

## NEWSLETTER n. 5

April 2019

# CRIMINAL CONFISCATION IN THE DRAFT OF THE NEW BELGIAN CRIMINAL CODE

Thibaut Slingeneyer

An ambitious reform of the Penal Code is in progress in Belgium.

If this project is successful, the main characteristics of Belgian criminal confiscation will be as follows:

### **A penalty and a safety measure**

Confiscation will obviously remain a penalty in most situations. It will generally continue to be an *accessory penalty*, but (and this is the novelty) it may as well be a *main penalty* when the judge considers that a level 1 penalty can be imposed (i.e. a penalty of the lowest level). Confiscation will remain a penalty for both natural and legal persons.

Confiscation will also be a safety measure when it concerns "things the possession of which is contrary to public order and morality" (1). In this latter case, confiscation will be possible even in the absence of a conviction.

(1) Draft new Belgian Penal Code, art. 52.

### **A mandatory but non-excessive penalty**

The explanatory memorandum asserts that confiscation must "deprive the offender of things that are unlawful, misused or acquired as a result of the offence" (2). For this reason, the proposed reform opts for a mandatory and "real" confiscation (given the "direct link between the asset to be confiscated and the commission of the offence") (3). There is no provision for a suspended sentence.

Two modalities are envisaged in order to prevent confiscation from having an excessive scope: on the one hand, special rules are provided for the confiscation of real estate (a law must specifically provide for this type of confiscation and a written request from the public prosecutor's office is required); on the other hand, the judge may adapt the amount of the confiscation "in order not to subject the convicted person to an unreasonably heavy penalty" (4).

(2) J. Rozie et D. Vandermeersch, , *Commission de réforme du droit pénal. Proposition d'avant-projet de livre 1er du Code pénal*, Bruxelles, la Charte, 2016, p. 138.

(3) J. Rozie et D. Vandermeersch, *op. cit.*, p. 138.

(4) J. Rozie et D. Vandermeersch, *op. cit.*, p. 14.

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### *Allocation of the burden of proof to determine the proceeds from the criminal offence*

The burden of the proof will lie with both the offender and the public prosecutor. The public prosecutor will seek to demonstrate the "increase (...) in the patrimony and expenses of the convicted person (...) which cannot be explained by the official income of the convicted person" (5), whereas the offender will seek to make it "plausible that the assets causing this increase or financing the expenses do not arise from the offences for which he is convicted" (6). This allocation of the burden of proof will concern all offences (whereas in the current system it concerns only a limited number of offences related to serious and organized crime).

As for the concept of "criminal proceeds", the draft does not precise whether it refers to the "gross profit" or the "net profit" linked to the offence (7); therefore, the reform does not clarify a notion whose meaning has always been controversial under Belgian law(8).

Currently, the Court of Cassation opts for the first option and states that "the judge is not required to deduct the costs caused by the commission of the offence or the purchase price of the property that made the offence possible" (9). However, nothing prohibits the judge from considering these elements, for instance in order to avoid an unreasonable penalty).

(5) J. Rozie et D. Vandermeersch, *op. cit.*, p. 140.

(6) J. Rozie et D. Vandermeersch, *op. cit.*, p. 141.

(7) M. Fernandez-Bertier, « Les peines patrimoniales prévues par le projet de Livre 1<sup>er</sup> du Code pénal : l'amende, la confiscation et la peine pécuniaire fixée en fonction du profit de l'infraction », *La réforme du Livre 1<sup>er</sup> du Code pénal belge*, C. Guillain et D. Scalia (eds.), Bruxelles, Larcier, 2018, p. 191.

(8) Cass., 14 octobre 2014, *Pas.*, 2014, p. 2191.

(9) F. Lugentz et D. Vandermeersch, *Saisie et confiscation en matière pénale*, Bruxelles, Bruylant, 2015, p. 30.

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### **Replacement of value-based confiscation by a subsidiary penalty**

Whether the convicted person is no longer in possession of the assets at the time of the decision (or risks no longer being in possession), the judge issues a subsidiary sentence. Thus, in the case of non-execution of the confiscation, the offender will be required to pay an equivalent amount of money, which entails that the judge has to carry out a monetary evaluation of the assets.

Whether several authors are involved, the abovementioned subsidiary penalty is issued only against the person who disposes of the confiscated property or who has concealed. If such a person cannot be determined, "each author shall be sentenced to pay a portion of this sum, which is divided by the number of known authors (...)" (10).

(10) J. Rozie et D. Vandermeersch, *op. cit.*, p. 140.

### **Abolition of the "extended" confiscation**

Belgian law has currently experienced an "extended" confiscation. Confiscation may therefore target pecuniary benefits arising from offences other than those for which the offender was convicted (Penal Code, art. 43*quater*). The drafters of the new Belgian Penal Code decided to eliminate the extended confiscation for three reasons: it does not respect the principle of the presumption of innocence; this mechanism is very complicated and it is rarely applied in practice; moreover, its disappearance is compensated by the creation of a new penalty: the pecuniary penalty fixed according to the expected or obtained profit from the offence (11).

Article 5 of Directive 2014/42/EU requires Member States to provide for such an extended confiscation. With the aim of protecting the principle of the presumption of innocence, would Belgium take on the role of Antigone and could it be accused of not complying with the European transposition requirement?

(11) J. Rozie et D. Vandermeersch, *op. cit.*, p. 139.