Anna Czesława Czwojda Wrocław, 19 November 2016

Summary of doctoral dissertation
entitled: "Forfeiture of material Benefit Under Polish Criminal Law"
written in the Department of Material Criminal Law of
the Faculty of Law, Administration and Economics of the University of Wrocław
under the supervision of dr hab. prof nadzw. at the University of Wrocław Anna Muszyńska

Under all previously applicable criminal codes of the Polish criminal law, the legislator sought to deprive the perpetrators of any property obtained through the commission of such offences. Introduction of solutions which recover benefits obtained by a perpetrator to criminal law, not only satisfied the sense of justice but also made committing crimes unprofitable. Penal measures which combined a repressive and preventive element meeting at the same time key assumptions of the country's criminal policy formed an efficient instrument for depriving offenders of criminal benefits. Forfeiture proved to be a tool bringing together all indicated features. Its varied forms were considered to correspond to the objectives set by the legislator. Nevertheless, it can be observed that so far, the issue of forfeiture, which is mainly identified with the forfeiture of items and tools, has been rarely presented in the context of forfeiture of financial benefit. As a matter of fact, such a state of affairs seems to be completely incomprehensible when recognising its importance at a dogmatic level, in the context of functions of criminal law and civil law consequences that result from ordering forfeiture. Literature on forfeiture of financial benefit is scarce. It is hard to consider the existing one as comprehensively and scientifically developed. The regulations on this institution were originally formulated in compliance with assumptions of the socialist legal doctrine based on the idea of introducing forfeiture into the legal order. Due to regime change the *ratio legis* of the forfeiture for the financial benefit has also changed. The controversy surrounding the regulations on confiscation, frequent criticism and distrust of society towards forfeiture recognised as equivalent to confiscation provided grounds for reviewing the issue of forfeiture of the financial benefit on a scientific basis thoroughly.

In consideration of the foregoing, the objective of the research paper is to assess the construction of the financial benefit forfeiture in the Polish criminal law. The assessment is made on the basis of applicable provisions and related to an attempt to solve exponential problems referring to civil law regulations. The crucial research problem contemplated in this

paper was whether the forfeiture of the financial benefit is a tool that meets the legislator's requirements, whether it is an optimal regulation used for implementation of legislator's objectives considering its current normative form. The dissertation has mainly focused on the normative perspective of forfeiture of financial benefits. Pursuant to Art 45 of the penal code, if the perpetrator, even indirectly, has gained a benefit not subject to the forfeiture of the items listed in Art. 44 § 1 or 6 of the penal code, by committing the offence, the court orders forfeiture of such benefit or its equivalent. For the above reasons, it is necessary to answer main questions: whether forfeiture of benefit forms an independent institution, what conditions must be met for the forfeiture to be ordered, and what the nature of forfeiture is.

As the paper analyses forfeiture of benefit as a legal regulation, the nature of forfeiture of benefit which has become particularly important in the face of changing its position in the Criminal Code is a central issue of these reflections. Since forfeiture of benefit was removed from the catalogue of criminal measures on 1 July 2015, it gives rise to questions as to whether its nature has changed and if it has become a different type of means responding to a prohibited act and whether the current concept of forfeiture of benefit resulting from the amendment is in compliance with other regulations concerning this institution. Therefore, the introduced amendment has been analysed considering regulations which determine, *inter alia*, instructions on ordering forfeiture and regulations concerning individual legal bases of forfeiture

An analytical and legal research method, based on the scope of provisions of criminal law and judicial decisions, has been used to present the subject matter of the dissertation. This methodology enabled the combination of normative, doctrinal and juridical material concerning financial benefit forfeiture. To solve the indicated problems, the notion of "forfeiture of financial benefit" had to be explained with an emphasis on its multifaceted nature, source and different concepts. the main focus of the explanation of terminology was to reconstruct the meaning of the term financial benefit and capture its criminal law and civil law classification. Difficulties in proposing individual legal definitions of financial benefit have been highlighted.

Next, the paper presents the historical frame of the term in a limited scope. The above results from the fact that, the institution of forfeiture has been existing under Polish Law for a relatively short period of time. The penal code from 1932 and 1969 provided for confiscation of property which was seen as a synonym of financial benefit forfeiture. The Introduction of financial benefit forfeiture reflected a change from confiscation. The purpose of amendments concerning the functioning of this institution and introduced in 2001, 2003 and 2015 was to

break the link between forfeiture and confiscation. However, both the judicial decisions and views of doctrine relating in the broad sense to the achievements obtained in confiscation continued to significantly affected the interpretation of forfeiture. It was necessary to consider whether it was justified to refer to the regulation which related to confiscation in the past in the interpretation of forfeiture.

The dissertation comprises 6 chapters, introduction and conclusion. The first chapter deals with terminological issues. It focuses on searching for answers to the question of what is meant by financial benefit. Interrelation between the following terms "majątek" (property), "przedmiot" (item), "majątek" (property/estate) very often treated as synonyms invites to analyse the main term within a broader context than only according to the criminal law. In order to introduce some civilianistic designates of "financial benefit" into the criminal law it was required to determine the extent of this reception into the criminal law. Discussed terminological issues include forms of financial benefit, particularly focusing on these which fall within the scope of criminal forfeiture. The term of personal benefit has been subjected to language analysis. It has been indicated how this term may be interpreted and what problems may be revealed based on such interpretation of the internal typology of benefit and "civilianization" of personal and financial benefit.

The second chapter provides different approaches to financial benefit in the penal code. Being aware of the importance of the analysed thread, financial benefit has been illustrated as an intent of the perpetrator's action - as a crucial element of intentional offences. This chapter further shows financial benefit as a subject of the executive action. It has been discussed by using the example of the offence of corruption. In chapter 2 reference has been made to financial benefit recognised as a feature of basic and modified types. Financial benefit has been presented in this case in order to situate it within the features of different kinds of offences, and show it as an alternative with other features which provide the modified type. Finally, financial benefit has been presented as a criterion of similarity of offences. In order to put a questions about the meaning and scope of this form of benefit, the problem of comparing similar offences, where their similarity is reflected in the description and where it is not clear, had to be addressed

The next chapter outlines the information on the history of depriving perpetrators of illegally obtained goods. The analysis of first normative regulations designed to take back benefits obtained from prohibited acts illustrates the legislators' tendency to see deprivation of benefit not only as a means of penal response but also as a source of income for the State Treasury. Presentation of the historical background emphasised the need to trace the evolution

of regulations that apply to it. By discussing key interpretative presumptions and doubts, it was possible to present period during which the legislator stressed the importance of confiscation and when it aimed to remove it. Next part provides evidence of the coexistence between forfeiture and confiscation in the post-war period which aimed at showing the idea of their joint use in combat against political and economic opponents and offenders. Discussion concerning the reasons for resigning from confiscation of property in the penal code of 1932, has provided an opportunity to take a closer look at its functioning under non-code legislation.

Chapter 4 sets out fundamental course of considerations. Exegesis of provisions allowing forfeiture has been preceded by the analysis of the functions of this measure presented through the objectives of the penal law. It has been encouraged mainly by putting forfeiture in one chapter with compensatory measures as a result of the great reform of the Penal Code in 2015. Introduced changes have been discussed on the grounds of substantive, procedural and executive regulation. Repressive and preventive function of forfeiture, presented in the dissertation, provided a starting point for a reflection on relation of the financial benefit forfeiture with other types of forfeiture. An overview of general and specific directives on forfeiture application, identification of specific grounds for its ordering served to determine the nature of financial benefit forfeiture. in order to find relevant arguments making it possible to define the nature of forfeiture it was necessary to present a specific basis for the application of financial benefit forfeiture - Art. 299 § 1 of the penal code The question about the competitiveness of different grounds for adjudication of forfeiture, or their relations within the arrangement *lex specialis – lex generalis*, including the problem of adjudication of the forfeiture of its equivalent, has designated another area of investigation. Detailed issues include the problem of procedural presumptions, the essence of their functioning when ordering forfeiture, modifications they were subjected to and uncertainties created by them. Verification of the effects the financial benefit forfeiture has in view of the civil law was required in order to properly identify and evaluate issues raised in the dissertation. In this area, the thematic scope includes a material issue concerning the rebuttal or procedural presumptions. The impact of forfeiture on matrimonial regime, including the possible consequences of repeal and remission of financial benefit forfeiture are presented. Further, it has been found necessary to consider mutual claims of the perpetrator and the holder of benefits and accomplices of the prohibited act in relation to adjudicated forfeiture.

In order to complete presented issues, chapter 5 outlines the institution of recovery of financial benefit, in the past evaluated as *sui generis* penalty measure, currently provided for by Law on the responsibility of joint entitles. It therefore had to be established whether this

institution is a variation of forfeiture or a separate instrument depriving an entity other than the perpetrator of benefit. The presentation of relations between financial benefit forfeiture and an obligation to return such benefit has shown within the substantive and procedural area.

Comprehensive coverage of financial benefit forfeiture involves referring to the civil legal institution which serves for depriving unlawfully obtained undue benefit. In this regard, there was a need to answer the question what is the relation of civil legal forfeiture of benefit and penal legal forfeiture of financial benefit, whether both institutions are complementary, compete against each other or are mutually exclusive. It was also necessary to consider the functioning of financial benefit forfeiture in the penal law and forfeiture of benefit in the civil law taking into consideration the common objective of depriving the perpetrator of what he is not legally entitled to. In this respect the problem of the scope of benefit and profits as well consequence of conducting separate proceedings, civil and criminal has been presented.

The multitude of problems arising with respect to discussed issues make it very difficult to complementary formulate the forfeiture of financial benefit. Discussions on the forfeiture of financial benefit result in emphasising that the change of its position initiated by the legislator is of formal nature. However, the legislator has not narrowed the forum for discussion nor has he closed it. Positioning financial benefit forfeiture at the level of consequences of criminal offence determines the statement that it is still a penal reaction to an act. In this regard, a legislative change of location of financial benefit forfeiture does not affect the assessment of its penal nature which is undeniable. The punitive nature of the presented institution is based on *ratio legis* of its functioning in the penal code of 1997 where its objective is to lead to depriving the perpetrators of something they are not entitled to in the light of law, as a result of committing an offence. Classifying the forfeiture of financial benefit among means of penal reaction raises no concerns. On the other hand, a different perspective on the forfeiture of financial benefit as a criminal measure poses not only formal problems but also significant practical problems. Conclusions drawn at the end of each chapter and the summary of the dissertation demonstrate that the most important challenge of legislative process is to decide on the position of financial benefit forfeiture at the substantive level and introduce a mechanism increasing its efficiency. Current normative form of forfeiture is not without disadvantages which occur in case of detailed solutions. The is no doubt that the regulation of financial benefit forfeiture requires further efforts of the legislator as well as doctrinal discussion.