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Forfeiture of items in Austrian and Polish financial criminal law

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SUMMARY
The author compares the regulations of the Austrian Financial Criminal Act and the Polish Financial Penal Code regarding the forfeiture of items, indicating their characteristic convergence and emphasizing sometimes significant differences.

Key words: financial criminal law, forfeiture of items

The institution of forfeiture of items appears, in principle, in all modern codifications of criminal law. The basic functions that are attributed to it are, on the one hand, retribution, i.e. measuring the perpetrator of a material ailment, related to depriving him of the ability to dispose of objects that were part of his property so far, and on the other hand – securing the community against the threat of leaving in hands of the perpetrator items used to commit a crime. Forfeiture plays a special role in financial criminal law, which by its very nature is based more heavily on sanctions having the character of property ailments. It often happens that it is the most serious result from the perpetrator's point of view arising from the commission of a crime, with consequences going beyond the fine imposed by the court. Hence, the importance of modeling the premises and consequences of forfeiture can hardly be overestimated in this area of criminal law.

By nature, greater freedom in the specific shape of this institution appears wherever the legislator decides to codify the field of financial criminal law separately.

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Under the conditions of the continental legal system, this is primarily the case for two Central European countries – Austria and Poland.

It is beyond dispute, that a separate codification of financial criminal law is a solution quite unique in the scale of European criminal law orders. In addition to the comprehensive regulation of Polish Financial Penal Code, only one more legal act of this type should be indicated, namely the Austrian Financial Criminal Act, the content of which also forms part of the legal order of the Principality of Liechtenstein. As part of this study, there will be references to this legal act, in many respects similar to Polish solutions, which, however, may be an inspiration to consider changes within the institutions well known by the Polish lawyers. As part of these considerations we will deal with cases of forfeiture as ailment for the perpetrator of the crime or minor offense, and not the situations known to both codifications in which it applies as a precautionary measure. In addition, while the Polish solution clearly delimits both spheres, in Austrian conditions the criteria for their division can be somewhat fluid – § 18 of the Financial Criminal Act provides the possibility of forfeiture, both when the details of the perpetrator of the offense are not established, and when they are known, but his whereabouts could not be determined.

The content of § 17 of the Financial Criminal Act refers to the specific penalty of forfeiture of items, which, however, in the Austrian financial penal law has been extended on a slightly broader scale than its Polish equivalent.

According to the content of section 1, forfeiture may only be ordered in the cases specified in the regulations of the specific part. In section 2, the Austrian legislator has included an exhaustive catalog of items that may be forfeited. First of all, they include the items of financial offenses themselves and their affiliations. The next category are tools and other items used to commit a criminal act. The legislator here lists, by way of example, suitcases, bags and other similar items, if they have been specially adapted to the requirements of such behavior. Therefore, this category includes items intentionally adapted for committing financial offenses[1].

However, in the next section, the legislator mentions other items that were used to obtain the items indicated above, i.e. those that directly came from a tax offense. The legislator also points to various types of raw materials, auxiliaries and semi-finished products that were used to obtain items derived from the tax offense, along with their affiliations.

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[1] E. Köck , M. Kalcher, S. Judmaier, M. Schmitt, *Finanzstrafgesetz Band 1. Kommentar und Rechtsprechung*, Wien 2018, s. 388.

According to the next section, the category of items subject to the forfeiture also includes means of transport, if the object of the offense was placed in a place usually not used to transport similar items, as well as those that were used to commit tax offenses that the perpetrator could not have done without using means of transport because of the nature of the goods carried. However, the legislator emphasizes, that public transport means participating in traffic, operating independently of the instructions of the passenger or user are not subject to forfeiture[2].

Section 3 specifies, that the subject of the forfeiture may primarily be objects owned by the perpetrator or other participant of the offense. A third party property may be forfeited, if one of two alternative conditions is met. Firstly, it is possible, if due to gross negligence, the owner was not aware that the object being his property was used to commit a criminal act, and secondly, at the time of purchasing the object, he knew, or only as a result of gross negligence, he did not learn about circumstances justifying the declaration of forfeiture. In this case, it is sufficient, that the premises of the forfeiture occurred not only on the side of the owner of the thing, but on the side of the person who was responsible for caring for that thing.

In turn, items covered by a monopoly are forfeited regardless of whose property they are. This also applies to items referred to in § 17 section 2 letter b, and therefore items used to commit a financial offense, unless the owner of the property was not involved in the act, nor does he otherwise complain within the meaning of subsection 3, and the specified devices can be removed before the decision is taken. In this case, the costs have to be paid by the perpetrator and the others involved in the deed.

The order of forfeiture does not exclude the rights of a third party related to the rights connected with that item, as well as damages claims of its owner against the perpetrator of a criminal act. This naturally applies only to cases in which this penalty was not applied to the owner of the item, as permitted by § 17 section 3[3].

According to section 6, if the forfeiture were disproportionate to the significance of the act or to the allegation of the offender, the penalty of forfeiture shall be replaced by the substitution of value in accordance with § 19. This does not apply to means of transport and containers of the kind specified in section 2 letter b and monopoly articles which, by reason of their nature or otherwise, are to be obtained on the basis of certain facts, such that they infringe monopoly regulations.

According to section 7, items subject to forfeiture become federal property. However the rights of third parties regarding these items shall expire, subject to,

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[2] *Ibidem*, s. 392.

[3] R. Leitner, O. Plückhahn, *Finanzstrafrecht kompakt*, Wien 2018, s. 46.

the rights mentioned to in section 5, and in particular the rights to damages that may apply to the perpetrator of the criminal act[4].

In turn, § 18 mentions cases in which it is possible to order the forfeiture of objects as a precautionary measure. In practice, this applies to two different situations. First, this rule shall be used in cases where the perpetrator of the act has not been disclosed, and alternatively, when the identity of the perpetrator or other party involved in the crime is known, but their whereabouts remain unknown[5].

§ 19 of the Austrian codification introduces an alternative penalty to forfeiture, which can be applied in a situation where the ruling of the forfeiture would be impossible or unnecessary, i.e. collecting the monetary equivalent of this measure. According to § 1, this shall be done, if at the time of adjudication forfeiture for practical reasons is not possible, and also if it would violate the legally protected interests of third parties.

This penalty may also be used when the case referred to in § 17 section 6 occurs, i.e. when, due to the value of the thing or the nature of the person's participation in the commission of the criminal act, the application of the forfeiture would seem pointless, which in practice means – too painful for the perpetrator. According to section 2, acquisition of the equivalent of money can be determined parallel with the forfeiture in a situation where at the time of issuing the decision there are reasonable doubts as to the possibility of forfeiture or as to the scope of protection of third party rights.

According to section 3, the amount enforced under § 17 corresponds to the value of the item subject to forfeiture at the time the offense was committed. If it is not possible to determine the value of things at that time, the value is assumed at the time criminal proceedings are instituted. If it is not possible to determine the value of a particular item, the value of the corresponding item is assumed.

In a situation where the forfeiture order violates the rights of a third party, the amount enforced should correspond to the amount of those claims; however, it may be reduced in a situation where it is possible to satisfy claims of this kind from income derived from the subject matter.

By section 4, this penalty is imposed on cooperating perpetrators, as well as receivers of goods, who participated in committing a tax offense with which the objects subject to the forfeiture are related. This penalty should be imposed on entities indicated in the provision in proportion to their participation in the prohibited act.

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[4] E. Köck, M. Kalcher, S. Judmaier, M. Schmitt, *Finanzstrafgesetz...*, s. 385.

[5] R. Leitner, O. Plückhahn, *Finanzstrafrecht...*, s. 47.

If imposing the penalty on the perpetrator would be too harsh due to the nature of his act or the low degree of his social danger, the provision of paragraph 5 gives the opportunity to refrain from applying the penalty in question in whole or in part.

By the rule of section 6, when deciding on the distribution of the amount at which the penalty is discussed among persons cooperating in the commission of a criminal act, as required by § 4, as well as in the case of total or partial resignation from applying this penalty against the perpetrator, as permitted by paragraph 5, the principles of the penalty referred to in § 23 should be taken into account. In accordance with section 7, the monetary equivalent of forfeiture is federal income.

The regulation of the Polish Financial Penal Code, revealing significant similarities to the Austrian act, regulates many issues in a separate way.

According to article 29, the forfeiture of items includes an item directly derived from a financial offense, a tool or other item constituting movable property, that served or was intended to commit a financial offense, package and an item connected to the object of a financial offense in a way that precludes their disconnection without damaging any of these items, and an item whose manufacture, possession, circulation, storage, transport, transfer or consignment is prohibited[6].

Article 30 points, that the court may order the forfeiture of items only in the cases indicated in the Code, and is obligated to order it, when the Code so indicates. According to § 6, in the cases referred to in the previous paragraphs, forfeiture of items mentioned in Article 29 section 4 (items, whose manufacture, possession, circulation, storage, transport, transfer or consignment is prohibited) shall be mandatory.

According to article 31 section 1 the court may order or obligatory orders the forfeiture of the items specified in article 29, point 1 to 3 in the cases mentioned in the Code, even when these items are not the property of the perpetrator. §1a states, that the court may order the forfeiture of items specified in article 29 point 2, when they are not the property of the offender, if their owner or another authorized person provided, that they could be used or intended to commit a financial offense or could have provided it with the caution required in the given circumstances[7].

In accordance with § 2, forfeiture of items is not applied, if they are owned by a third party, and the perpetrator obtained them by means of a criminal act. By the regulation of § 3, forfeiture of items is also not ordered if this decision would be disproportionate to the seriousness of the financial offense committed by the perpetrator, or a public due, regarding items threatened with forfeiture was already

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[6] G. Bogdan, A. Nita, J. Raglewski, A.R. Światłowski, *Kodeks karny skarbowy. Komentarz*, Gdańsk 2007, s. 172.

[7] P. Kardas, G. Łabuda. T. Razowski, *Kodeks karny skarbowy. Komentarz*, Warszawa 2017, art. 31, t. 3, 4.

paid, unless it's amount is disproportionately low in comparison to the amount of the monetary equivalent of the forfeiture of items or items in question belong to the category specified in article 29 point 4 (namely their possession is prohibited) or which have been specially adopted to commit a criminal act[8].

According to §4 items subject to forfeiture shall become the property of the State Treasury as soon, as the decision becomes final[9].

§5 states, that court, imposing the forfeiture of some categories of items, in particular alcoholic beverages, cosmetics or medicinal products, may order their destruction in whole or in part, if the sale of these items is impossible, significantly impeded or unreasonable, or if these items do not meet the conditions for admission to trading in the country specified in specific provisions.

By means of §6, in case of the forfeiture of tobacco products, destruction is mandatory, and according to regulation of §7, costs of the destruction of items forfeited bears the perpetrator of the criminal act[10].

It is worth emphasizing that also in the Polish Financial Penal Code exists, described in Article 33, an extensive regulation regarding the forfeiture of a financial advantage achieved by the perpetrator, which gives a wide basis of means to retrieve the benefit transferred to third parties.

Article 49 is a provision regulating the issue of adjudicating the most offensive of penal measures that can be imposed on the perpetrator of a tax misdemeanor, i.e. the forfeiture of items. The regulation is comprehensive and mainly based on the reception of the third chapter solutions. It is worth considering limiting the reception, especially art. 31 of the Financial Penal Code, in the part regarding charging tax offenders with the costs of destroying items forfeited. In such cases, it happens that the proceedings themselves generate higher costs.

Paying some attention to the list of regulations discussed above, it is necessary to emphasize their far-reaching similarities, resulting from the fact of convergence of regulated matter, as well as common sources of inspiration, which in both cases is the leading codification, for the financial criminal legislator.

This does not change the fact, that in both codifications one can point out certain discrepancies, sometimes deriving from the content of the solutions of financial acts, and sometimes from the separate procedural provisions.

Attention is drawn by, for example, a much larger and more detailed catalog of items that can be forfeited. This applies in particular to items the possession

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8 G. Bogdan, A. Nita, J. Raglewski, A.R. Światłowski, *Kodeks karny...,* s. 175.

9 *Kodeks karny skarbowy. Komentarz,* V. Konarska-Wrzosek, T. Oczkowski, J. Skorupka, I. Zgoliński (red.), Warszawa 2017, art. 31 t. 5.

10 P. Kardas, G. Łabuda. T. Razowski, *Kodeks karny...,* art. 31 t. 11.

of which is prohibited on the basis of applicable administrative provisions, and which, according to Austrian regulations, may be taken away from the perpetrator only by means of an administrative procedure, essentially without elements of the procedural guarantee.

In turn, in the Austrian financial criminal law system, the rights of third parties who have not cooperated in the commission of a criminal act are more widely protected. The provisions of the Austrian Financial Criminal Act broadly set out the grounds for excluding the possibility of forfeiture when the object was the property of such a person, which in Polish law applies only to tools and other objects used to commit a criminal act. This largely compensates for the lack of a rule explicitly articulated in the Polish code for renouncement of forfeiture when the perpetrator obtained items potentially by means of a criminal act.

On the other hand, the Polish regulations draw attention to the decision regarding the destruction of items subject to forfeiture. In Austrian law this issue was also left to administrative regulations.

The list of considerations regarding the directions of postulated changes in the construction of the forfeiture can be much longer. Outside the sphere of these inquiries, stays for example, the postulate of unification of criminal law, associated with the abolition of codification of financial criminal law as a separate act, is sometimes raised. It is understandable, however, that if such an otherwise controversial procedure were to be carried out, it would extend to the sphere of behavior whose separateness in Polish law, and even more so in Austrian law, has already grown into a tradition.

It is appropriate to agree with the thesis that the regulations regarding the mechanisms of forfeiture in financial criminal law fulfill their role well. Although it is impossible not to notice the need for certain modifications, it is difficult to recognize that expectations in this respect are deep. This is certainly an important conclusion, especially in the field of such high normative volatility as Austrian and Polish financial criminal law suffers.

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Przepadek przedmiotów w austriackim i polskim prawie karnym skarbowym

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Słowa kluczowe: prawo karne skarbowe, przepadek przedmiotów.