the property guarantee. In any case, the public interest in fighting crime by skimming off property outweighs the right of the person concerned to his or her property, which he or she has acquired through an unlawful act. Nor is the principle of the protection of legitimate expectations infringed in that regard. Ultimately, the encroachment on the property of the person affected by the retroactive effect of the law was also appropriate, because the application of the hardship provision in individual cases could lead to a waiver or mitigation of confiscation.

This is the overview of the new collection right of the reformed tStGB. The instrument of asset absorption has been considerably ex-tended in terms of content, personnel and time. However, the legislator did not want to leave the matter at that. Following the entry into force of the new tStGB, it has ensured or at least planned to further facilitate or expand the confiscation of assets.

Initially, the reform of the Anti-Money Laundering Act introduced *extended confiscation of the proceeds of crime*. Where money laundering has been committed in a gang or habitual manner, the court shall order the confiscation of the offender's property if circumstances indicate that such property has been obtained for or from unlawful acts. Admittedly, the wording of the provision requires the court to be convinced that the objects originate from criminal offences. However, the explanatory memorandum to the provision states that it is sufficient for the extended confiscation if the court considers it much more likely that the objects originate from criminal offences than from another activity. Reference is made explicitly to Directive 2014/42/EU[7].

Furthermore, in March 2017, the Ministry of Justice proposed in a government draft amendment to the Criminal Code the independent ordering of confiscation in cases where it is established that there are still objects to be confiscated after the judgment has

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6 Chih-Jen Hsueh, *The Modernization of Criminal Confiscatory System: The LegislativeIssues about Substantive Law of Confiscation in 2015*, NATIONAL TAIWAN UNIVERSITY LAW JOURNAL, 47(3), September 2018, p. 1101-1103; Chih-Wei Chang, *Constitutional Issues Related to the Retroactive Effect of Confiscation of Proceeds in the Criminal Law*, THE LAW MONTHLY, 68(6), June 2017, p. 122-123.

7 Analysis and criticism Chih-Jen Hsueh, in: *On the Problem of Confiscation of Money Laundering*, Verbrechen, Finanzierung und Geldwäsche: Wie kann Kriminalität effektiv verfolgt werden? p. 309 ff. (Jiuan-Yih Wu ed., 1st ed. 2017).

taken legal effect. The public prosecutor's office may subsequently request the competent court to order confiscation in order to make up for the lack of confiscation.

IV. OWN EVALUATION

A. Positive Ratings

This was the presentation of the main features of the new confiscation laws of the StGB in Taiwan. It cannot be denied that the legislator has worked very hard to modernize the long outdated recovery system. The modernization of the collection laws of the tStGB is often praised in the literature and compared to the update of a computer system from DOS to WINDOWS[8].

In my opinion, the StGB's new right of confiscation deserves approval in many places. Above all, the characterization of confiscation as a legal *consequence of its own kind* is to be welcomed to the extent that confiscation no longer has to be linked to the conviction and the imposition of the main penalty by the offender. This takes account of the autonomous function of confiscation in relation to the main penalty. Furthermore, the categorization of confiscation as a legal consequence of its own kind removes the obvious contradiction of the previous law, ac-cording to which the simple confiscation of the unlawful object also counted as an additional penalty for averting danger (confiscation by way of security).

In addition, the legislator rightly structured the confiscation of the capital gain as an *independent institution*. They shall no longer be subject to the same order requirements as the confiscation of the instrument and product. The conditions for the ordering have been redesigned according to the purpose of the asset absorption. In material terms, confiscation extends to all economic benefits, uses and surrogates directly obtained through the act. To the extent that the confiscation of the original object is impossible, the confiscation of the value compensation shall be considered in principle for all offences. From a personnel point of view, the third party involved in the action is also recognized as the addressee of the confiscation under certain conditions. All these amendments to the law remove the inappropriate restrictions on the existing right to confiscate property.
The merit of the new StGB undoubtedly lies in the creation of the substantive legal basis for a more effective asset absorption, although the necessary safeguards are not yet sufficiently available to the law enforcement authorities.

8 Cf. Yu-Hsiung Lin, *Examination and Application of the New Provisions of Criminal Proceeds Confiscation*, THE TAIWAN LAW REVIEW, No. 251, April 2016, p. 6-34.

B. Neglect of the similarity of confiscation penalties

In my opinion, however, the StGB's new right of confiscation also casts a big shadow. Its lack consists above all in the fact that the re-labelling prematurely rejects a punitive character or a similarity in punishment of the individual forms of confiscation as a legal consequence of its own kind. The significance of re-labelling by the legislator is indeed limited to recognizing the ambivalence of the legal nature of confiscation, without necessarily rejecting its punitive nature. The premature rejection of the similarity of penalties in the various forms of confiscation means that the validity of the principles of legality and guilt for confiscation are easily circumvented.

My criticism is based on the following considerations: It can be assumed that the legal nature of a sanction does not depend on its technical legal classification, but on its effect and objective. The legal nature of the individual forms of confiscation may therefore not be concluded directly from the fact that they are now regulated in a separate section. This applies all the more if the legislator does not clarify the exact content of the so-called "legal consequences of its own kind".

On this basis, the order to confiscate the instrument and product of the offence against the offender clearly constitutes a sanction similar to a criminal offence, because it affects the offender in addition to the main penalty as an evil against property. Furthermore, confiscation does not presuppose that the object has the quality of being generally dangerous, nor that there is a risk that it will serve the commission of unlawful acts. A security character of the collection is thus excluded.

It is questionable and controversial whether the confiscation of the proceeds from the crime through the gross principle has a punitive character. In the explanatory memorandum to the Act, the confiscation of the capital gain is described as a quasi-conditional compensatory measure. The ruling doctrine shares this view. In doing so, it refers decisively to the decisions of the German Federal Court of Justice[9] and the Federal Constitutional Court[10] without even dealing with the criticism of German doctrine.[11] I, on the other hand, am of the opinion that the gross principle declares not only the profits but also the "defective" property of the perpetrator to be confiscated. The real reason for the addition of evil by the gross principle lies in the fact that the state has issued a blame for the fact that the accused has invested his own assets in committing the offence. This leaves the area of mere compensation measures. Confiscation ac-quires an evil character that is valid in deed and is therefore transformed into a punitive measure[12].

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9 BGHSt 40, 371; 47, 369.

10 BVerfGE 110, 1.

11 Cf. Albin Eser, in: Schönke/Schröder, Strafgesetzbuch Kommentar, 29th edition, 2014, Vorbem. §§ 73 ff. Rn. 14 ff.

12 Hsueh, (footnote 5), pp. 1065-1069; Hsueh, (footnote 6), pp. 328-336.

From this one may conclude that with the new confiscation laws of the StGB the constitutional borders of the penal legislation are exceeded. Three unconstitutional points can be identified. First, it is contrary to the *principle of guilt* that the confiscation of the proceeds from the offender does not presuppose the culpable commission of an offence. In order to comply with the principle of guilt, a constitutional interpretation must be adopted de lege lata to the effect that, instead of the gross principle, the net principle must be applied to the levying of assets on innocent offenders and third parties[13]. Secondly, it is contrary to the *prohibition of retroactivity* that confiscation is to be decided in accordance with the law in force at the time of the decision. § 2 II tStGB n. F. must in this respect be declared unconstitutional by the Constitutional Court[14]. Thirdly, the ex-tended confiscation of the proceeds of the crime under the Anti-Money Laundering Act violates the principle of the presumption of innocence. According to the applicable law, the court may order the extended confiscation of the proceeds of the crime only after it has satisfied itself that the assets derive froma catalogue crime[15]. From a legal policy point of view, however, further alternative regulatory models must be examined in order to overcome the difficulties of proof in the case of asset absorption[16].

It has therefore been established that, apart from confiscation of the unlawful object, confiscations of the instrumentalities, the product and the proceeds of the crime are still penalties of punitive character. The similarity in punishment of confiscation has thus been prematurely re-jected or grossly neglected by the prevailing view. The question arises as to what drove the legislature to prematurely reject the similarity of con-fiscation to punishment and thus violate constitutional boundaries. This cannot be explained by the fact that asset confiscation has already proved to be an effective means of combating crime. The effectiveness of asset skimming has not yet been confirmed by criminologists. Nor can it be justified solely on the grounds that the outdated recovery system of the StGB urgently needed to be modernized. The modernization of the laws of confiscation could also have taken place within the limits of the con-stitution and could only have been directed towards the future. In my opinion, the real reason for this is that the legislator wanted to close the gaps in the system of asset absorption specifically for the two spectacular cases mentioned above. In order to allow confiscation in the case of the La Fayette frigate, the legislature has not only created the provision for the independent order of

13 Hsueh, (footnote 5), pp. 1085-1086.

14 Hsueh, (footnote 5), pp. 1103-1110.

15 Hsueh, (footnote 6), p. 335-336.

16 Following American law, it is often demanded that the civil procedural "preponderance of evidence" should apply to the existence of the benefit from the offence. Accordingly, confiscation of the capital gain would also be permissible if the connection between the unlawful act and the pecuniary benefit could not undoubtedly be established. From a constitutional point of view, the legality of this facilitation of evidence depends on whether the encroachment on the property thereby made is still proportionate. This question can probably be answered in the affirmative if one advocates the net principle, because the confiscation of the capital gain is, by its legal nature, a quasi-conditional compensatory measure. If the gross principle is advocated, the facilitation of evidence only appears to be constitutional if it applies to those offences which are typically difficult to prove and particularly dangerous to the general public, such as organized crime and drug-related crime.

confiscation of the capital gain, but has also allowed the retroactive effect of the new confiscation provisions. In order to make confiscation possible in the event of an oil scandal, the Ministry of Justice, in its government draft of the Criminal Code, has again at-tempted to introduce the subsequent order of confiscation. The fact that the legislator deliberately passed the law with the intention of solving two spectacular economic crimes is unworthy of a constitutional state.

V. CONCLUDING REMARK

Overall, the legislative reforms have modernized the law on criminal asset confiscation, but in some places they have violated constitutional law. The modernization of asset confiscation has been carried out at the expense of the rule of law by prematurely ignoring the criminal nature of asset confiscation and overestimating its effectiveness in combating white-collar crime. The deficits identified should be eliminated by the legislator as soon as possible. So after the reform, we are already back on the road to reform.