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Confiscation and management of crime assets in Montenegrin legislation and practice

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For the publisher
M.Sc Nenad Koprivica

Authoris
Mr. Zoran Pažin
PhD Miloš Bešić
Mrs. Biljana Braithwaite
Mrs. Marija Vuksanović

Associate on the project
Mr. Asaf Adrović

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Preface

Organized crime constitutes one of the main threats to the social and political development of every country. Having in mind that the proceeds of crime can be infiltrated into the legal economic course and as such be used for the exertion of political and economic influence, it is clear to what extent the products of organized crime have negative impact on the functioning of the system of authority, the growing risk of corruption and the public trust in the work of the institutions. With the increase in the activities of organized criminal and terrorist groups, the issue of the confiscation of illegally acquired assets has come into focus again, both in the EU countries, and in those aspiring top become its members. Therefore, the efficient and transparent functioning of the system of the confiscation of the proceeds of crime is of importance not only from the point of view of the suppression of crime and the protection of rights of the persons who sustained damage with the perpetration of criminal acts, but it also constitutes a key prerequisite for the successful fight against organized crime and corruption.

This study has been created from the need to perceive the effects achieved so far with the application of the concept of the confiscation of the proceeds of crime in Montenegro. The Study was being prepared with the support of the US Embassy to Montenegro, within the framework of the project entitled Reform of Judiciary in Montenegro: Support to the Fight against Organized Crime aimed at contributing to the establishment of the full system of the rule of law and to the fulfilment of the criteria for the membership of Montenegro to the European Union. It is intended for decision makers and for the representatives of the public authorities entrusted with the application of the same, but also for all other actors involved in the process of the implementation and monitoring of the legislative reform in Montenegro.

The first part of the Study contains comparative law analysis of the normative framework for the confiscation of the proceeds of crime, which strives to offer an overview of legislative and institutional solutions related to the confiscation of material gain, but also to contribute to perceiving the completeness and coherence of the domestic normative framework.

The second part of the Study is focused on the implementation of the legislative framework which regulates the confiscation of the proceeds of crime. Although due to the underdeveloped case law and the lack of reliable data, it is not possible to make representative conclusions on the implementation of the current legal framework, this chapter endeavours to indicate key obstacles which competent bodies are faced with during the implementation of laws in this area.

Special chapter of the Study is aimed at approaching to legal experts and other potential beneficiaries key international standards related to the confiscation of the proceeds of crime, including the EU regulations and the European Court of Human Rights case law.

Finally, the Study also contains the report on examining the view of civil society organizations, professional associations and media about the confiscation of material gain and other measures that the state undertakes in the fight against organized crime. The report makes it possible to perceive the way in which civil society actors view the functioning of the system, but also to what extent these can be an instrument of pressure in advocating the necessary changes and the monitoring of the application of the current laws.

Comparative law analysis of normative framework for confiscation of proceeds of crime in Montenegro

The experiences in developing anti-criminal policy so far, aimed at creating a reliable strategic basis for the fight against criminal activity in Montenegro, have shown that mere pronouncing a perpetrator guilty and sentencing the same to imprisonment, especially if the observation is accepted on the inappropriately lenient penal policy from the aspect of special and general prevention, have not significantly affected the criminal structure, especially the organized one, so called "corporate organization".

Pecuniary gain is the most frequent motive of the criminal acts committed in organized way, as well as of criminal acts with corruptive elements[1]. Pecuniary gain serves as a generator of new criminal activities, as well as for the strengthening of criminal organization, creating economic basis for the acquisition of contemporary technical equipment used for the perpetration of criminal acts, which often exceed technical capacities of the state, or still through the attempts of legalizing illegally acquired pecuniary gain through money laundering[2], for the purpose of achieving economic or political influence in the society[3].

Temporary absence of certain members of a criminal organization for the reason of serving their sentences, even if these were the leaders of a criminal organization themselves, does not at the same time mean the end of the criminal organization, since with the internal distribution of tasks and roles, running a criminal organization from the prison or integration with other criminal groups (criminal fusion) results in the survival of the structure of organized crime, which sometimes becomes even stronger. The reason for this should be looked for, first of all, in the untouched economic power of the criminal organization, very often supported by corruptive connections, as the focal point and organized crime catalyst. The existing model of criminal law protection has not affected the economic power to a considerable degree despite the existence of the provisions on the confiscation of the proceeds of crime in former laws, but also in current Criminal Procedure Code.

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[1] A. Laudati, Sistem za borbu protiv nezakonitog bogaćenja u evropskom zakonodavstvu (System for the fight against illegal enrichment in the European legislation)
*The "Economy" published in 2003 a research on the annual turnover of the Italian mafia in the amount of € 85.000.000.000, with the total estimated value of mafia assets of € 1.00.000.000.000, which makes 7% of the Italian GDP, just as is the amount of the Italian public death

[2] FATF, as an inter-state body the objective of which is the development and improvement of national and international strategies for the fight against money laundering and financing terrorism, operates with the figure of five hundred trillion dollars of money being laundered annually, which is the "third industry" in the world by revenues

[3] Bojan Dobovšek i Andrej Jurij Pirnat, Organizovani kriminal, kao peta grana vlasti, Fakultet za krivično pravosuđe i bezbjednost Univerziteta u Mariboru, Slovenija (Organized crime, as the fifth power, Faculty of Criminal Justice and Security, Maribor University, Slovenia)

So far, Montenegrin case law has not been dealing much with the application of the criminal law measure of the confiscation of the proceeds of crime, thus these measures have not given significant contribution to the suppression of criminal activity, which is the sense and the basis of criminal legislation, as provided for in the Article 1 of the Criminal Code, although the very criminal law measure bears great potential in the fight against crime. The reasons for this should primarily be looked for in certain kind of inertness of prosecutors and judges, with regards to the need to respond to all cotemporary challenges placed before them.

The legal basis for the confiscation of the proceeds of crime is enshrined in the Article 112 of the Criminal Code, which prescribes that nobody can keep the proceeds of crime, which in the law is determined as a criminal offence and which is a general principle of comparative law, as well. The proceeds are confiscated under the conditions provided for by this Code and by the court decision which established the perpetration of a criminal act. The Law on Responsibilities of Legal Entities for Criminal Offences regulated this issue in exactly the same manner in its Articles 35 and 36.

Montenegrin courts can order the confiscation of the proceeds of crime, not as a criminal sanction (like in France, for example), but as a criminal law measure, sui generis, by means of which special and general prevention is also achieved, thus in fact fulfilling the very purpose of the pronouncing of a criminal sanction. The measure is pronounced to a criminally responsible perpetrator, whom punishment has been pronounced (40 years of imprisonment, prison sentence, fine or community work), judicial admonition or suspended sentence, as warning measures. Also, the above measure may be pronounced even in the case of passing a decision on punishment without main hearing. The measure may be pronounced the measure even to a non-criminally responsible individual whom the security measure of mandatory psychiatric treatment has been pronounced to and the placement in a healthcare institution and mandatory psychiatric treatment outside the institution. This measure can be considered even towards a minor whom correctional measure has been pronounced to or juvenile imprisonment.

The conditions and the manner of confiscating the proceeds of crime are provided for by the Article 113 paragraph 1 of the Criminal Code, which prescribes that money, valuable objects and any other proceed of crime will be confiscated from the perpetrator, and if the confiscation is not possible, the perpetrator will be obliged to pay the pecuniary amount corresponding to the said proceeds. The perpetrator may also be deprived of the pecuniary gain for which there is reason to believe that it has been acquired through criminal activity, unless he/she makes it probable that the origin of the same is legal (extended confiscation).

The confiscation of the material gain from the paragraph 2 of this article may be performed if there is an enforceable judgement against the perpetrator for:

1) some criminal act perpetrated within a criminal organization (Article 401a of the Criminal Code),

2) some of the following criminal acts:
- against humanity and other properties protected by the international law committed from greed;
- money laundering;
- unauthorized manufacturing, possession and circulation of narcotics;
- against payment transactions and commercial activity, as well as against office, committed from greed, punishable by eight years of imprisonment of more.

The material gain will be confiscated in case it has been acquired in the period before and/or after the perpetration of the criminal act from the paragraph 3 of this article until the enforceable judgement is pronounced, when the court establishes that the time context in which the material gain was acquired and other circumstances of the specific case justify the confiscation of the material gain.

Criminal legislation in Montenegro is based upon the viewpoint that it is justified to confiscate the property for which there is no evidence of being acquired as a consequence of the perpetration of a criminal act, in case certain provisions have been met for linking such property to the criminal activity of the perpetrator, with regards to the proceedings for the criminal acts from the catalogue. In this way, Montenegro follows the legal tradition and solutions contained in the criminal codes of Austria and Germany, as well as in the Framework Decision of the EU Council dated 24th February 2005 (2005/212/JHA).

As opposed to the confiscation of the proceeds of crime, which is deemed mandatory, extended confiscation is an optional form of confiscation. Besides, the Criminal Code also requires time link between the criminal act which the perpetrator was convicted for and the criminal activity through which property was gained in relation to which extended confiscation is applied. The material gain will be confiscated in case it was acquired before and/or after the perpetration of the criminal act until the enforceable judgement is pronounced for that crime, under the condition that the court establishes during the proceeding that the time attribute within which the material gain was acquired, as well as other circumstances of the subject case make it justified for the proceeds to be confiscated.

The proceeds of crime will also be confiscated from the individual it was transferred to free of charge, or from the individual who had been aware of it being acquired by means of a criminal act or who could have known or must have known about it.

The proceeds of crime in favour of another person will also be confiscated.

Although the legislator does not give exhaustive list of everything that might be considered as "objects of value and other gain", apart from money (cash or bank money), comparative practice shows that these might be the following:
- immovable assets, like apartments, apartment buildings, commercial buildings, construction land, agricultural land, forests,
- passenger motor vehicles and cargo motor vehicles,

- vessels, like boats, motor boats, yachts, ships,
- aircraft,
- securities, like shares, bonds, bills of exchange, cheques,
- artefacts,
- jewellery,
- construction material,
- other market products etc.

From the point of view of the comparative practice the following claims from the area of obligations are also deemed material values: illegal credits, package tours, insurance policies, but also prevention of the reduction of somebody's property by postponing, reducing, remitting or writing down a debt etc.

If the confiscation is not possible, the Criminal Code envisages that the perpetrator will be obliged to pay the pecuniary amount corresponding to the acquired proceeds, not elaborating the way how this amount is determined (value based confiscation). The extent of the proceeds of crime is practically the most important problem with regards to the application of this criminal law measure. In relation to this matter, there are polarized viewpoints in the criminal law theory and practice and they range from the understanding that the perpetrator of a criminal act has all the costs related to the perpetration or on the occasion of the perpetration of the criminal act acknowledged, to total de-recognition of any costs whatsoever[4]. In the case law and in theory there is a prevailing moderate solution starting from the fact that the perpetrator of a criminal act, on the occasion of determining the extent of material gain, certain costs should be acknowledged incurred in relation to the perpetration of the criminal act, but it is still questionable which are the costs to be acknowledged and which are the ones to be deducted from the total material gain. It is certainly not justified to acknowledge the costs which constitute the material equivalent for the perpetrator's effort invested in the perpetration of the criminal act and the costs which by their nature are integral parts of the perpetration of the criminal act, in order not to pay for the criminal activity indirectly[5].

According to the assessment of the author of the analysis, there is a need for the specialist training of prosecutors and judges on the methodology of determining the extent of the proceeds of crime, due to the fact that there is no adequate case law in Montenegro in this area, as well as the need to encourage broader application in pronouncing these criminal law measures and finally, the need for the standardization of the case law by taking the principled legal views of higher instance courts, primarily of the Supreme Court of Montenegro. Useful landmarks of the good practice can be the experiences of certain European countries with regards to procedures in criminal cases related to illegal trading in narcotics and psychotropic substances, where on the basis of the available evidence, for example, collaborating witness's statement, the court comes to the possible quantity of

[4] Professor Dr. Zoran Stojanović – Komentar Krivičnog zakonika (Commentary to the Criminal Code), 2010
[5] Ibid

drugs acquired by the criminal organization, which following criminal practice is mixed with other substances with the purpose of increasing the quantity of "goods" in circulation. Therefore, the market price of the drug is determined according to the retail street price and with that, the extent of the illegal material gain. Montenegrin courts find the basis for such approach in the Article 480 of the CPC, which prescribes that the court will apportion the extent of the material gain at its own discretion, if the determination of the same would cause disproportionate difficulties or significant obstruction of the proceedings, which, naturally does not deprive the court of the duty to determine exact value of the proceeds of crime whenever this is possible.

The correctness of the stated approach is confirmed by the case law of the European Court of Human Rights in Strasbourg, which found in the case Philips vs. UK (*judgement dated 5th July 2001*)[6] that the use of factual and legal assumptions was not contrary to the Article 6 paragraph 2 of the European Convention on Human Rights and Fundamental Freedoms, negating in particular that the stated manner violates the presumption of innocence, nor the provisions on the prohibition of self-incrimination. The European Court of Human Rights finds that the right of the applicant to peaceful enjoyment of property from the Article 1, Protocol 1 of the ECHR was also not interfered with since the criminal law measure of the confiscation of the proceeds of crime has got a legitimate purpose in democratic society.

The Article 113 paragraphs 5 and 6 of the Criminal Code also envisage the confiscation of the material gain from the individuals whom it was transferred to free of charge, or with the charge which obviously does not correspond to the actual value, as well as in the situation when the proceeds were made in favour of another person. In practice, it will most often concern spouses, relatives in direct line, relatives in collateral line up to the third or fourth degree, persons in godparenthood etc.

The court will pronounce the confiscation of the material gain solely if it exceeds the amount awarded to the injured party according to the Article 114 of the Criminal Code, by which the injured party's rights are protected and are given priority. Quite obviously, the fact that the courts very rarely apply the provisions of the Article 234 of the CPC imposing to the court to hear the injured party's property claim, upon his/her own proposal, except if this would cause a considerable delay in criminal procedure, which should only be an exception to confirm the rule that the criminal court, in principle, should in the so called adhesion procedure concurrently deliberate upon the property claim, is a problem in the Montenegrin case law. Apart from the inertness and a sort of conformism, most often there are no valid reasons for not deliberating in the adhesion procedure on the injured party's property claim, which can according to the Article 234 paragraph 2 of the CPC, refer to the compensation for damage, restitution of items or annulment of a legal matter, but by inertia the injured party is referred to the possibility of conducting a special civil procedure, in which way judicial costs are accrued, so besides the problem of the backlog, the courts are getting burdened with new cases, which concurrently creates a negative anticipation

[6] ECHR- HUDOC

of the citizens in relation to judiciary, in relation to its slowness and inefficiency. The injured party who is referred to lawsuit in relation to his/her property claim is entitled to request, as it is provided for by the Article 114 paragraph 2 of the Criminal Code, to be compensated from the confiscated material gain, provided he/she institutes the lawsuit within six months as of the day of the referring decision becoming effective and if within three months from the day of the decision on granting his/her property claim he/she requests to be compensated from the confiscated material gain. Therefore, in case the adhesion procedure is not conducted in a timely manner and if the property claim is not deliberated upon during the criminal procedure, the measure of the confiscation of material gain as a powerful legal mechanism in the fight against corruption and organized crime is unnecessarily prolonged and its scope is made relative, since according to the Article 114 paragraph 1 of the Criminal Code the court will pronounce the confiscation of the material gain solely if it exceeds the awarded property claim of the injured party in that amount, which needs to be previously established. Besides, according to the assessment of the author, new deadlines set for the injured party who has already lodged the property claim in the criminal procedure are inappropriately and unnecessarily long, thus sometimes, after several years' long criminal procedure in which the criminal court has left his/her property claim unheard, judgement is passed in which he/she gets referred to institute a lawsuit.

In practical terms, this means that the state is not in the position to use the confiscated material gain in a valid way, which assets should become state ownership, or budgetary revenue, which could be used as additional funds for the strengthening of the economic base of the police, prosecution and courts, and other bodies in the fight against crime, since the legal status of these assets is made certain only upon the expiry of all the deadlines for the compensation of the injured party. It is to be expected for the expenses of the competent public authority from the Article 4 of the Law on Care for Seized and Confiscated Assets to be unreasonably high due to several years' long trials.

According to the assessment of the author of the analysis, it is not appropriate to use the term "confiscation of assets" in order to avoid legal confusion and in favour of juristic conciseness and the regularity of legal terminology since the "confiscation of assets" would be contradictio in adjecto, due to the fact that assets consist of the collection of property rights (contrary to the property mass), which belong to certain legal entity, and consequently cannot be taken away from the same as a legal category, since assets as such are not the consequence of illegality, because of which it is correct to use the term "proceeds of crime". This objection is relevant both for the Criminal Procedure Code and for the Law on Care for Seized and Confiscated Assets, which is generally on a low nomotechnical level. For example, the notion of assets in the Article 2 of this Law creates total legal confusion by mixing up the notions of property mass and property rights. The term "other real rights over the objects" is nonsense in itself, without mentioning the "first real rights".

The existing solution, according to which the Public Property Administration also deals with this issue, besides its regular duties, does not make a reliable support for the improvement of the condition in this area. The experiences of Italy, Ireland and Belgium can give useful guidelines with regards to the direction in which the system in Montenegro should be developed.

Particularly problematic from the point of view efficiency and effectiveness, but also the consistency of legal order and the authority of criminal justice, is the conducting of the enforcement (civil) procedure for the confiscation of the proceeds of crime, which through a series of procedural possibilities can turn into a lawsuit thus prolonging the procedure itself, and all this after all relevant factual and legal matters have already been deliberated in the criminal procedure.

The injured party, who failed to lodge a property claim during the criminal procedure, may request the compensation from the confiscated material gain if, for the purpose of establishing his/her claim, he instituted a lawsuit within three months from the day of taking cognizance of the judgment, which pronounced the confiscation of the material gain, no later than within three years as of the day of the decision on the confiscation of the material gain becoming enforceable and if within three months from the day of the decision on granting his/her property claim becoming enforceable, he/she requests the compensation from the confiscated material gain. The objection on the inappropriately and unnecessarily long deadlines finds its justification in already given reasons.

The procedural provisions on the seizure of objects, which can be confiscated according to the Criminal Code (Article 85 of the CPC), or which can serve as evidence in criminal procedure, for which purpose they can be seized and handed over to the court for conservation, or the conservation of which will be ensured otherwise, do not require wider observation in this analysis, since they are of a principled and general character and need not be in correlation with financial investigations, since the legal nature of this concept differs from the criminal law measure of the confiscation of material gain, although in practice these concepts can be interconnected.

Procedural provisions which are fully related to the confiscation of the proceeds of crime are contained in the provisions of the Articles 90-97 of the CPC, which regulate the seizure of assets and financial investigation for the purpose of the extended confiscation of assets. The procedure for the confiscation of the material gain, as one of the so called special procedures is regulated by the Articles 478-485, while the procedure for the confiscation of assets the legal origin of which has not been proven is regulated by the Articles 486-489 of the CPC.

Public prosecutor issues an order to institute financial investigation against the suspect or the accused for the criminal act for which the Criminal Code prescribes the possibility of extended confiscation of assets from the convicted person, his/her successor or the person whom the suspect or the accused transferred certain assets to, as regulated by the Article 90 paragraph 2 of the CPC.

During the financial investigation evidence will be collected on the assets and the revenues of the suspect or the accused, his/her successor or the person onto whom the accused transferred the assets acquired at the time prescribed by the Criminal Code.

In the procedure being conducted for the criminal act for which the Criminal Code prescribes the possibility of extended confiscation of the assets of the convicted person, his/her successor or the person onto whom the convicted person transferred his/her assets and who cannot prove

their legal origin, and there is reasonable doubt that these assets were acquired illegally, the court may order the seizure of the assets upon the proposal of the public prosecutor.

In the procedure of the seizure of assets, the provisions of the law that regulates enforcement procedure are applied mutatis mutandis, unless otherwise provided by the provisions of this code. The commentary from this analysis related to inadequate linking of the criminal law procedure with the provisions of the law regulating the enforcement (civil) procedure finds its field of application even here.

The legislator, by using appropriate formulation, marks the "contested assets" as "potentially illegal" and not as "potentially criminal", which means that the doubt about the possible criminal origin is not required, which would be contrary to the presumption of innocence from the Article 3 of the CPC.[7] Illegality is a considerably broader term, and the assets can be illegal even if they are not the proceeds of crime (or when there is no proof of their criminal origin). Pursuant to the Article 90 paragraph 1 of the CPC, the assets are illegal always when the person concerned fails to prove the legality of their origin. The burden of proof is therefore on such person (*onus probandi*) always when there is a relevant misbalance in value[8] between the assets and the reported revenues.

Judge for investigation or the chair to the panel before which the main hearing is conducted makes the decision on the seizure of objects, material gain or assets immediately or within eight days as of the day of the receipt of the request. The appeals against the decision are decided upon by the panel from the Article 24 paragraph 7 of the CPC.

The procedure to decide on then seizure of objects, material gain or assets is instituted by the public prosecutor.

Public prosecutor's request should contain: description of the objects, of the material gain or of the assets; the data on the person holding these objects, material gain or assets; the reasons for doubt in the legal origin of the objects, material gain or assets and the reasons for the probability that by the end of the criminal procedure the confiscation of objects, material gain or assets will be rendered considerably more difficult or even impossible.

The description of the objects, material gain or assets must be accurate to the extent that it enables a reliable identification and separation, like the number of the cadastre parcel in the Title Deed, chassis number, number of bank account, specifying the securities which money was invested in, bank vault sign etc.

In case of an appeal against the decision on the seizure of objects, material gain or assets, the panel from the Article 24 paragraph 7 of the CPC, will schedule the hearing summoning the person that the decision refers to, his/her defence counsel and the public prosecutor.

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[7] Professor Dr. Milan Škulić – Commentary to the Criminal Procedure Code, 2009
[8] Ibid

The hearing is held within 30 days from the day of the appeal being lodged. The summoned persons will be heard at that hearing. Their failure to appear does not prevent the holding of the hearing. This deadline is of monitoring or instructive character, thus the failure to observe the same does not lead to the same legal consequences as in the case of preclusive deadlines.

The panel will revoke the decision in case the suspect, or the accused manages to prove the legal origin of the objects, material gain or assets by means of authentic documents, or, in case of the lack of the authentic documents, if he/she makes it probable that the objects, material gain or assets are of legal origin.

The panel will modify the decision if it is proven or made probable that the seized object, certain part of the material gains or assets are of legal origin.

The seizure of objects, material gain or assets may not last longer than until the panel from the Article 24 paragraph 7 of the CPC decides upon the request of the public prosecutor for the confiscation of assets the legal origin of which has not been proved, pursuant to the Article 486 of the CPC.

In case the seizure was ordered during the on the scene investigation, it will be revoked ex officio if the investigation is not initiated within six months from the day of the decision on seizure. This is a strict (*ius cogens*), preclusive deadline, which means that there is no possibility of extending the same.

The court may revoke the decision on seizure of objects, material gain or assets ex officio or upon the request of the public prosecutor or the interested party, if it is proven that such measure is not necessary or justified due to the seriousness of the criminal act, economic conditions of the person it refers to or the conditions of his/her dependant, and the circumstances of the case which indicate that the confiscation of objects, material gain or assets will not be rendered impossible or made considerably more difficult by the end the criminal procedure.

The decision on the seizure of objects, material gain or assets is enforced by the court competent for enforcement, pursuant to the law regulating the enforcement procedure. The same court is competent for the disputes arising from the enforcement.

On the day of the opening of the bankruptcy procedure against the legal entity which is in the possession of the seized objects, material gain or assets conditions are met for the lodging of the motion to vacate with regards to these objects, material gain or assets, as well as to the amounts due.

With regards to special procedure for the confiscation of the proceeds of crime it needs to be pointed out that this material gain is determined ex officio during the on the scene investigation, during the preliminary procedure and during the main hearing. During the on the scene investigation, preliminary procedure and at the main hearing, the court and other authorities are obliged to collect evidence and to determine the circumstances of importance for determining the material gain.

If the injured party filed the property claim for the restitution of the proceeds of crime, or for the payment of the amount which corresponds to the value of the objects, the material gain will be determined only in the part not covered by the property claim.

The provision of the Article 478 paragraph 3 of the CPC is deprived of legal logic, since there is no sense in determining the material gain solely in the part which is not covered by the property claim, for the simple reason that the property claim by the injured party (for the reason of subjectivity, psychological pressure, ignorance etc.) can be placed unrealistically, by which the provisions of the Article 478 paragraph 1 of the CPC are derogated. According to this article, the proceeds of crime are determined ex officio.

In case of the confiscation of the proceeds of crime from another person onto whom the proceeds were transferred or in favour of whom the proceeds were acquired, that persons as well as the representative of the legal entity will be summoned in order to be heard, both during the investigation and at the main hearing. In the summons, the person will be warned that the procedure will be conducted even without his/her presence.

The representative of the legal entity will be heard at the main hearing after the accused. The procedure in relation to another person will be the same in case he/she is not summoned as a witness.

The person onto whom the material gain was transferred or in favour of whom the same was acquired, or the representative of the legal entity, is authorized to propose evidence in relation to determining the material gain and, upon the authorization of the panel chair, to pose questions to the accused, witnesses and expert witnesses.

The exclusion of public from the main hearing does not refer to the person onto whom the material gain was transferred or in favour of whom the same was acquired, or to the representative of the legal entity.

If as late as during the main hearing the court should determine that there are conditions for the confiscation of the material gain, it will suspend the main hearing and summon the person onto whom the material gain was transferred or in favour of whom the same was acquired, or the representative of the legal entity.

When there are conditions for the confiscation of the material gain, the court will, ex officio, or upon the proposal of the public prosecutor, pronounce the temporary security measures according to the provisions of the law regulating the enforcement procedure. In that case, the provisions of the Article 243 of the CPC are applied mutatis mutandis.

With regards to the temporary security measures (Article 481 of the CPC) pronounced by the court when considering the confiscation of material gain, and when there is a danger of it being used for further perpetration of criminal acts, of it being hidden away, alienated, destroyed or dis-

posed with in any other way, which would render its confiscation impossible or considerably more difficult, it is necessary to pint out to the controversies contained in the decision from the Article 481 of the CPC, according to which the judge (investigating judge, panel chair or the panel) may even pronounce these measures ex officio (without the proposal of the competent public prosecutor), having in mind that the Constitutional Court of Slovenia proclaimed almost identical provisions as unconstitutional, since they endanger the principle of judicial independence.[9]

While special appeal is not allowed against the decision of the panel on the temporary security measure pronounced at the main hearing, against the decision of the judge for investigation and of the panel chair one may lodge an appeal which is deliberated upon by the panel from the Article 24 paragraph 7 of the CPC.

In the case of the confiscation of the proceeds of crime from the person onto whom the material gain was transferred or in favour of whom the same was acquired, that person may lodge the request for the reopening of the criminal procedure, but solely with regards to the decision on the confiscation of the material gain, as regulated by the Article 483 of the CPC.
The confiscation of the assets the legal origin of which has not been proved is regulated by the Articles 486-489 of the CPC.

After the coming into effect of the judgment pronouncing the accused guilty of the offence for which the Criminal Code prescribes the possibility of extended confiscation of the assets of the convicted person, his/her successor or the person onto whom the convicted person transferred the assets, who is not able to prove the legality of their origin, the public prosecutor files the request for the confiscation of the assets of the convicted person, his/her successor or the person onto whom the convicted person transferred the assets for which there is no proof of legal origin, no later than within one year.

The request contains the data on the convicted person, his/her successor or the person onto whom the convicted person transferred the assets, designation of the assets to be confiscated, proofs on the possession of the assets by the convicted person, his/her successor, or the person onto whom the assets were transferred, as well as the proofs of their legal incomes and the circumstances that point out to the obvious disproportion between the overall assets and the legal incomes of the convicted person, his/her successor, or the person onto whom the convicted person transferred the assets.

The request delivered to the convicted person without delay, his/her successor or the person onto whom the convicted person transferred the assets, with the warning that he/she is obliged to prove the legal origin of the assets at the session of the panel from the Article 24 paragraph 7 of the CPC, as well as that the assets will be confiscated in case of the failure to prove the legality of their origin.

[9] Decision of the Constitutional Court of Slovenia V-I 296 dated 20th May 2004

The duty of the public prosecutor to file the request is imperative and it is not the matter of his/her disposition. This means that the assets of criminal offenders for which the Criminal Code prescribes the possibility of extended confiscation must always be examined within a prescribed deadline.

In the legal theory and practice of the contemporary Europe, with regards to the extended confiscation of assets, controversial is the issue of the burden of proof as to whether it concerns illegally acquired assets, as well as the issue of the retroactive validity of certain regulations.[10] Thus, in Austria retroactive application of regulations is possible up to a certain degree, while in Germany, on the other side, the same is not allowed. As regards the burden of proof in Germany, the owners of the "controversial assets" are not required to prove their legality, but to "make it probable" that the assets were acquired legally, which is a lot lower standard of proof. Thus, the extended confiscation of "criminal assets" is extended because it does not concern solely the proceeds which were proven to derive from a specific criminal act, but also the material gain which is reasonably assumed to have been acquired through a series of other criminal acts and which is a result of a sort of "criminal career" of a specific perpetrator, who has been pronounced an enforceable judgement.[11]

The panel from the Article 24 paragraph 1 of the CPC deliberates on the request for the confiscation of the assets the legal origin of which has not been proven, at the session which may be closed for the public in accordance with the Article 314 of the CPC.

The public prosecutor, the convicted person, his/her successor or the person onto whom the convicted person transferred the assets and his/her agents are all invited to attend the session.

If the convicted person, his/her successor or the person onto whom the convicted person transferred the assets fails to prove the legal origin of the assets using authentic documents, or in another way in case of the lack of authentic documents, the panel makes the decision on the confiscation of these assets.

If the convicted person, his/her successor or the person onto whom the convicted person transferred the assets, manages to prove the legality of the origin of the assets or of one part of the same using authentic documents or by any other means, the panel makes the decision on the complete or partial rejection of the request. The panel from the Article 24 paragraph 7 of the CPC will reject the request if it was filed after the expiry of the deadline from the Article 486 paragraph 1 of the CPC.

It is necessary to pint out here to a serious collision with regards to the reduction of the standard of proof between the provisions of the Criminal Procedure Code and the Criminal Code. Namely,

[10] Professor Dr. Milan Škulić – Commentary to the Criminal Procedure Code, 2009
[11] Ibid

the Article 488 paragraphs 3 and 4 of the CPC requires from the convicted person to prove using authentic documents or in any other way the legality of the origin of the assets, while the Criminal Code (Article 113) envisages a lower, or more lenient standard for the convicted person who is required to make it probable that the origin of the assets is legal. The existing collision needs to be resolved by giving precedence to the provision of the Criminal Code which prescribes the concept itself and the substantive law conditions for the application of the same, while the Criminal Procedure Code prescribes solely the procedure for the application of the concept regulated by the substantive law regulation.[12]

The decision on the confiscation of the assets the legal origin of which has not been proven contains the data on the convicted person, his/her successor or the person onto whom the convicted person transferred the assets, on the assets being confiscated and the decision on the costs of the care and management of the seized assets from the Article 96 of the CPC. If the confiscation would endanger the sustenance of the convicted person, his/her successor or the person onto whom the convicted person transferred the assets, or of the persons who they are legally obliged to sustain, such decision will exempt one part of the assets from the confiscation.

Therefore, the assets necessary for the sustenance of certain persons is exempted from the property mass being confiscated, and the exempted assets also belongs to the assets the legal origin of which has not been proven and by being exempted they have not acquired legal status. The advantage is given to the reasons of social policy and to the protection of the existence of certain individuals. The duty of sustenance, in the sense of the Article 488 paragraph 1 of the CPC, comprises the legal duty of sustaining certain individuals, like the duty of sustaining minors, pursuant to the provisions of the Family Law.

The decision on confiscation of the assets is delivered to the convicted person, his/her successor or the person onto whom the convicted person transferred the assets, his/her agent, public prosecutor and to the public authority which manages the confiscated assets pursuant to the law.

The convicted person, his/her successor or the person onto whom the convicted person transferred the assets and his/her agent are entitled to lodge the appeal against the decision on the confiscation of the assets from the Article 487 paragraph 3 of the CPC, within eight days, while the public prosecutor may lodge the appeal against the decision on the complete or partial rejection of the request.

Higher instance court decides upon the appeals.

The successfulness of financial investigation is significantly conditioned by the interdisciplinary knowledge, which, besides criminal law covers also civil law, commercial law, specific knowledge of banking and fiscal regulations, securities etc. Financial investigation has better prospects for

[12] Professor Dr. Zoran Stojanović – Commentary to the Criminal Code, 2010

success in case there are appropriate records and registers of assets of legal entities. As such records and registers in Montenegro are often deficient, or imprecise, or not regularly updated, for financial investigation to be efficient, according to the current state of affairs, quite a lot of "classical" police work is needed, which involves searching through all municipalities and all banks, that might be relevant for the financial investigation against the accused.

Therefore, the author of the analysis thinks that measures need to be undertaken for the centralization of the database on legal entities, starting from the unique citizen's register number, or register number or PIN, with regards to commercial and other legal entities, which would lead to the fast access to data, which is significant when one has in mind that the subject matters of financial investigations are urgent ones by their legal structure.

Comparative European experiences indicate that integrated financial investigations, which are carried out in parallel with the pre-trial, or criminal procedures, most often are carried out by the specialized criminal investigations units, and somewhere by the very prosecution office (BOOM unit in the Netherlands), or by a specialized multidisciplinary unit (Criminal Assets Bureau in Ireland), finance guard (Guardia di Finanza in Italy),[13] and in Belgium the same specialized agency carrying out financial investigation, concurrently takes care of the seized and confiscated proceeds of crime. The approach of Ireland and Italy, which comprises multidisciplinary financial investigations units, obviously achieves good results with regards to efficiency and effectiveness, but such approach to this matter in Montenegro would involve very serious budgetary implications, which is of special significance in the context of the so called global economic recession and the consequences of the recession on public revenues and expenditures, thus the option of this model would require a comprehensive cost–benefit analysis. At that, one should also bear in mind the importance that the efficacy of the fight against corruption and organized crime has for the entire society, the stability of the legal order, legal certainty and economic valorisation of the society through economic development and foreign investments. It is also worthwhile noticing that the Recommendation number 17 of the EU Strategy for the beginning of the new millennium refers to the possibility for the establishment of specialized financial investigation units, which is also advocated by the Recommendation of the European Council on the improvement of the investigation methods in the fight against organized crime, related to organized drug smuggling.

In exercising public law prerogatives related to managing pre-trial with the purpose of prosecuting criminal offenders, the prosecution is above all reliant on the police, but also on other public authorities competent for the detection of criminal acts having the obligation to act upon every request of the public prosecutor. In the context of financial investigation, this is particularly relevant for the Administration for Prevention of Money Laundering and Financing Terrorism (Department for international and internal cooperation), as a *sui generis* financial intelligence service,

[13] General of the Army, Cosimo D'Arigo, who commands 68.000 members of the Finance Guard in the Republic of Italy, considers that "the fight against organized crime can be successful if its core is attacked, namely the illegal money".

Customs Administration (Intelligence Sector, which collects, compares, analyses and forwards the relevant data) and the Tax Administration. With regards to submitting reports to the prosecution on the assets that are potentially subject to seizure or confiscation, significant role can be played by other public authorities that keep assets records, like the Central Register of the Commercial Court, Real Estate Administration, Central Depositary Agency, Harbour Master, Ministry of Interior, but also the commercial entities like insurance companies, which can provide data on the insured assets, banks, with regards to leasing vehicles, industrial equipment and similar.

The powers and the actions of the police undertaken ex officio or upon the prosecutor's order during the on the scene investigation are regulated by the Article 257 of the CPC.

Pursuant to the internal organization of the Police Directorate, Criminal Investigations Sector carries out operational and operational-technical activities on the prevention and detection of criminal acts prosecuted ex officio, discovering and apprehending the perpetrators, technical crime investigations and expert analysis. Within the framework of this sector, in the context of financial investigations, particularly significant is Commercial Crime Suppression Department and the Department for the Fight against Organized Crime and Corruption.

According to the internal organization of the criminal investigations police, the Commercial Crime Suppression Department is also entrusted with undertaking the operational actions related to financial investigations. In case the existing solution were to be retained, strong personnel empowerment of this department, in order for this organizational unit of the criminal investigations police to be able to respond to big challenges resulting from efficient financial investigations, at which vertical and horizontal coordination would be necessary, by spreading the unit in the entire Montenegrin territory.

Also, within the Criminal Investigations Sector there is a special organizational unit – Department for Special Checks, which carries out criminal intelligence activities of the collection, processing, analysing and distribution of the data and information of importance for the prevention and suppression of crime, including also part of secret surveillance measures, as special investigation techniques.

Contemporary trends in police work deviate significantly from the traditional police methods of reactive character, according to which police would be activated only upon a criminal report or detection of a criminal act. Namely, police nowadays act proactively, relying considerably on intelligence work (*intelligence-led policing*), which is expressed fully especially against a security threat like organized crime, where particular emphasis should be put on *ante delictum* police actions. Therefore, public prosecutor, special prosecutor in particular, must have at his/her disposal a multidisciplinary investigation team, which requires permanent training of all subordination segments, or all the actors of the investigation chain. In pre-trial proceedings prosecutor must be in the position to capitalize on his/her advantage in relation to the suspect, contained in the secrecy of the procedure of checking the facts, which give grounds of suspicion, including the cir-

cumstances of importance for financial investigation with the purpose of detection, identification, seizure and confiscation of the proceeds of crime.[14]

Following the objection of the European Commission with regards to "*the lack of research capacities of the bodies implementing the laws, as well as a significant lack of expertise in contemporary financial investigations*" it should be pointed out that the manner of solving this problem by raising the capacities of the state in this area has got two important aspects. The first, broader aspect, is related to the notion of financial investigation, as a regular part of the pre-trial proceedings in the case in which there is reasonable doubt that a criminal act has been committed, for example, against payment operations and commercial activity, or certain criminal acts against office, in which there is a regular need for expert opinion of an economic-financial expert, for the purpose of establishing facts which make essential features of the concerned criminal act, which expert knowledge is needed for and which neither the public prosecutor nor the court have. The second, narrower aspect of the notion of financial investigation refers to the action of detection, identification, seizure or confiscation of the proceeds of crime (integrated financial investigation).

In the situation of insufficient financial expert capacities within the prosecution or the police, which the prosecutor is primarily referred to during the on the scene investigation, in practice the choice comes down to the possibility of engaging some person from the list of court experts, which can be very sensitive since, in certain way, the procedure, which must have certain level of secrecy and confidentiality, goes beyond the framework of the prosecution on one side, and on the other side, due to the fact of the explicit deficit of highly capable and professional experts, which the representatives of judiciary have pointed out to on several occasions, narrows down the space for the subsequent, possible, expert testimony before the court, due to the fact that the prosecution is just one of the parties to the procedure, and for the needs of a judicial procedure, expert witness is appointed by the written court order.

The existing condition, therefore, requires expedient normative amendments in the sphere of the concept of expert testimonies for the needs of judiciary, which now proves to be "a bottle neck" in the work, both of prosecution and the courts. At that, it is necessary to observe the recommendations of the Council of Europe Committee of Ministers R(81)7 on the measures for easier access to court, in the part dealing with expert testimonies.

Within the domain of legal profession, there is the opinion, stated by prosecutors, judges and lawyers, that the level of ability and professionalism of expert witnesses very often is not at the necessary level, which would correspond to the importance of expert testimonies for the overall quality of the criminal proceedings, and the legality of court decision, as a result of such proceed-

[14] CARDS Regional programme 2002/2003
Project: Development of reliable and functional police systems and strengthening of the fight against main criminal activities and enhancing police cooperation (CARPO)
Financial investigations and confiscation of the proceeds of crime (Manual for the members of police and judiciary)

ings. The objections are directed towards the arbitrariness in the interpretation of facts, with insufficiently professional arguments and accompanying documentation, as well as towards the entering into the legal assessment of the facts, which goes beyond the framework of expertise and sometimes even towards the lack of objectiveness in the presentation of findings and opinions. However, for the sake of consistency in the analytical approach to the problem, the author finds it necessary to pint out to the fact that frequently also the authority which requires expert testimonies does not do it by means of a precise order which will clearly define the task and the role of expert witnesses, while sometimes judges are led by non-principled opportunism, allowing the expert witnesses to "adjudicate" in cases, expressing the legal assessment of the facts. The consequences are the accumulation of costs due to the necessity of renewing expertise and general assessment on the inefficiency of judiciary, due to the increased backlog. Expertise also takes inappropriately long time to prepare, and the authorities conducting the procedure rarely sanction improper expertise, although the Criminal Procedure Code envisages procedural punishment for the same.

The problem which discredits the purpose of the law on professional (expert) assistance to judiciary in making legal decisions is contained in the fact that there are considerable gaps between the normative conditions, prescribed by the law for the selection of expert witnesses, and actual application in which there is no reliable and responsible system of triage of the candidates for court experts, thus the selection criteria, which have not been elaborated sufficiently in the law and secondary legislation, are indicated solely as a formal framework, instead of being a reliable support to the high quality selection of expert witnesses.

Instead of the system of haphazard testing of the abilities of the candidates for expert witnesses, as it is envisaged by the Article 13 of the Law on Court Experts, as an exception, in relation to the rule for the expert knowledge and professional skills for certain area of expertise to be proved by "fluid proofs" – published professional or scientific papers, as well as "abstract" opinions and recommendations of the courts or other public authorities, professional associations, as stated in the Article 7 of this law, it is necessary, according to the assessment of the author to the analysis, to introduce mandatory testing of competence and knowledge to be done by the competent authority, having public prerogatives to do the same. Argumentum a fortiori, according to the current legal solution, persons with specialist and scientific titles (of any kind) are not at all obliged to submit proofs on the occasion of their selection for expert witnesses. Such proofs would be related to competence and professional skills for certain area of expertise. This way of determining competences of expert witnesses is completely unacceptable, starting from very often inappropriate level of undergraduate and postgraduate course in Montenegro. Such a system makes it possible for any individual holding a university degree and five years of experience to become an expert witness, if he/she is able to obtain some recommendation or opinion.

Based on the above arguments, the author finds that the existing model should be changed towards the creation of a normative legal framework with clear, objective and reliable criteria for the appointment and dismissal of expert witnesses, legally-technically elaborated procedure of

mandatory testing of abilities, knowledge and skills, instead of the current optional testing. The testing should be entrusted to a competent public authority and not to expert witnesses themselves and to their association of citizens. The criteria for the appraisal of the conditions for the appointment of expert witnesses obviously must include the criteria of ethical aptitude of the candidates, followed by the appropriate testing. *Mutatis mutandis*, the systems of selection envisaged by the regulations on the initial training of the holders of judicial office and the established criteria of the Judicial and Prosecutorial Council, used on the occasion of the appointment of judges and prosecutors can serve as the point of reference for the necessary reforms. Besides the abovementioned, there must be a developed and institutionalized system for the training of expert witnesses with a transparent plan and programme, as well as with the holders of duties and budgetary implications. The system must operate as the system of gradation, professionalism and experience with the certification of knowledge and titles, in which there will be no room for the insufficiently trained or amateur expert witnesses.

The challenge of facing ever so complex form of crime should be followed by the appropriate specializations of prosecutors and judges for the purpose of the acquisition of nuanced knowledge and skills. Expert witnesses must be able to respond to the same challenge of specialization, by developing highly specialized skills by individual areas. *White collar crime* has changed significantly the methodology and tactics of acting through the complexity of electronic transactions and operations, which must also be followed by the appropriate knowledge upgrade of all the participants of the investigation chain, especially in the part related to financial investigations, related to detection, identification, seizure and confiscation of the proceeds of crime.

Beyond doubt, there is a need for further affirmation and improvement of international cooperation in financial investigations, especially with the countries in the region, since crime, its organized form in particular, knows no borders and it is easily operational at a broader international level. The Law on international legal assistance in criminal matters constitutes a high quality legal basis for this need. It is harmonized with international legal standards, which is very important if one has in mind the difference between the legal system of the requesting state and the one of the requested state can constitute a serious obstacle in the fight against organized crime. Particular quality is seen in the possibility of direct assistance between the international law enforcement bodies, through bilateral agreements or international organizations, like Interpol or informal international network CARIN (*Camdem Assets Recovery Interagency Network*)[15], composed of the national experts from the area of financial investigations, for which network the Europol offers administrative-technical assistance, and for which kind of cooperation the Law on international legal assistance in criminal matters provides sufficient space.

The Framework decision on the execution in the European Union of orders freezing property or evidence adopted by the European Council on 22nd July 2003 constitutes a revolutionary qual-

[15] carin@europolen.int

itative step forward in relation to international legal cooperation. It affirms the principle of reciprocal recognition of mutual decisions, which is a step further in relation to the mutual assistance being offered so far. In October 1999, in Tampere, in Finland, the heads of states and governments of the EU member states agreed on such approach as the basis for the future cooperation among the judiciaries of the EU member states. The principle of mutual recognition of decisions comprises two exceptionally important legal instruments – *European Arrest Warrant and Freezing of Evidence and Assets*, which is intended to be confiscated in further course of the proceedings. This deviates from the current system of the requesting state and requested state, with the introduction of the principle of acting upon the request of the member state (national treatment), with the purpose of executing the same, with very clearly specified possible exceptions from the acting upon freezing order. The identical principle was observed even on the occasion of passing the Framework Decision on the Application of the Principle of Mutual Recognition on the Decisions of Confiscation dated 24th February 2005, with regards to assets confiscation.

The author of the analysis finds that regional implementation of the stated European principles in the Southeast European countries would be of capital importance for the progress in the suppression of crime, especially of the organized one, which has supra-national character.

However, according to the assessment of the author, the translations of international legal documents (conventions, recommendations, framework decisions) can constitute a problem, as well as of the letters rogatory for international legal assistance themselves. These translations are often confusing, while national criminal law terminology is not fully harmonized with the abovementioned mechanisms of international law. Thus the need for legal edition of translations appears to be necessary, through clarifications of the legal contents with teleological (targeted) and systemic interpretation, which is possible solely through the team work composed of legal experts and translators. An example of the abovementioned disharmony is the term "freezing" which is not known to the national legal system, while regularly present in international conventions and other legal instruments (Warsaw Convention), although Montenegrin legal system is familiar with the concept of temporary security measures.

The confusion in interpretation can also be caused by the translations of the terms "forfeiture" and "confiscation", which can have completely different meanings, depending on the type of proceedings (civil or criminal) and the state these are applied in, although both of them point out to the deprivation of assets under certain conditions.

There is still a dilemma whether this matter would be more comprehensively addressed with the adoption of a special law, which would deal with all the issues of seizure and confiscation of the proceeds of crime, with the purpose of consistency and clarity of regulations (as it has been done in Serbia, Croatia and some other countries), or will the incorporation of the provisions in certain laws lead to the appropriate result.

Ever so distinct convergence between two capital European legal systems – European-continental and Anglo-Saxon or adversarial system gives rise for thinking about the future concept of common European law besides the present differences in the systems of individual European states.[16] On the other hand, the unevenness of legal systems can be a serious hindrance in the accomplishment of international cooperation. Striving to respect and follow international legal standards when financial investigations are concerned, it is necessary to think about the necessary application of the solutions known by certain countries, related to the confiscation of the proceeds of crime even in the situation when there is no criminal judgment that would establish a criminal act, or even when the criminal proceeding was not being conducted, for example, due to the demise of the suspect or due to the statute of limitations for criminal prosecution.

With regards to the so called "civil confiscation", specific examples can be found in the Republic of Ireland, Italy and Great Britain in Europe, but also in Canada, USA, South African Republic and Australia.

However, for the author of the analysis, the opinion of certain authors from the region that the domestic equivalent of this model is contained in the concept of obligation law - *unjust acquisition or legally unjust enrichment* - from the Article 217 of the Law on Obligations, is not acceptable. Namely, civil court proceeding in Montenegro, through the possibility of using the substantive law objection of *Legitimatio ad causam* (active and passive), gives prospects for success in the lawsuit solely to the party (plaintiff), who is the holder of the controversial substantive law relation. In a concrete case, this would be a debtor-creditor's relation, because of which possible claim that the state might have against the holder of such assets would not be justified, according to the civil laws of Montenegro *de lege lata*, even in the situation of obvious disproportion (discrepancy) between the manifest assets and the reported legal revenues of some legal entity or natural person.

On the other hand, Montenegrin legal system does not recognize the system of legal fiction *actio in rem*, which gives the possibility of bringing the complaint against thing (*in rem*), i.e. assets, and not against the holder of assets, which is the system in the USA, and which has proved to be very efficient, with a long tradition of legal precedents, since as far back as 1796, functioning on the principle of the *preponderance of evidence*.

The Law on civil procedure recognizes solely the possibility prescribed in the Article 76 paragraph 3 that the civil court can, exceptionally, with legal effect, only in certain lawsuit, to recognize the right of a party even to those *forms of association*, which do not have party capacity, in the sense of the provisions of the Law on civil procedure, if it establishes that, considering the subject matter of the dispute, they essentially meet crucial conditions for the acquisition of party capacities, in particular if they possess the assets which can be enforced upon. Current solution clearly

[16] Professor Dr. Milan Škulić, Criminal procedure law – general part, Belgrade Law School and Official Gazette, fifth edition, Belgrade, 2009

implies the conclusion that the civil procedure against "forms of association" comprises "personal substrate", or requires as a condition for the admissibility of the complaint that it concerns the association of the existing persons (natural or legal), who by associating do not make a new legal entity, and it does not comprise the possibility of the complaint against thing (*in rem*), or the proceeds of crime.

Therefore, the author finds that it is more compatible with the Montenegrin legal system to extend the possibility for the confiscation of material gain through administrative procedure, additional taxation imposed on the assets, which appears to be disproportionate in relation to the reported legal revenues of the holder of such assets.[17]

International legal standards[18] consider legitimate to combine the systems of criminal, civil and administrative confiscations, especially with regards to legal entities and money laundering and the so called predicate offences.

Broader application of administrative confiscation is recognized by the legal systems of the USA and France, with a considerable difference that in France additional taxation is possible only after criminal procedure has established the existence of a criminal offence, which is then followed by the engagement of taxation bodies to carry out the confiscation in case there is considerable discrepancy between the assets under the economic ownership of the convicted person and his/her reported, legal revenues, while the USA system does not give the prejudicial importance to the criminal proceedings for administrative confiscation.

[17] Confiscation of material gain outside court proceeding (additional taxation) is in accordance with the UN Vienna and Palermo Conventions, which recommend "other proceedings" outside court proceedings

[18] Warsaw Convention in its Article 23 paragraph 5 recommends confiscation in civil court proceedings too Recommendations number 19, 20 and 21 of the EU Strategy for the beginning of the new millennium (reversed burden of proof, confiscation of the proceeds of crime, irrespective of the perpetrator of the criminal offence, in order to cover the cases when the perpetrator has died or is absent)

Confiscation of the proceeds of crime in Montenegrin practice

- Case study -

Overview of special challenges in the application of the concept of the confiscation of the proceeds of crime

The confiscation of material gain constitutes a sui generis legal measure, the application of which causes consequences similar to those of conviction, with the purpose of establishing the condition disrupted with the perpetration of a criminal offence. Although the confiscation of assets is based on the fundamental legal principle according to which no one can keep the illegally acquired gain, the application of this concept still causes controversies and it is linked with a whole series of challenges of theoretical and practical nature. These challenges can impact the identification and the confiscation of assets, the manner in which the courts establish the existence of the proceeds of crime and finally, the management of confiscated assets.

The seizure of material gain as the profit reflected in the surplus of assets of the perpetrator acquired with the perpetration of a criminal offence, may be pronounced in certain types of decisions in which the fact that the criminal offence was perpetrated is established[19]. For the pronouncement of the measure of the confiscation of the proceeds of crime, very important is the implementation of financial investigations against the suspect, or the accused, with the purpose of the extended confiscation of assets in the procedure conducted for the criminal act for which the Criminal code envisages the possibility of the confiscation of assets. Financial investigations are undertaken for the sake of checking and determining the assets of the perpetrator of a criminal offence, as well as for the sake of detecting and identifying the illegally acquired assets. The conducting of financial investigations requires a developed inter-institutional cooperation and the exchange of data at the disposal of the Tax Administration units, Customs Administration, Real Estate Administration, courts, banks, insurance companies and other organizations.

[19] The court may pronounce the confiscation of material gain in the following rulings: 1) convicting judgement; 2) decision on punishment without the main hearing; 3) decision on judicial admonition; 4) decision on correctional measure; 5) decision on pronouncing security measures: mandatory psychiatric treatment and placement in a medical institution mandatory psychiatric outpatient treatment. (Škulić M. Komentar Zakonika o krivičnom postupku Crne Gore (Commentary to the Criminal Procedure Code of Montenegro), Podgorica 2009, p. 1224).

Financial investigation is instituted by the order of the competent public prosecutor, with the purpose of collecting evidence on revenues and the assets of the suspect or the accused, his/her successor or the person onto whom the suspect, or the accused transferred the assets which are the subject matter of investigative actions. The prosecutor is obliged to collect evidence and to investigate the circumstances of importance for establishing the proceeds of crime. If after the financial investigation it is established that there is reasonable suspicion that the subject assets were acquired illegally – competent public prosecutor lodges the request to the court for the seizure of assets in which he/she is obliged to explain his/her suspicion in the legality of the origin of the assets. The court decides on the measures of seizure of material gain depending on the stage of the procedure: judge for investigation, chair of the panel outside the main hearing, or the panel before which the main hearing is held. During the procedure, the court is obliged to establish whether material gain was acquired through the perpetration of the criminal act; causal connection between the perpetrated offence and the proceeds; the circle of people who acquired material gain; the structure and the extent of the material gain, as well as the fact whether the same has been transferred onto the third persons with or without the compensation, and whether these persons must have or could have known about the criminal origin of the proceeds. These duties of the court are not conditioned by the fact whether the injured party has placed the property claim or not, at which the fact is considered whether the person who sustained damage with the perpetration of the criminal act is entitled to dispose of his/her right in relation to the damage sustained.

The court determines ex officio the extent of the material gain, except if this would cause disproportionate difficulties or if it would lead to a considerable delay of the procedure, in which case the court has a discretionary right to set the extent of the gain, in accordance with the principle of the free appreciation of evidence. In its decision on the seizure of the material gain, the court is obliged to designate the value and the kind of material gain and the time which it is seized for[20]. In practice, it can happen very often that the perpetrator of a criminal act, with the purpose of covering up illegally acquired assets, unifies the same with the legally acquired assets. The identification of the illegally acquired material gain and the collection of evidence on their criminal origin constitute a special challenge. The forms of material gain can be changed with the disposal of the same, most often with the transactions that have transnational character and the following of which requires highly sophisticated logistics and coordination of several national systems, no matter if the transaction constitutes a criminal offence or if it serves to cover the same up.

Besides the seizure of the material gain, the concept of confiscation provides for the public prosecutor to be entitled to submit to the court the request for the confiscation of the assets for which there is no evidence of being acquired legally, after the pronouncing of a convicting judgment, no later than within one year from the convicting judgment becoming enforceable. The panel

[20] The court may not subsequently decide on the confiscation of the material gain, be it from the convicted person or from the third person, if it fails to do it in one of the stated rulings. Instead, this omission may be corrected solely in the procedure upon legal remedies (Škulić M. Komentar Zakonika o krivičnom postupku Crne Gore (Commentary to the Criminal Procedure Code of Montenegro), Podgorica 2009, Op.cit. p. 1225).

composed of three judges decides upon the request at the public session in the presence of the public prosecutor, the convicted person (or his/her successor or the person onto whom the convicted person transferred his/her assets) and his/her agent. In case the convicted person fails to prove the legality of origin of the assets, the panel issues the decision on the confiscation of the assets. Otherwise, the panel may pass the decision on complete or partial rejection of the prosecutor's request, in case the legality of one part of the assets has been proved.

The seized assets and funds are managed by the competent public authority – Assets Directorate, during the duration of the temporary security measure or following the confiscation of the assets, according to the Law on taking care of seized and confiscated assets[21]. This law also regulates the manner of taking care of, or of managing the seized or confiscated assets in the criminal or misdemeanour proceedings. The scope of work of the Assets Directorate in the part related to the management of the seized of confiscated assets comprises the valuation of the confiscated assets pursuant to the law; storing, guarding, restitution and sale of the seized/confiscated assets; depositing pecuniary funds obtained from the sale of the confiscated assets in accordance with the law and keeping records of the confiscated assets. The Directorate is obliged to manage the confiscated assets in the manner which guarantees the highest degree of the preservation of their value with the lowest costs, as well as to take care of the protection of the interests of the owners of the assets, conscientious holders and the persons whom the assets have been seized from in accordance with the law.

The application of this law is connected to numerous challenges related to the scope and complexity of managing and taking care of the seized movable and unmovable companies' assets and the seized shares and securities in companies, leasing or giving the seized assets for utilization without compensation, as well as the procedure of selling the same. The lack of developed methodology and bylaws,[22] which would be related to the activities of registering the seized assets and managing the same, but also the insufficiently developed institutional mechanisms and capacities[23] for acting in the subject cases, condition limited results in the implementation of efficient measures for taking care of the seized assets. Efficient management of these assets is additionally affected by the law degree of interest in purchasing or renting the assets, which can be explained by the fear from possible retaliation for taking over the same. Thus, in practice, the application of the law is mainly reduced to rendering it impossible for the persons from who the assets were confiscated from to use the same.

[21] OG of MNE no. 48/2008 dated 15th August 2008

[22] There are two bylaws in this area, passed in 2009: »Rulebook on the manner of guarding the confiscated precious objects« and »Rulebook on detailed content of the records on confiscated assets and the minute on assets takeover«

[23] The Sector for management and protection of public property – Division for management of seized and confiscated assets, employs solely four persons (three independent advisors and one state employee) (http://www.uzi.gov.me/uprava)

Case studies

Despite significant steps related to the compliance with the criteria from the Opinion of the EU Membership Application and the harmonization of domestic legislation with the fundamental principles contained in international documents and the EU Acquis Communautaire, the application of the concept of the confiscation and the management of the proceeds of crime in Montenegro is still not effective. Key problems are related to the institutional and organizational aspect of the implementation of the legislative framework and they are the consequences of the lack of systems in the existing solutions, but also of their inadequate utilization.

The reports on the progress of Montenegro on the path of EU integrations point out to the need for more efficient application of this concept in the suppression of organized crime. We should mention here the European Commission Screening Report for the Chapter 24 which states that Montenegro is perceived as one of the attractive destinations for the investment of the capital of organized criminal groups[24]. The practice of the extended confiscation of assets in Montenegro covers only a couple of cases, and the value of the confiscated material gain is twice lower in relation to the estimated revenues of the criminal groups active in the country and in the region. Inter-institutional cooperation is not effective due to the insufficiently developed capacities of the authorities dealing with financial investigations, as well as insufficient exchange of evidence access to relevant databases. Although Montenegro is a party to several international and regional initiatives, like EGMONT group[25] and the Committee of Experts on the Evaluation of Anti-

[24] Screening report for the chapter 24: Justice, freedom and security, p. 22 and 23. (http://ec.europa.eu/enlargement/pdf/montenegro/screening_reports/20130218_screening_report_montenegro_ch24.pdf)

[25] "Egmont group" represents an association of financial-intelligence services, intended for the improvement of cooperation in the area of the prevention of money laundering and financing terrorism. The aim of the "Egmont group" is to offer support to the stated services in the implementation of national regulations in this area and to contribute to the increase of their efficiency through the training of employees through enhanced cooperation in the area of the exchange of information and experiences.

Money Laundering Measures and the Financing of Terrorism (MONEYVAL)[26] and the signatories of the memoranda on cooperation in the area of the exchange of financial data with the partners from 26 countries, including seven EU member states, international cooperation in this area is not on a satisfactory level. It is necessary to invest efforts on establishing the EUROPOL office in Montenegro and on the operationalization of the cooperation with the EUROJUST, as well as on the functioning of the international legal assistance, strengthening of judicial and police cooperation in criminal matters, the exchange of data from criminal records within the framework of the European Criminal Records Information System (ECRIS)[27], as well as the exchange of data and experiences in the area of monitoring and establishing the illegal material gain.

Three cases have been recorded so far in Montenegro in which prosecution office, on the basis of the previously undertaken financial investigation, filed the requests for the seizure of material gain[28]. Acting upon these requests, the courts passed the orders on the seizure of the assets of the accused in the cases being conducted according to the indictments for the criminal acts with the elements of organized crime. According to the report on the work of the public prosecution office for 2011 and the letter of the Assets Directorate dated 11th March 2013, the accused had their assets seized in the stated proceedings in the total value of € 45.121.329,00. It is important to mention that the companies in which the accused persons are majority shareholders are insolvent and that their accounts have been blocked for quite a long time. Most of the seized unmovable assets are under the mortgage of the banks according to the crediting of the companies in which the accused persons are the founders or responsible officials. The Hipo Alpe-Adria Bank - AD Podgorica has instituted the procedure of the settlement of its claims[29].

Considering the case law, as well as the scope of incriminations for which the measure of the confiscation of material gain may be pronounced, it can be noticed that the relation between the cases in which seizure was pronounced and those in which this was not the case, is not uniform. Most of the activities undertaken so far were directed to the realization of training and the acquisition of the necessary equipment. Namely, the capacities of prosecution offices and of other law enforcement authorities are limited with regards to efficient implementation of financial investigations in the cases with the elements of organized crime and establishing the criminal origin of the assets. It has been proved that financial investigations require the engage-

[26] Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) of the Council of Europe was established in 1997, as a mechanism of pressure and evaluation of the implementation of measures against money laundering. The purpose of this body is to contribute to the application of relevant international standards in this area and to the functionality of the system for the prevention of money laundering and financing terrorism in the CoE member states.

[27] ECRIS constitutes a computerized system established in April 2012, aimed at encouraging the efficient exchange of data on criminal judgments at the level of the EU.

[28] This concerns the cases known like "Šarić", "Kalić" and "Khvan". None of these cases has been processed on the basis of plea bargaining.

[29] Letter from the Assets Directorate dated 11th March 2013

ment of not only financial experts, but also the persons with professional knowledge from other areas, most often the persons of geodetic and construction field. The courts primarily directed their work towards establishing facts which indicate the perpetration of the criminal act and the accused as the perpetrator of that act, unwillingly entering into the establishing of the type and extent of the acquired material gain and making decisions on temporary security measures. The reasons for that lie in the limited number of financial investigations conducted, but also in the lack of institutional mechanisms which would bring corruption cases, tax offences, money laundering and organized crime cases in mutual connection in an efficient way. Indicative is the fact that all transactions described in the case studies were accomplished through commercial banks in Montenegro, during a longer period of time, and that they were not marked as suspicious by the officials responsible for the prevention of money laundering and financing terrorism in these banks. Such claim is supported by the statements of the representatives of the banks, interrogated in the capacity of witnesses in the proceedings against the accused Šarić and Lončar, according to whom the designated legal entities had operated pursuant to the law and banking rules. This indicates that there is a need for the strengthening of the capacities of the banks in the area of monitoring and identifying illegal money flows, but also greater supervision by the Central Bank of Montenegro.

The year 2011 noted the increase of the number of perpetrators of the criminal acts of organized crime by 108.57% in relation to the previous year. In the same year, in the specialized departments of the higher courts, which adjudicate organized crime, corruption and war crime cases, there were 79 cases in all. In relation to the year 2010, 10% less cases were being dealt with, 42% of which were resolved, and 46.84% remained pending[30]. Although positive legislation envisages special investigative authorities aimed at the collection of data on the assets which the perpetrator of a criminal act disposed of prior to the perpetration of the offence, as well as the data on the condition of the assets following the perpetration of the act, these mechanisms are not used to a sufficient extent. In 2010, special investigation team carried out two financial investigations. In 2011, special investigation team worked on 3 cases which are still pending. One case which was instituted in 2010, was finalized with the issuing of the indictment against two individuals for the criminal act of money laundering. Prosecution led investigation on average lasted a little bit longer than four months, and according to the Report on the work of the public prosecution office for 2011 the length was mostly affected by the duration of the procedure for achieving international legal assistance. During 2012, there were six training sessions for the representatives of judiciary (to a smaller extent also for financial analysts and auditors) at the topic of financial investigations and confiscation of assets, money laundering and the assessment of evidence in the proceedings for criminal acts with the elements of organized crime.[31]

[30] Report on the work of courts for 2011

[31] Decision of the Judiciary Training Centre of Montenegro upon the request for the free access to information: Su X-II br. 11/13 dated 5th February 2013

During 2011, in the Higher Court in Podgorica[32], in the Specialized Department for the Fight against Organized Crime, Corruption and Terrorism and War Crimes, one ruling was passed on the seizure of material gain, ordering the seizure of the accused, namely the land with the area of 2.496 m², residential structures with the area of 1.393 m² and the funds on bank accounts in the amount of € 3.469.591,86. In the previous year no ruling was passed on the seizure of material gain. In 2011, Bijelo Polje Higher Court passed two such rulings[33] which have become enforceable, while in 2012 there were no cases to deliberate on the seizure of material gain in the proceedings conducted for the criminal acts for which the Criminal Code envisages the possibility of the confiscation of assets. With the lack of enforceable rulings in the proceedings in which rulings were passed on the seizure of material gain, in domestic practice there have been no cases of the confiscation of material gain.

Case no. 1.

The case concerned was conducted before the Higher Court in Bijelo Polje – Department for the suppression of organized crime, corruption, terrorism and war crimes, against the accused Duško Šarić and Jovica Lončar, for the criminal acts of establishing criminal organization, money laundering and unauthorized manufacturing, possession and circulation of narcotics[34]. The proceeding was instituted upon the indictment of the Supreme Public Prosecution – Department for the suppression of organized crime, corruption, terrorism and war crimes. The indictment was represented by the Special Prosecutor Ms Đurđina Nina Ivanović[35]. The accused Šarić, was charged with the perpetration of criminal acts of establishing criminal organization, unauthorized manufacturing, possession and circulation of narcotics and money laundering of longer duration, and the accused Lončar was charged with the perpetration of the extended criminal act of money laundering[36]. The panel of judges was composed of three judges: Šefkija Đešević, panel chair, and Jokan Varagić and Vukomir Bošković. The first instance ruling pronouncing the accused guilty and sentencing them to prison terms (Šarić to eight years and Lončar to six years) was passed on 3rd May 2012. The Court assessed that during the proceedings the allegations from the indictment were not proved. According to the allegations the accused Šarić Duško belonged to a criminal organization, which had been involved internationally for quite a long time in purchasing and selling drugs. However, he was acquitted of this part of the charges. The accused were obliged to

[32] Decision of the Higher Court in Podgorica upon the request for the free access to information: Su V br. 101/13 dated 12th February 2013

[33] Decision of the Higher Court in Bijelo Polje upon the request for the free access to information: Su I br. 19/13 dated 11th February 2013

[34] Ks. br. 3/11

[35] Kts.br.7/10-2 dated 14th May 2011, for the criminal acts from the Article 401a paragraph 2 in relation to the paragraph 1 of the Criminal Code of Montenegro, Article 300 of the Criminal Code of Montenegro and the Article 268, paragraph 4 in relation to the Article 49 paragraph 1 of the Criminal Code of Montenegro

[36] Direct indictment was issued against the accused Lončar, according to the Article 288 of the Criminal Procedure Code, within 48 hours from the moment of the deprivation of liberty.

pay the following amounts into the Budget of Montenegro and in the name of the illegally acquired material gain, i.e. the accused Šarić Duško the amount of € 16.670.029,83, and the accused Lončar Jovica the amount of € 4.736.859,39.

The first accused in this procedure, Duško Šarić (33) is widely known as the brother to Darko Šarić, for whom the Republic of Serbia issued the international arrest warrant on 21st January 2010, designating him as the first suspect in the international police action "Balkan Warrior" in which almost three tons of cocaine was seized in a Uruguay port. Two Serbian citizens were apprehended in that action, who had apparently been trying to transfer cocaine from the yacht "Maui" onto a transoceanic vessel. Darko Šarić's name appeared among the suspects, who at that time resided in Switzerland, according to the regional media, from where he controlled the delivery of the drugs worth nearly USD 250 million. In media articles, Darko Šarić was being marked as the leader of a powerful Balkan criminal organization which had for years smuggled cocaine from South America, through Western Balkan countries and Italy towards Western Europe, earning close to € 1 billion a year and directing this money onto the accounts of several commercial entities controlled by the criminal group allegedly headed by his brother, Duško Šarić. The illegally acquired assets were allegedly invested in the acquisition of certain enterprises and in financing their operations, but also used for the acquisition of luxury villas, apartments and agricultural properties. The enterprises mentioned in this context are: "Jedinstvo" from Gajdobra, "Mladi borac" from Sonta, "Putnik" from "Vojvodina" from Novi Sad, "Mitros" from Sremska Mitrovica, "Palić" from Subotica, and "Mat Company" and "Municipijum" from Pljevlja. The accused Jovica Lončar (51) is known in the public as the associate to Šarić brothers and the director of "Mat Company", founded by Duško Šarić.

Duško Šarić was apprehended on 15th November 2010 following the Italian arrest warrant, within the framework of the international police action under the code name "Pellets" for the suspicion of being involved in the international cocaine smuggling operations from South America to Europe, in the way that he had been arranging the acquisition and storing of cocaine, as well as its sale in the market. He has been detained since 17th November 2010, according to the order of the Higher Court in Bijelo Polje, confirmed by the Court of Appeals of Montenegro on 3rd June 2011. The accused Lončar has been detained since 12th May 2011[37].

According to the indictment, they were charged with covering the manner in which they acquired the amount of € 21.353.879,22 through the banking and financial operations of D.O.O. "Mat Company" from Pljevlja, in the period from December 2007 until the end of 2010. They apparently knew about the criminal origin of the money, aiming at introducing it into the legal monetary flows in Montenegro. The illegally acquired money was used for the repayment of the credit provided by the "Prva banka Crne Gore" established in 1901 (hereinafter referred to as: "Prva banka") and by the "Hypo Alpe Adria Bank", for the acquisition of operating machines and the

[37] The accused had the detention extended until the judgement becomes enforceable, or until the expiry of the punishment pronounced in the first instance judgement.

vehicles registered in the name of "Mat Company", "Tera Ing" and the accused Lončar. The credits were being repaid from the pecuniary amounts obtained on the basis of the subordinated loan agreement with the legal entity "Camarilla Corporation" from the Seychelles, the transfer of funds in the amount of more than € 15 million onto the residential account of "Mat Company" and the non-residential account of the legal entity "Matenico LLC" from the USA, the founder of which is "Mat Company".

During the course of the court proceedings, several witnesses were heard regarding the circumstances from the indictment, including the representatives of the commercial banks: "Prva banka", "ERSTE Bank" and "Hypo Alpe Adria Bank" through which controversial monetary transactions were being carried out. The representatives of the Central Bank of Montenegro and the Administration for the Prevention of Money Laundering and Financing Terrorism were also heard. The minutes of the Central Bank of Montenegro on the audit of regular and extraordinary accounts of the D.O.O. "Mat Company" opened with the "Prva" and "Hypo Alpe Adria Bank" were obtained and presented as evidence at the main hearing upon the proposal of the prosecution. The analytical cards of the legal entities "Mat Company" and "Mat Shop" were inspected, as well as foreign currency accounts statements and the payment orders from the "Mat Company" account with the "ERSTE Bank" and "Hypo-Alpe-Adria Bank". The documentation obtained from the Administration for the Prevention of Money Laundering and Financing Terrorism, Real Estate Administration, Commercial Court in Podgorica, Central Depositary Agency was inspected, as well as the operations documentation of the "Mat Company".

The Supreme Prosecution Office-Department for the Suppression of Organized Crime, Corruption, Terrorism and War Crimes, lodged to the court during the proceedings the request for the seizure of assets[38], on the grounds of suspicion that the assets that both the accused and the legal entity "Mat Company" disposed of were illegal, since the same were acquired through criminal act or suspicious transactions. The request was granted and on 27th July 2011 the court issued the order for the seizure of assets of the companies the founders or the owners of which are the accused persons. This was the first order of its kind in Montenegrin case law. The defense counsels lodged the appeal against this order. The panel of judges rejected the appeal as unfounded having examined the case file and the submitted written documents, assessing that there is a disproportion between the legal revenues[39] gained by these natural persons and legal entities in the period between 2006 and 2010 and the assets they possess as natural persons or which they transferred onto the legal entity D.O.O. "Mat company" - Pljevlja, and that the assets were illegally acquired through the subordinated loan using the proceeds of crime and that the same could not be returned to the legally gained incomes of the company, having in mind that in 2008 and in 2009

[38] Kti.S.br.1/10 and Kt.-S.br.7/10-2 dated 12th July 2011

[39] Financial investigation established that the accused Šarić gained legal revenues as the owner of the of the enterprise "Municipijum" at Pljevlja and the legal entities "Mat Shop" D.O.O. Pljevlja and "Mat Company" D.O.O. Pljevlja, and the accused Lončar as the founder and the executive director of the legal entities "Mat Company" and "Tera ing".

the "Mat Company" was operating with losses. The seized assets comprise greater number of operating machines, registered in the name of the legal entities "Tera Ing" from Pljevlja, in the value of € 7.058.700,00, then real properties (residential and commercial buildings, land, petrol station) and motor vehicles owned by the companies "Mat Company", "Mat Construction" and the accused Lončar, as well as the shares in the publishing house "N.I.G. Pobjeda" estimated to the value of € 266.731,99. According to this order, the overall market value of the seized assets was estimated to € 12.483.577,54. In mid-November 2011, the Real Estate Administration took over the keeping of one part of the assets of one part of the accused persons. On 21st December 2012, the Administration issued the public call for leasing the petrol station "Mat Petrol" at the initial lease price of € 4.000. Following the public call, the "Elcom" company from Pljevlja was selected to be a lessee. In 2008, the company was the owner of the subject petrol station, with the duty to employ all the persons which had worked there prior to the seizure order.

Case no. 2.

This case is conducted before the special department of the Higher Court in Bijelo Polje, against the accused Kalić Mersudin (54), Kalić Safet[40] (42) and Kalić Amina (29), for the extended criminal act of money laundering[41], upon the indictment of the Supreme Public Prosecution Office – Department for the Suppression of Organized Crime, Corruption, Terrorism and War Crimes. The main hearing against the accused persons started on 30th May 2012, before the panel chaired by the judge Drago Konatar. After the judge Konatar had resigned from the office on 1st October 2012, the main hearing started anew before the panel chaired now by the judge Vidomir Bošković.

The indictment,[42] which came into force on 1st December 2011, charged the accused with association in order to cover the manner of acquiring money in the period from 2005 to June 2011 through banking and financial operations. They knew that the money had been coming from the criminal act perpetrated by the criminal organization one of the organizers of which had been the accused Mersudin Kalić, convicted by German judiciary with an enforceable judgment. The Kalićs were charged with introducing such money in legal monetary flows through simulated agreements on the basis of which they paid the money into the bank accounts of the companies "Daut&Daut" D.O.O, "Tajson" D.O.O, "Turjak" AD, "M Petrol" D.O.O and "Kristal" AD, the founders or executive directors of which were they or their next of kin, with the purpose of re-

[40] Safet Kalić was born in October 1969 at Rožaje. Having stayed abroad during his youth, Safet Kalić returns to Rožaje, where he invests funds in the establishment and the work of the petrol stations and the purchase of the factory "Kristal" AD. According to the allegations from the media, he was considered a very influential businessman at Rožaje. He became known by the broader public after the publishing of the video recording of his wedding to his wife Amina, where some representatives of the National Security Agency appeared as guests, and apparently also the representatives of criminal clans from the region.

[41] Ks.br.10/11, for the criminal act from the article 268 paragraph 4 in relation to the paragraph 1 of the Criminal Code in relation to the Article 49 paragraph 1 of the Criminal code of Montenegro

[42] Kts.br.9/11 dated 26th December 2011, which came into effect on 27th December 2011

paying credits, by which they covered up the origin of the money in the total amount of € 8.523.308,00.

The accused Amina and Mersudin Kalić were deprived of liberty on 27th July 2011 and put in detention. On 22nd December 2011, the judge for investigation Vukomir Bošković passed the decision on rejecting the proposal for the abolishment of detention for Amina Kalić while setting the bail. After the issuing of the indictment on 26th December 2011, the out-of-trial panel of the Higher Court in Bijelo Polje passed the decision on abolishing the detention to the accused Amina Kalić and on pronouncing surveillance measures, namely the prohibition of leaving the residence, duty of daily reporting to police authorities and seizure of passport and ID card. The accused Mersudin Kalić had the detention extended until the decision of the court due to the danger of absconding, while against the accused Safet Kalić, who is tried in absentia, the decision is in force on pronouncing detention, which starts to run as of the deprivation of liberty.

The order on conducting investigation for the reasonable doubt of committing the extended criminal act of money laundering, for which the Criminal Code prescribes the possibility of confiscating assets was passed against the accused on 30th July 2011[43]. Because of the existence of the grounds of suspicion that the assets of the accused had been illegally acquired, and that the accused use the same and that he could alienate the same, thus significantly hinder or render impossible the seizure of the same by the end of the criminal proceedings, the supreme Public Prosecution Office lodged the request to the court for the seizure of assets[44], which was recorded as the assets in the possession of the accused as the natural persons, as well as the assets of the legal entities in which the accused are either the founders or responsible officials. From banking and financial documents, balance of loss and profit of the subject legal entities, as well as from other relevant documents obtained through financial investigation, it turns out that Mersudin, Safet and Amina Kalić hold several million worth assets, which surpasses their legal revenues achieved through the operations of the legal entities in which they have shares. Kalić Safet was the founder and the executive director of "Daut&Daut" D.O.O Rožaje, which is the founder of "Tajson"D.O.O Rožaje and the majority shareholder in the AD "Kristal"; the accused Kalić Amina is the founder and the executive director of "Tajson" D.O.O Rožaje, and the accused Kalić Mersudin is the responsible official to dispose of pecuniary funds of the legal entities "Daut&Daut" D.O.O Rožaje and "Tajson"D.O.O Rožaje and the executive director of "Turjak" AD Rožaje, the majority shareholder of which is Šabotić Mersada, sister to the accused Mersudin and Safet and the wife to Šabotić Ernest, who is the founder and the joint owner of "M Petrol". According to the banking documentation, through the "CKB" and "Prva Banka", several credit agreements were realized, mostly for the acquisition of fixed assets, paid into the accounts of the accused persons and their relatives. The credits were being repaid from the funds paid from these persons' current accounts to the accounts of the companies "Tajson" D.O.O and "M Petrol" D.O.O.

[43] Kts.br.9/11, for the criminal act from the Article 268 paragraph 4 in relation to the paragraph 1 of the Criminal Code in relation to the Article 49 paragraph 1

[44] Kti.S.br.9/11 dated 30th July 2011

Deciding upon the request of the prosecution office, the judge for investigation of Bijelo Polje Higher Court Vukomir Bošković passed on 4th August 2011 the order on the seizure of assets of the accused, their next of kin and legal entities where they have their shares. With the seizure order tens of properties were seized, as well as passenger vehicles in the name of Safet, Amina, Mersudin Kalić, Sadika (mother), Šabotić Mersada (sister), Šabotić Ernes (son-in-law). The money worth € 45.500,00 was seized from Amina Kalić, and € 21.000,00 from Mersudin Kalić. Assets were also seized from the legal entities in which the above mentioned had their shares, as follows: "Tajson" DOO Rožaje; "Turjak" AD Rožaje; "Turjak" AD Rožaje; "Kristal" AD Rožaje; "Daut&Daut" DO Rožaje; "M Petrol" DOO Rožaje. According to this order, the total value of the seized assets has been assessed to the amount € 28.668.161,69. On 1st December 2011, the out-of-trial panel of the Higher Court in Bijelo Polje rejected as unfounded the appeals of the defense counsels of the accused against the assets seizure order. The Assets Directorate published two public calls for leasing the petrol station "M petrol" at Rožaje, at the starting lease price of € 1.000. This public call also covered the hotel "Rožaje" at the price of € 11.000 and the café "Tajson" at Rožaje at the lease price of € 2.500. Until the moment of the completion of this report, the structures had not been leased due to the fact that there had been no interested lessees, thus the Assets Directorate is looking for the legal possibility of putting the said structures into function[45].

[47] Letter from the Assets Directorate, 11th March 2013

Conclusions and recommendations

Although without continuous monitoring of the work of the competent bodies and greater access to relevant information from this area, it is not possible to offer the response to the question how much the system of criminal justice is really efficient with regards to the issue of the confiscation of the proceeds of crime, the experiences so far have indicated insufficient efficiency in the application of this concept in domestic legal system. In that context, it is necessary to apply literally the existing normative framework and its further development, perceiving fully the financial effects and the strengthening of the autonomy and capacities of the bodies entrusted with the implementation of relevant legal provisions.

Having in mind the above challenges, we think that it is necessary to implement the following recommendations in order for the Montenegrin system of the confiscation of the proceeds of crime to be more efficient and transparent:

- Revise relevant regulations in order to ensure their harmonization with international standards, thus facilitate their practical application;
- Ensure greater independence and unity of prosecution through constitutional-legal guarantees, as well as offer support to the strengthening of capacities and the level of equipment of prosecution office, in order to ensure literal application of the existing legal instruments;
- Work on the improvement of capacities of the authorities engaged in the detection, seizure and confiscation of the proceeds of crime and in the management of the same, through the programme of professional development based on the analyses of the beneficiaries' need and continuous training, especially with regards to the methodology of establishing the extent of the proceeds of crime;
- Enhance inter-institutional cooperation in this area, through better links among the existing databases; centralization of the database on the assets of legal entities, as well as through the establishment of centralized registers of the decisions passed on the confiscation of material gain and the data on confiscated assets and greater control of monetary transactions by the banks and the Central Bank of Montenegro;

- Encourage the development of international and bilateral cooperation in the area of detection, seizure and confiscation of the proceeds of crime based on the concluded agreements and memoranda;
- Ensure continuous support to special investigation teams, through the provision of contemporary analytical means and greater exchange of information on the application of special investigative techniques and methods;
- Ensure more detailed normative regulation of the assets confiscation proceedings, through the development of secondary legislation; exchange of experiences and good practice in the area of assets management, then elaboration of models for the management of confiscated assets from the moment of the seizure or confiscation to the moment of their distribution for socially beneficial purposes;
- Create conditions for high quality expertise from the area of commercial operations, through more precise regulation of the matter related to the organization and procedural position of expert witnesses, but also through greater involvement of financial experts in professional development programmes;
- Work on the improvement of awareness among professional and lay public on the importance of the confiscation of the proceeds of crime.

Civil society opinion poll on confiscation of the proceeds acquired through corruption and organized crime

Basic findings

This report involved three groups of interviewees – NGO representatives, representatives of the media and professional organizations in the area of judiciary. It is apparent that all the interviewees have similar view on the situation in Montenegro as regards the confiscation of the proceeds acquired through corruption and organized crime. This view is relatively negative and the interviewees mainly consider that the efforts of the state in that sense are inadequate, as well as that the effects of the confiscation process are poor and even counterproductive.

Almost unanimously, the interviewees consider that the main problem lies in the bad practice of managing the confiscated assets. Namely, they state that the management of these assets is too costly for the state, that the confiscation process is reduced solely to retribution, that there is still no solution for the confiscated assets to be used in general social purposes.

The second problem which is generally recognized by the interviewees is the issue of transparency in managing these assets. Namely, the majority of interviewees consider that public authorities have failed in that respect, even in relation to regional examples.

Although, the interviewees generally agree that the efforts of public authorities are insufficient with regards to the confiscation of the proceeds of crime, there are considerable differences with regards to the assessments of other factors. While one part of nongovernmental organizations (especially those active in this area) and media, see the responsibility in almost exclusive lack of political will and poor work of public authorities, the other part of the interviewees expands the list responsible to the representatives of civil sector and media themselves due to the creation of the specific climate of distrust which favours this condition.

The following is the list of the identified key obstacles leading to the malfunctioning of the system:

- Lack of political will,
- Specific political culture,
- Auto-censorship dues to the lack of general political culture,
- Insufficient coordination in the work of the competent authorities,

- Insufficient material capacities of the competent authorities,
- Lack of logistical support in the work of the competent authorities,
- Change of competences in conducting investigations which has not been fully implemented,
- Poor financial situation in the country and in the society which encourages organized crime,
- Poor capacities of the competent authorities and the lack of high quality training,
- Insufficient agility of the competent services and authorities to institute investigations at their own initiative,
- Lack of efficient solutions for managing the confiscated material gain,
- Poor quality and biased media reporting on this topic,
- Lack of public understanding of the nature of the proceedings, which produces additional mistrust among citizens.

The interviewees think that basic measures to be implemented in order to increase the efficiency of the system in this sphere are the following:

- Establishing true political will,
- Introduction and promotion of the concept of the social and political responsibilities,
- De-politicization and professionalization of the competent public authorities,
- Analysis of the effects of assets confiscation,
- Adequate solution to the issue of managing the confiscated assets,
- Introducing greater transparency in this area,
- Improving the cooperation and coordination among institutions,
- Increasing investments in the fight against organized crime,
- Utilization of good comparative experiences.

Detailed report with excerpts from the statements

TOPIC ONE:
Are you familiar with the activities undertaken by the state at the plan of the fight against organized crime, as well as in relation to the confiscation and management of the proceeds acquired through organized crime?

The structure of the interviewees ensured a rather relevant group of collocutors for the topic of the fight against organized crime. Namely, the majority of the interviewees deal with this topic in certain ways either directly or indirectly. The NGO representatives mostly implement a series of project activities, and certain number of them are the members of various committees and working bodies at the international or national level in this area. Media representatives are informed through official and unofficial channels and they consider themselves relatively well informed about the topic. The same is worth for the representatives of professional associations (Association of lawyers and Association of judges) involved in the research.

Although the majority of interviewees say for themselves that they are quite well acquainted with the activities undertaken by the state in the area of the fight against organized crime and the confiscation and management of the assets acquired in this way, several of them criticized the way how information is imparted about this topic. Although official public authorities are most frequent source of information, sometimes actively and sometimes through the use of the Free Access to Information Law, the collocutors consider that the information is scarce and occasionally inadequate.

> *"As regards the collection of information, both in the countries of the ex-Yugoslavia and here, the Police Directorate is the predominant source. Besides the official announcements and press releases, police very often, and especially in case of big affairs with political tone, impart unofficial information through journalists whom the inspectors cooperate with and who announce parts of it as they deem required. Because of that, we have unbelievable situations, like in the "Šarić" case, where numerous pieces of information are published, often contradictory, so that one might think of a kind of phantom. Public, practically, cannot know what is the current state of investigation, rather one cannot see fire from smoke"*, explains a media representative.

TOPIC TWO:

To what extent is civil society familiar with the activities undertaken by the state at the plan of the fight against organized crime, as well as in relation to the confiscation and management of the proceeds acquired through organized crime?

It is very hard to make a general conclusion in relation to this question. Generally speaking, all the interviewees can be divided in three categories:

1) Representatives of the part of the civil sector and media who consider the accessible information inadequate and blame for that public authorities, which deny direct access either intentionally or unintentionally.
2) Representatives of professional organizations who mostly consider that everybody is interested in being informed on relevant topics in a correct and decent way and in accordance with laws.
3) Representatives of the second part of civil sector and media who are focused on the problem of disinformation and biased information which creates among the citizens a wrong image of specific events and produces scepticism

Thus, in the first group of responses there would be the comments like:

"*NGO sector greatly contributes to the level and the quality of information about the activities undertaken by the state at the plan of the fight against organized crime. The Government per se does not have a regulated system of valid and timely information of the general public, nor does it have political interest to establish such system*", said by one of the representatives of the civil sector.

Another one similarly pointed out to the problem of human resources in the NGO sector dealing with these and similar topics:

"*… the number of organizations dealing with this area in a systemic and continuous way is very small, mostly because of the lack of capacities – human resources and professional knowledge - but also because of the risks such activities incur, including the risks for personal security endangering privacy.*"

According to the interviewees, the problems encountered by the organizations that deal with the issues of organized crime, as well as inadequate reactions of the state, demotivate citizens:

"*The lack of readiness of the institutions to face these phenomena greatly demotivates citizens to report the cases of corruption and organized crime. There is no example of good practice, nor the so called success stories which would indicate that things essentially change*", one of the interviewees explained.

The second group is composed of those who consider that the existing practice of informing the public about the system of confiscation and management of the proceeds of crime is sufficiently transparent, and that the information being published are sufficient for citizens, and that whoever

wishes to be more thoroughly informed he/she can do it through the request for the free access to information, to the extent it is legally allowed.

Also, they think that the openness of the system towards media cannot be generalized:

> "… there are institutions, which provide prompt and accurate information, but there are also PR teams which deal least with what they should do."

In the third group, there are those who criticize the role of the media in informing the society and the citizens about this topic:

> "*Media are sometimes even unaware that they transmit spins in their race for exclusivism.*"

Among them there are highly critical ones, which point out to very specific harmful consequences of sensationalist reporting. Some of the critics come directly from media field:

> "*In case we take into consideration that a large part of citizens have their impression about this topic dominantly shaped on the basis of the views of certain media, instead on the basis of the official data, I would conclude that they are not quite well informed or at least not in an adequate way. The activities undertaken by the state, often remain in the shade of sensationalist headings or beforehand launched negative campaigns, which reduce the result and render impossible the breakthrough of relevant information. Certain media relativize every progress and the public authorities have got the problem to present the results, since their appearances are finally reduced to apologizing or poor explanations. A model should be found in which essential information will be able to overpower media speculations and scepticism they produce.*"

Other media representatives from this group underline mutual responsibility – of the media and the public authorities which do not do properly their job of communicating with public:

> "*I think that the citizens are mainly ill-informed. More precisely – they are wrongly informed! Why? Because the majority of media manipulate the same information. With that, public authorities traditionally poorly communicate with public, which makes the entire image quite bleak.*"

Among the critics, there are also the representatives of professional organizations, who underline the need for the strengthening of the capacities of the media in order for the same to be able to report properly about this topic:

> "*… since the reports are biased, and there are frequent violations of the presumption of innocence and right to privacy. They consider, furthermore, that civil society contribution is positive, but they also state that it can sometimes be counterproductive, in the way that it can hinder the investigation or the passing of the court decision after the case has been official processed. Every civil oversight is good, even desirable, provided legally established boundaries are observed*".

Finally, several interviewees emphasized that there was a lack of transparency with regards to the disposal of the confiscated assets. They mentioned positive examples from the region, where public authorities opened their doors to the media so that they become familiar with the confiscated assets and the ways the same are used:

"What is missing in this story is that the public is not sufficiently familiarized with the way the confiscated assets are disposed of, or how these assets are scrutinized from the moment of the seizure to the moment when the same have been confiscated by means of an enforceable court decision".

TOPIC THREE:
To what extent is your organization involved in the development, implementation and monitoring of the policies related to the confiscation and management of the proceeds of crime?

The majority of nongovernmental organizations have been involved in the procedure of monitoring the policies related to the confiscation and management of the proceeds of crime. They mostly consider that this kind of involvement is done at their own initiative, although in the last couple of years there has been somewhat more significant trend of the involvement of the civil sector by the public authorities.

One of the civil sector representatives raised the issue of the readiness and of the capacities of the NGOs themselves to participate in the work of important working groups and to contribute to the development and adoption of important state documents in this area:

"The Government is ready to involve NGOs in the procedure of policy development, but it is questionable to what extent does the sector have the capacity to participate in the working groups and to monitor all the laws and strategies being adopted. This constitutes one of the key challenges that the civil sector in Montenegro is faced with."

On the other hand, the media, besides their regular activities of reporting, which might be considered certain kind of monitoring, are not involved in the processes of development, implementation or the monitoring in this area.

Professional organizations, however, consider that they are involved to the extent permitted by the profile of their work.

TOPIC FOUR:
How efficient, effective and transparent is the system of the confiscation and management of the proceeds of crime?

With regards to this topic, the interviewees almost unanimously assess very negatively the system of confiscation and management of the proceeds of crime. Generally, their opinion could be summed up through the words of a representative of a professional organization:

> *"The management could be better in the sense that it is not reduced solely to making it impossible for the persons who the assets were confiscated from to use the same. Activities should be undertaken so as to make the confiscated assets and the material gain generally beneficial."*

Exactly this problem – that it has proven that the confiscated assets are more of a ballast than they are beneficial – has been emphasized with several examples. One of the civil sector representatives illustrated his view with the "Šarić" case by stating the following:

> *"What I know is that so far some € 80.000 have been spent on the maintenance of the assets in the "Šarić" case. This is certainly bad. The judgment has not yet become enforceable in order for the state to be reimbursed and compensated for the costs incurred."*

However, he is aware that the utilization of these assets is not so easy in the situation of a small and closed society as Montenegrin is:

> *"Montenegro is a small country and these assets could be leased or sold. However, being such a small area people do not want to come forward for they know who these assets belong to, for fear, and do not want to manage or purchase the same. In relation to that, the state must find a better solution for the management of the seized assets."*

With regards to the agility of the state and the transparency of work, the opinions are somewhat different. On one side, the representatives of media and civil society are focused on the importance of external pressure which puts the things in motion. On the other side, the representatives of professional organizations see no problem in that whatsoever, and in certain way they welcome the upcoming changes.

> *"The system operates efficiently and transparently to the extent there is a pressure from Brussels and national nongovernmental organizations. There is the impression that the state undertakes international commitments and standards a lot before national institutions are ready to implement them"*, were the words of a representative of an NGO.

Several interviews emphasized the problem of poor capacities of public authorities to deal with this issue in a high quality way. While ones underline the problem of willingness, others emphasize the problem of resources and the lack of training.

"The lack of political will and the necessary capacities is evident, although the latter is more often used as a pretext, shifts can be made even with a smaller number of professional, responsible and de-politicized staff", said a representative of an NGO.

Somewhat more moderate is the view coming from a professional association:

"*Things are inevitably changing, and the EU accession process has decisive effect on that. Nevertheless, certain changes happen with a dynamics which is even greater than the one which the institutions and the society in general can accept. However, this is expected from us in the future too, in case we wish to ensure the compatibility with the European standards. It is necessary to work on the continuous education, primarily of the holders of judicial office, but also of the representatives of other public authorities involved in detecting and processing criminal offences of organized crime. Due to the fact that we mature as a society, the desired changes can be achieved within a foreseeable time, provided there is sufficient political will, work and resources*".

Besides the abovementioned, there is the impression that this area has been neglected in relation to other elements of the reform in the fight against organized crime (thus, according the words of the interviewees, the Action Plan contains only four measures related to the confiscation of assets). Furthermore, they also indicate that the number of financial investigations is still negligible, and that so far the state has seized the proceeds of crime worth less than € one million, and that no decision on confiscation has been passed.

Finally, it is obvious that some of the interviewees are not completely familiar with this matter and that their go beyond the scope of the topic, which, quite possibly, indicates the problem of the capacities of the organizations that deal with this issue, which has already been referred to:

"*The Law on the conflict of interests must be harmonized with international recommendations and practices. The officials must in no way be exempted from this measure. We witness the data on the incomes of certain public officials, which exceed the framework of what is considered official*", was a comment of one of the interviewed organization.

TOPIC FIVE:
What are key recommendations/challenges that impact the functioning of the system?

The interviewees identified a large number of problems and obstacles that affect the functioning of the system. We could classify them in the following way:

- **Lack of political will**

"*"… it is impossible to expect from the state to process and prosecute those criminal groups which at one stage almost openly financed political campaigns or assisted the work of local self-governments, investing the money from criminal activities in developing certain capital projects."*

- **Specific political culture:**

"One way is to dismiss all these people, starting from the Prime Minister. It is up to the citizens of Montenegro who obviously trust them and who are not concerned so much about it. According to the surveys, they are not so much squeamish about it. All polls indicate this."

- **Auto-censorship due to the lack of general political will and specific political culture:**

"The other way is for these people to start doing their job. This is very hard to achieve. Not everything begins from a couple of people in the Government, who call prosecutors and judges to undertake something. Quite a lot of it is in the auto-censorship of the people who should be doing that job. That auto-censorship was created from the understanding that there is no political will for the fight against organized crime and corruption."

- **Insufficient coordination in the work of the competent authorities:**

"Montenegro is a small system and this is an advantage in our context since the information is disseminated fast, but very often the reaction of prosecution is missing. Furthermore, it is necessary to work on better linking all relevant entities, inspection bodies, local self-governments, police. It is particularly important to raise the capacities of the Tax Administration which could be of great importance for the conducting of financial investigations and for other institutions of the system to establish better links with this administration. As the situation is now, financial investigations are carried out mostly by financial crime inspectors for whom it is difficult to achieve significant results since they are not familiar sufficiently with accounting regulations and since they have insufficient experience in following complex money flows, so that the outcome of the procedure greatly relies on the findings and the opinions of economic experts." Or "Slow and poor investigation by the police and prosecution. Insufficiently substantiated indictments and slow work of the courts."

- **Insufficient material resources of the competent authorities:**

"lies in political will and insufficient professional and material resources of the Supreme Public Prosecutor's Office."

- **Lack of logistical support in the work of the competent authorities:**

"This means that the prosecution bodies must have quite a logistics at their disposal in order to be able to obtain these data first of all. One should know that the assets concerned, i.e. whether the holders of the assets are connected with the perpetrators of criminal offences as it is provided for by the law. On the other hand, this is most easily noticed if one has in mind the equipment and the capacity of our prosecution. Such initiative requires strong logistical equipment, sometimes even quite sophisticated, which the prosecution does not possess at the moment."

- **Change of competences while conducting investigations:**

"If observed from the aspect of the actions of the law enforcement bodies, then we have another limiting circumstance, that investigation has been transferred to prosecution, consequently their effect has been narrowed down. In case of a doubt in the existence of a criminal act, they are obliged to inform the prosecutor immediately. No action in a pretrial procedure can be undertaken without a prosecutor".

- **Bad financial situation in the country and within the society which encourages organized crime:**

"If there is a chronic budgetary deficit at the local level and if only six Montenegrin municipalities are self-sustainable, then this opens the space for the appearance of such investors who invest capital of suspicious origin."

- **Poor capacities of the competent authorities and the lack of high quality training:**

"When capacities are concerned, negligible number of training sessions have been organized due to all the challenges and requirements of this system. Besides, training sessions are not well structured, nor are their results sustainable. There is no developed practice, nor are there examples of good practice in Montenegro; the exchange of experiences with other countries obviously does not function sufficiently well."

- **Insufficient agility of the competent services and authorities:**

"If the information I have is accurate, all the accusation for corruption have reached the prosecutors through third parties. No indictment issued by prosecutors has been a result of independent investigation on given matter."

- **Lack of efficient solutions for the management of material gain:**

"Key problem, according to the opinions of the interviewees, lies in the lack of good solutions for the efficient and legal management of the confiscated material gain."

- **Poor quality and biased reporting on the topic:**

"Significant problem, especially in the light of proper public information, is seen in the lack of capacities in the media to report on corruption and organized crime and to carry out research journalism in this area." Or: "Significant problem, especially in the light of proper public information, but also the abuse of media freedoms, is seen in the evident lack of media responsibility, which is a consequence of the premature decriminalization of defamation and insult, and the lack of instruments for effective self-regulation."

- **Lack of public understanding of the nature of the procedure which produces additional mistrust:**

"I also think that our big problem is that the majority of citizens do not understand that in every democracy there is a necessary process before pronouncing a sanction and that no matter how much public is convinced in the irregularity of somebody's activities, this in itself is not sufficient for the punishment to be pronounced. Because of the functioning of the system in almost all countries of the region, during the nineties of the past century, for example, the acquittal for the lack of evidence is almost always interpreted as favouritism or corruption".

TOPIC SIX:
Which normative and institutional changes should happen in order for the system to become operational in a legal and transparent way?

The interviewees gave a series of concrete and principled suggestions:

- **Existence of political will:**

"*existence of political will and readiness for the fight against corruption and organized crime".*

- **Introduction and promotion of the concept of social and political responsibility:**

"Furthermore, it is necessary to build social and political responsibility of the entities which are competent to articulate and define this responsibility, but also the responsibility of the individuals who represent the institutions entrusted with the application of laws".

- **Depoliticization and professionalization of the competent public authorities:**

"It is necessary to appoint professionals without political background and conflict of interests as the heads of public institutions, strengthen and depoliticize judiciary and start with the confiscation of assets where there are conditions for that".

- **Analysis of the effects of the confiscation of assets:**

"There is another thing to be analyzed. Namely, what are the effects of the seizure of assets? If as a result of the seizure the entity stopped working, then there is a twofold negative effect – that seizure is undertaken and that the assets must be taken care of, and that on the other hand these assets do not bring any profit, in order to possibly fund basic functions of every company from such profit. Essentially, one should think twice before pronouncing such a measure."

- **Resolve adequately the issue of management of confiscated assets and introduce greater transparency in this area:**

"Also, it is necessary to create conditions for the establishment of a self-sustainable system of managing the assets (in that sense, the examples from Italy are useful) and direct its effects towards resolving social problems, since it is not known at this moment which purposes the confiscated assets are used for; such information is not transparent nor accessible to the citizens and there is a realistic risk that they might be used outside the public interest, for illegal enrichment of individuals or irrational spending of public resources."

- **Enhance the cooperation and coordination among institutions:**

"The cooperation among the institutions at the national and regional level is of crucial importance, as well as securing sufficient number of qualified financial experts without whose assistance these crimes will not be detected nor processed efficiently."

- **Increase investments and use good comparative experiences:**

"Besides the experience gained by all those involved in the fight against organized crime, greater amount of the money which would be invested in order to make the fight a successful one, it is also necessary to use the experiences of the systems which have passed along the same path before us. In that sense, certain shortcuts could be made in the progress towards reducing organized crime to the least possible degree. This comprises training, cooperation with regional and international prosecution offices and other institutions involved in the fight against organized crime."

ADDITIONAL TOPIC SEVEN, SOLELY FOR MEDIA REPRESENTATIVES:
Is there research journalism in this area? How do you estimate its contribution to the overall fight against organized crime and corruption?

Only media representatives were asked this question. The objective was to get from them some kind of self-evaluation and reflexion with regards to the condition in research journalism in Montenegro. This is particularly important because the need for high quality research journalism came up on several occasions during the interviews with media representatives, civil sector representatives and professional organizations, as well as with the media themselves.

Most of the answers were very pessimistic and negative. With the exception of one representative who described the condition in the following words, the others said that in Montenegro there was no research journalism and it could not exist either.

"We have journalists who follow certain topics. Among them, there are those who follow and research the topic of organized crime. The contribution is big. It is reflected in the fact that we publish articles that we write. Naturally, observing the rules of journalism. We write about the things that are problematic for Montenegrin citizens. If it was not for that team of people, Montenegrin citizens would not be acquainted with many events".

If this relatively positive assessment of the situation in one's own media house is excluded, other interviewees were quite negative. Some of them blamed media community explicitly for such condition:

"Essentially not! The contribution of the majority of the media is harmful, since they do not research, but publish what they are delivered by their competitors."

The others, however, explained the situation with certain external factors, like the pressure on media:

".Research journalism in Montenegro is not on an enviable level. We still witness the threats and the attacks on journalists directly before or immediately after the publishing of some research articles. The issues of organized crime and corruption are often not covered in the media exactly because of the insufficient security of journalists. In order to improve research journalism there is a need for professional training of journalists and additional financial means. Research journalism creates critical awareness of the citizens and it needs to be improved."

The third group, however, thinks that research journalism depends on finances, and that practically it cannot exist in Montenegro, just like in a large number of other underdeveloped countries:

"Not only does research journalism not exist in Montenegro, but it is also lacking in the many parts of the world. At that, I am not thinking only of the underdeveloped part of the world. Research journalism requires long-lasting work and substantial amount of money. The only information on criminal structures comes to us from the police, and not from these structures. Media houses have no money or opportunities to make it possible for people to infiltrate themselves among criminal structures, to be involved in that matter for years without doing anything else. If they researched this topic for years they would know exactly what it is all about. Only a couple of media houses in the world are capable of making it possible for their people to deal with research journalism, because they have big funds and because they have many journalists. They can assign one or two of them to do the research in drug smuggling or arms smuggling for years, just like what the BBC was doing in the territory of the Balkans. That is research journalism. Public feels that research journalism means asking two parties about certain issue, some problem. That is not research journalism. That is the most normal professional article. If certain problem appears, two sides give their opinions. That is normal, professional journalism. Research journalism requires lot of skills, money and time. We have none of that."

International standards and European Court of Human Rights jurisprudence on the confiscation of the proceeds of crime

- Annex -

This briefing paper provides an overview of international standards (including European Union instruments) and European Court of Human Rights ("**ECtHR**") jurisprudence on the confiscation of the proceeds of crime. First, it addresses the questions of what confiscation is and why it is important. Second, it identifies the key international standards and gives an indication of the scope of each one. Third, it explains the approach that those standards take on key aspects of confiscation. Finally, it addresses prominent aspects of the ECtHR jurisprudence on confiscation. It focuses primarily with the judicial phase of confiscation proceedings in which the final decision on confiscation is made, although it also touches upon issues such as the freezing of assets with a view to confiscation and on international cooperation in confiscation matters.

Introduction

What is confiscation?

Confiscation is the final or permanent deprivation of property by order of a court.[48] It may also include such a deprivation of property by order of a competent authority other than a court.[49] Confiscation is not necessarily punitive in nature[50] and it is not necessarily limited to deprivations of property that follow from criminal proceeding.[51]

The wide definition of confiscation indicates that it is a flexible concept. There are a number of variables for a legislature to consider in designing confiscation measures. These variables include: the scope of property that is potentially liable to confiscation; the types of criminal (or other illicit) behaviour should potentially lead to confiscation; and the standards and burdens of proof should be applied in determining whether or not particular assets should be liable to confiscation. These and other issues are considered below in the light of the international standards.

[48] Articles 1 of the Strasbourg Convention, the Warsaw Convention and the 2005 FD: "'Confiscation' means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property." Articles 2 of UNTOC and UNCAC and article 1 of the Vienna Convention: "'Confiscation', which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority."

[49] It is so widened in the definition of 'confiscation' used in UNTOC, UNCAC or the Vienna Convention, but not that used in the Strasbourg Convention, the Warsaw Convention or the 2005 FD

[50] The definitions of 'confiscation' in the Strasbourg Convention, the Warsaw Convention and the 2005 FD state that confiscation can refer to a "penalty" or a "measure".

[51] It is so limited in its definition in the Strasbourg Convention, the Warsaw Convention and the 2005 FD, but not in UNTOC, UNCAC or the Vienna Convention.

Why is confiscation important?

IAlthough there are differing views on exactly what a confiscation regime should look like, confiscation is nonetheless widely recognised and promoted as a powerful weapon in the fight against serious crime.[52] It serves a number of purposes in this regard. When successfully implemented it has the potential:

- To undermine criminal incentives and thereby to act as a deterrent to illicit activities.
- To protect the legitimate economy from corruption and the infiltration of illegal assets.
- To bolster tax revenues in the legitimate economy.
- To remove property that might otherwise be used by a criminal organisation in committing further offences.
- To impact on the leaders of criminal organisations.
- To generate assets that can be used for the public good.
- To assist in upholding the rule of law.

[52] See, e.g., the inclusion of confiscation in Financial Action Task Force Recommendation 4 of 2012.

International standards

International standards

The following are the key international standards relating to the confiscation of the proceeds of crime.

1. UN Convention again illicit traffic in narcotic drugs and psychotropic substances of 1988, which came into force in November 1990 (the "**Vienna Convention**"). The Vienna Convention was introduced to promote cooperation in order to effectively address various aspects of international drug trafficking.

2. UN Convention against Transnational Organised Crime of December 2000 ("**UNTOC**"). Its scope extends to promoting cooperation to prevent and combat 'transnational' offences involving organising criminal groups. The offences covered relate to participation in organised criminal groups, money laundering, corruption and obstructing justice as well as other 'serious crime' (punishable by a maximum of at least four years' imprisonment or a more serious penalty).[53]

3. UN Convention against Corruption ("**UNCAC**") of December 2005, which is intended to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; its scope in respect of confiscation is limited to the proceeds of offences established in accordance with its own provisions.

4. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime of 1990 (ETS 141) (the "**Strasbourg Convention**"). The Strasbourg Convention has potentially a much wider scope than the three UN Conventions listed above in

[53] See Article 3 of UNTOC. The scope has been expanded by Protocol also to cover certain human trafficking and arms trafficking offences.

that it is not in itself limited to confiscation of the proceeds of any particular category of offences. However, when signing or ratifying the Strasbourg Convention parties may by declaration limit the application its provisions requiring the adoption of confiscation measures to specified offences or categories of offences.

5. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism of 2005 (the "**Warsaw Convention**"). The Warsaw Convention has special application to the financing of terrorism, recognising that funds allocated for the financing of terrorism should be targeted through confiscation measures, even where such funds have legitimate origins. However, it also applies to confiscation measures more generally, although again Contracting States may limit its application by declaration.

6. The International Convention for the Suppression of the Financing of Terrorism (1999) (the "**Terrorist Financing Convention**"). The Terrorist Financing Convention has relatively basic provisions. It provides that each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of proceeds derived from, and of funds used or allocated for the purpose of committing, the terrorist financing related offences within its scope. It is silent on other forms of confiscation, so it is not considered further below.

European Union instruments

The key current EU instruments on confiscation are set out in items 1 to 5 of the list below. Except in relation to 'extended confiscation'[54], these instruments apply in respect of any criminal offences punishable by imprisonment for more than one year. Member States ("MS") are obliged to introduce confiscation measures in respect of all such offences.[55] Accordingly, these EU instruments promote harmonisation to a significantly greater degree than the international standards described above.

However, the current EU framework is not without its limitations and, perhaps as a result, a proposed new European Union Directive on confiscation was adopted by the European Commission in March 2012 (see item 6 of the list below). The proposal includes fuller provisions for the harmonisation of confiscation laws within the EU in relation to certain specified serious offences.

[54] 'Extended confiscation' is explained in the third part of this paper.

[55] Within the EU, ordinary confiscation, value confiscation and the confiscation of instrumentalities must be available for all crimes punishable by a maximum of more than one year's imprisonment. The 2001 FD provides that MS must not limit the application of the Strasbourg Convention beyond that extent and the 2005 FD obliges MS to harmonise their confiscation laws to provide for ordinary confiscation in respect of all such crimes.

Due to changes to the conferral of powers relating to confiscation following the entry into force of the Lisbon Treaty, the Proposed Directive is limited in coverage to offences specified in Article 83 TFEU.[55] In order to retain a degree a harmonisation of confiscation laws in respect of criminal offences that fall outside of the scope of the Article 83, the Proposed Directive therefore maintains in force selected provisions of the 2005 FD.

1. Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing and confiscation of instrumentalities and the proceeds of crime, which entered into force on 5 July 2001 and the implementation date of which was 31 December 2002 (the "**2001 FD**")

2. Council Framework Decision 2003/577/JHA of 22 July 2003 on mutual recognition of orders freezing property or evidence, which entered into force on 2 August 2003 and the implementation date of which was 2 August 2005 (the "**2003 FD**")

3. Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, which entered into force on 15 March 2005 and the implementation date of which was 15 March 2007 (the "**2005 FD**")

4. Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, which entered into force on 24 November 2006 and the implementation date of which was 24 November 2008 (the "**2006 FD**")

5. Council Decision 2007/845/JHA of 6 December 2007, which includes the obligation on MS to set up national Asset Recovery Agencies, which took effect from 18 December 2007 and the implementation date of which was 18 December 2008

6. Proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union; Brussels, 12.3.2012 COM(2012) 85 final (the "**Proposed Directive**")

[56] Those offences are terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime (including illicit arms trafficking committed in that context).

The approach of the international standards to key aspects of confiscation

Freezing orders and investigative powers

Confiscation will often be preceded by the freezing of assets during an investigation, temporarily preventing dealings in those assets. The freezing of assets may be important in preventing the concealment or dissipation of property that may subsequently become liable to confiscation. All of the major international standards[57] addressed in this paper oblige parties to adopt measures allowing for the freezing of assets and other investigative powers. These are developed further in the Proposed Directive, including safeguards to ensure that a freezing order must not remain in force longer than necessary and frozen property that is not confiscated must be returned to its legitimate owner.[58]

Ordinary (conviction based) confiscation

Ordinary, conviction based confiscation is one of the most basic confiscation tools, alongside value confiscation and the confiscation of instrumentalities. Ordinary confiscation is the confiscation from a person of economic advantages or benefits derived from a criminal offence for which that person has been finally convicted. It enables a court by order to deprive a person of the proceeds of the crime(s) of which that person has been convicted.

All of the international standards listed above include an obligation on parties to adopt any necessary measures to enable ordinary confiscation of the 'proceeds' of crimes within their

[57] The Vienna Convention, UNTOC, UNCAC, the Strasbourg Convention and the Warsaw Convention

[58] Freezing orders are subject to the same proportionality tests as confiscation orders, but their temporary and preventive nature is likely to help the case that they are proportionate (e.g. Raimondo v Italy 12954/87, 22 February 1994 and Arcuri v Italy 52024/99, 5 July 2001)

respective scope.[59] The definition of the 'proceeds' of crime is therefore important in this regard:

- In both UNTOC and UNCAC the 'proceeds' of crime means any property (including legal documents or instruments evidencing title to, or interest in, such property) derived from or obtained, directly or indirectly, through the commission of an offence.
- The Vienna Convention has very similar provision in respect of offences within its scope.
- The 'proceeds' of crime are defined in the Strasbourg Convention, FD 2001 and FD 2005 as any economic advantage from criminal offences, which may consist of property of any description and may also include any legal documents or instruments evidencing title to, or interest in, such property.
- They are defined more widely still in the Warsaw Convention as any economic advantage, *derived or obtained*, directly or indirectly, from criminal offences, which may consist of property of any description and also any legal documents or instruments evidencing title to, or interest in, such property.
- The Warsaw Convention also provides for the confiscation of laundered property.
- 'Proceeds' is widely defined in the Proposed Directive: it means "any economic advantage derived from a criminal offence; it may consist of any form of property [including legal documents or instruments evidencing title to, or interest in, such property] *and includes any subsequent reinvestment or transformation of direct proceeds by a suspected or accused person and any valuable benefits*."

Value confiscation and intermingling

In some situations it may not be possible to seize the direct proceeds of crime, which may make ordinary confiscation difficult or impossible. This may arise where the proceeds of crime have been transformed or converted into another form of property. In such a case, a measure which enables the confiscation of an amount of money that corresponds to the value of the proceeds of a crime may be an effective weapon. This form of confiscation is known as value confiscation.

[59] When signing or ratifying the Strasbourg Convention parties may limit the application of this provision in Article 2(1) on the adoption of confiscation measures to specified offences or categories of offences. The application of the equivalent provision in the Warsaw Convention may also be limited either to offences punishable by a maximum of more than one year's imprisonment or by reference to a list of specified offences, provided that ordinary confiscation must apply to money laundering and to the categories of offences listed in the appendix of the Convention

Another situation in which it may not be possible to seize the direct proceeds of crime may arise when such proceeds have been mixed with property acquired from legitimate sources. This is known as intermingling. The issue of intermingling may be addressed by the introduction of specific measures allowing for the confiscation of an amount of the mixed property capped at the assessed value of the original proceeds of crime.

UNTOC, UNCAC, the Vienna Convention and the Warsaw Convention all oblige parties to adopt value confiscation measures; additionally they oblige parties to enable the confiscation of property into which the proceeds of crime have been transformed or converted and to enable the confiscation of intermingled assets up to the assessed value of the proceeds of crime that have been mixed.

The Strasbourg Convention, the 2001 FD[60] and the 2005 FD provide explicitly only for an obligation to adopt value confiscation measures and do not directly address issues relating to transformation, conversion or intermingling of assets. These issues are perhaps intended to be addressed through the wide definition of 'proceeds' in these three instruments, which covers any economic advantage from a criminal offence. It may be considered that a transformed, converted or intermingled asset that was ultimately derived from an offence could be confiscated, without any explicit additional provisions, on the basis that it remains an economic advantage whether or not its form has changed.

The Proposed Directive follows the approach of the existing EU instruments in this regard, except that it contains an even wider definition of 'proceeds' which makes it absolutely clear that an economic advantage that derives from a criminal offence includes any subsequent reinvestment or transformation of direct proceeds by a suspected or accused person. Accordingly, it makes clear that confiscation powers should be sufficiently widely drawn to encompass such reinvested or transformed assets.

Confiscation of instrumentalities

Instrumentalities are any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences. They may include, for example, vehicles that are used to conceal goods in trafficking situations or equipment intended for use in carrying out a crime. UNTOC, UNCAC and the Vienna Convention all oblige parties to adopt measures to enable confiscation of property, equipment or other instrumentalities used in or destined for use in offences covered by those Conventions. The Strasbourg Convention, the Warsaw Convention, the 2005 FD and the Proposed Directive all provide similarly that each party shall introduce measures to enable it to confiscate instrumentalities[61] (as defined in the first sentence of this paragraph).

[60] Although the drafting of the 2001 FD on this point is not very clear, it seems that value confiscation may be also limited in cases where the value is less than EUR 4,000.

[61] 'Instrumentalities' is not a defined in UNTOC, UNCAC or the Vienna Convention

Confiscation of income and other benefits derived from the proceeds of crime

The proceeds of crime, or property into which such proceeds have been transformed or converted, may give rise to income or other valuable benefits. It is obviously important that all such benefits are subject to confiscation in appropriate cases if it is to be ensured that criminal activity is not rewarded. All the major international standards address this issue, although they do it in differing ways.

UNTOC, UNCAC, the Vienna Convention and the Warsaw Convention all provide expressly for the confiscation of such income and benefits in the same manner and to the same extent as the proceeds of crime. The Strasbourg Convention and the 2005 FD address the issue differently through a definition of the 'proceeds' of crime that encompasses any economic advantage from a criminal offence. Arguably, at least, this covers advantages in the form of income derived from the proceeds of crime, although there is perhaps a concern that this isn't entirely clear in that the Proposed Directive extends the definition of 'proceeds' explicitly to cover "any valuable benefits".

Extended confiscation

Criminal organisations may engage in multiple criminal activities. On that basis it may be considered appropriate to enable confiscation proceedings in respect of one crime to encompass an extended set of assets that may also have an illicit origin. Extended confiscation is a measure used to achieve this. It involves the confiscation of assets which go beyond the direct proceeds of a specific crime and extends the scope of a confiscation order to cover additional illegally obtained assets. A power of extended confiscation would typically enable confiscation of additional assets that are determined to be the proceeds of crimes that are similar to crimes in relation to which ordinary confiscation is being sought. In cases of extended confiscation there is therefore no requirement to establish a link between all of the suspected criminal assets and a specific criminal offence.

The United Nations and Council of Europe Conventions do not directly address the possibility of extended confiscation measures. The 2005 FD, on the other hand, does provide that extended confiscation must be available in relation to property belonging to persons convicted of certain serious organised crimes and terrorism offences. It puts forward three alternative sets of rules, at least one of which each MS must implement.

The Proposed Directive also provides for extended confiscation, but in place of the potentially complicated approach in the 2005 FD, it instead requires a single minimum standard approach to extended confiscation. This interesting proposal subjects extended confiscation to a tougher standard of proof (when compared with the balance of probabilities standard) and comes with two important exclusions as safeguarding measures. The proposed standard of proof is that a

court must find it "substantially more probable" that the property in question has been derived by the convicted person from "similar criminal activities" than from other activities. Exclusions apply where the person has been acquitted of those similar criminal activities and where criminal proceedings are not possible due to prescription. The Proposed Directive also proposes, in relation to extended confiscation, that the person affected must have an effective possibility of contesting the probability that the property in question is derived from similar criminal activities.

Reversing the burden of proof

One important element of a confiscation regime, both in relation to extended confiscation and more widely, is the way in which it determines which assets should be properly liable to be confiscated. It may be difficult to prove that assets have an illicit origin without the owner's assistance, so it may be considered appropriate for confiscation measures to place onto the defendant the burden of proving that assets have a licit origin. A number of the international standards[62] tentatively suggest this approach by providing that each party may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles[63] of its domestic law, and with the nature of the judicial and other proceedings. The Warsaw Convention is a little less tentative. It obliges parties to adopt measures in respect of serious offences (as defined by national law) requiring an offender to demonstrate the origin of property allegedly liable for confiscation, although this obligation can be disapplied by declaration.[64] The ECtHR has found specific systems involving reversed burdens of proof within limits to be compatible with the European Convention on Human Rights ("**ECHR**").[65] However, the ECHR does "[require] States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[66]

[62] UNTOC, UNCAC and the Vienna Convention

[63] In UNCAC the reference here is to "fundamental principles"; in UNTOC and the Vienna Convention the reference is merely to "principles".

[64] See article 53(4)

[65] E.g. Grayson and Barnham v UK App. No. 19955/05 and 15085/06, 23 December 2008

[66] Paragraph 28, Salabiaku v France App. No. 10519/83, 7 October 1988

Third party confiscation

A criminal may attempt to avoid confiscation measures by transferring assets representing the proceeds of crime to third parties, such as relatives or persons over whom the criminal has control. Third party confiscation refers to confiscation of assets in the hands of such third parties.

The United Nations and Council of Europe Conventions do not contain special rules on third party confiscation, although it is potentially covered by their general confiscation provisions. The 2005 FD expands on the issue of third party confiscation in the context of extended confiscation: MS may consider adopting measures to enable extended confiscation in the context of certain serious organised crimes and terrorist offences from the closest relatives of the person concerned and from controlled persons.

The Proposed Directive contains developed provisions on third party confiscation. It explicitly requires the introduction of measures enabling third party confiscation, but only in the following situations:

- where the property is subject to restitution;
- where an assessment on the convicted person is unlikely to succeed; or
- where the third party has received the assets for less than market value consideration and:
  - has some knowledge (actual or constructive) of the illicit origin of proceeds, or
  - has some knowledge (actual or constructive) that the transfer is being effected in an attempt to avoid confiscation of other property.

It also provides that third parties whose property may be affected must be able to participate in proceedings to the extent necessary to preserve their rights.

In terms of protections for 'innocent third parties, the ECHR jurisprudence provides very limited protections in this respect.[67] However, confiscation provisions in UNTOC, UNCAC and the Vienna Convention are expressly not to be construed to prejudice the rights of bona fide third parties, and the Strasbourg Convention provides that each party shall adopt such measures as may be necessary to ensure that interested parties affected by confiscation measures under the Convention shall have effective legal remedies in order to preserve their rights.

[67] In AGOSI v UK App. No. 9118/80, 24 October 1986 a seizure order against an 'innocent owner' was upheld.

Civil (non-conviction based) confiscation

There are certain situations in which criminal conviction-based confiscation may not be possible. For example, there may be insufficient evidence to support a criminal prosecution, or the suspect may have died, or have become a fugitive, or been acquitted following trial. In such situations, there is no criminal conviction, but it may still be considered desirable to enable confiscation proceedings, subject to appropriate safeguards. Some States do provide for confiscation proceedings, under certain conditions, in the absence of a criminal conviction. This is referred to as civil confiscation or non-conviction based confiscation.

The international standards have not detailed a highly developed approach to civil confiscation. This may be because the operation of confiscation in the absence of a conviction is a particularly sensitive area due to the potentially severe effects of confiscation measures that may be imposed on the basis of civil standards of proof and the fact that confiscation is so often procedurally linked with a criminal trial. The Vienna Convention, UNTOC, UNCAC, the Strasbourg Convention and the Warsaw Convention do not explicitly make criminal conviction a precondition to confiscation, but their definitions of 'proceeds' and their provisions on confiscation of instrumentalities suggest that the focus is very much on conviction based confiscation.

However, there is some nascent development of the international standards in this area. UNCAC provides that, for mutual assistance purposes, parties shall "consider" taking measures to allow confiscation of property of foreign origin under an order issued by the court of another party without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.[68]

Within the European Union standards recognising civil confiscation are developing. The 2005 FD provides, in relation to tax offences, that MS may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence. In 2008, the European Commission suggested that Member States consider introducing civil confiscation measures.[69] This has been taken forward in the Proposed Directive, which requires the introduction of civil confiscation, albeit only in very limited circumstances where the death, illness or flight of the suspected or accused person causes problems in pursuing a criminal conviction and on the proviso that the person whose property is affected must be represented by a lawyer.

[68] See article 54(1)(C) of UNCAC

[69] Paragraph 3.3.1, Communication from the Commission to the European Parliament and the Council: 20.11.2008, COM (2008) 766 final, "Proceeds of organised crime, Ensuring that 'crime does not pay'"

International cooperation

UNTOC, UNCAC, the Vienna Convention, the Strasbourg Convention and the Warsaw Convention recognise the importance of international cooperation in relation to confiscation and include details provisions to that effect.[70] The EU approach moves from a system of mutual assistance to a system of mutual recognition. The 2006 FD aims to introduce within the EU a system under which one MS must recognise and execute in its territory a confiscation order issued by a criminal court of another MS; and there are limited grounds for non-recognition or non-execution of such an order.[71] The 2001 FD provides that requests from other MS relating to confiscation and related measures must be treated with the same priority as is given to such measures in domestic proceedings.

[70] See UNODC Manual on International cooperation for the purposes of confiscation of the proceeds of crime: http://www.unodc.org/documents/organized-crime/Publications/Confiscation_Manual_Ebook_E.pdf

[71] The 2003 FD provides similarly in respect of freezing orders.

Key aspects of echr jurisprudence on confiscation

Proportionality and interferences with the peaceful enjoyment of property

Article 1 of Protocol 1 of the ECHR ("**P1-1**"): "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

Each of the three sentences of P1-1 embodies a distinct rule; the ECtHR has generally found that confiscation orders amount to a 'control of use' of property within the third sentence, rather than a 'deprivation'.[72] "However, the three rules are not 'distinct' in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in light of the general principle enunciated in the first rule."[73] This means that the application of the rule in the third sentence does not automatically result in a finding that there has been no violation. Instead, the ECtHR has typically found that a confiscation measure is an interference with a person's property rights. However, such an interference may be justified if it is provided by sufficiently precise and foreseeable law and pursues a legitimate aim[74] in a way that is proportionate.[75] The difficult questions in confiscation cases tend to arise in relation to the issue of proportionality.

[72] E.g. AGOSI v UK App. No. 9118/80, 24 October 1986 or Butler v UK App. No. 41661/98, 27 June 2002

[73] Paragraph 48 of AGOSI

[74] A 'control of use' within the third limb must be in "the general interest" or "to secure the payment of taxes or other contributions or penalties".

[75] *Baklanov v Russia* App. No. 68443/01, 9 June 2005

The means employed by a confiscation measure must be proportionate to the aim pursued.[76] There are relevant factors on both sides of the equation. Factors relating to the measure, such as the nature and effect of the confiscation (taking reasonable account of the applicant's conduct)[77] must be weighed up against factors relating to the object of the law in question[78] The requirement of proportionality then requires: "the court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual or individuals concerned… In determining whether a fair balance exists, the court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question."[79]

A fair balance is more likely to be struck, and a measure is therefore more likely to be proportionate, if there are certain safeguards in place for the benefit of persons affected. These include:[80]

- Any discretion to impose the measure in question is not unfettered
- The imposition of the measures is subject to judicial supervision
- The competent authorities in question have to make their case out based on the evidence
- All presumptions applied were rebuttable
- The person affected is able to adduce evidence
- All the evidence is properly assessed by the court
- The avoidance of excessive delay (any interference should not be of excessive duration)
- The law provides for effective remedies (whether or not they are pursued)[81]

Given the importance of the aims typically pursued by confiscation measures and the wide margin of appreciation States enjoy in respect of the framing and enforcement of such measures, it is perhaps not surprising that the ECtHR has been somewhat reluctant to make findings of disproportionality in confiscation cases. However, the confiscation of foreign currency with a lawful origin following a customs offence of non-declaration of importation of that cash (where it had been lawful to import it) has been found disproportionate.[82] In that case, the applicant had no prior criminal record, there was no suggestion of possible further criminal activity and the State risked suffering no pecuniary loss from the applicant's offence. The ECtHR found that the confiscation in question was deterrent and punitive in purpose, but the applicant had already been

[76] See paragraph 36, *Air Canada v UK* App. No. 18465/91, 5 May 1995
[77] See paragraph 54 of *AGOSI*
[78] So if the object is the combating of drug trafficking for example (e.g. *C.M. v France* App. No. 28078/95, 26 June 2001 and *Butler v UK* App. No. 41661/98, 27 June 2002) the measure against it is more likely to be proportionate than if the object is to deter less serious illicit behaviour (e.g. *Ismayilov v Russia* App. No. 30352/03, 6 April 2009)
[79] See paragraph 52 of *AGOSI*
[80] *Butler v UK* App. No. 41661/98, 27 June 2002
[81] *Air Canada* v UK App. No. 18465/91, 5 May 1995
[82] *Ismayilov v Russia* App. No. 30352/03, 6 April 2009

punished once for his offence. It found that the confiscation therefore imposed an "individual and excessive" burden on the applicant, stating that "the interference should correspond to the gravity of the infringement."[83] Other examples of findings of disproportionality include: where an innocent owner of property suffered excessive delay in the return of their confiscated goods;[84] and where third parties affected by confiscation measures were not given the chance effectively to challenge them.[85] Though such findings are relatively unusual, where the ECHR applies, the proportionality of confiscation measures should be carefully weighed up to ensure a fair balance has struck in each case.

Fair trial rights

The first sentence of article 6(1) provides: *„In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

The Proposed Directive seeks to require States to ensure suspects affected by confiscation have fair trial rights, but interestingly, article 6(1) itself will not always be applicable to confiscation proceedings. This is because article 6(1) will only apply under its criminal head in the "determination" of a "criminal charge", which may not be the case, for example, in relation to preventive or provisional measures.[86] Similarly, article 6(1) will only apply under its civil head in the "determination" of a person's "civil rights and obligations".[87] Again, it applies only in determinations, so it does not apply to interim or provisional measures taken prior to a decision on the merits. Only exceptionally would it apply to interim orders where they partially determine the rights of the parties in relation to a final claim.

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[83] Paragraph 38 of *Ismayilov*

[84] *Jucys v Lithuania* 5457/03, 8 January 2008

[85] *Denisova v Russia* 16903/03, 1 April 2010

[86] Conviction based confiscation has been described as analogous to a sentencing procedure and as punitive in nature, such that the criminal head of article 6(1) is applicable (*Phillips v UK* App. No. 42087/1998, 5 July 2001). However, this will depend on the circumstances. Where the proceedings involve no finding of guilt and have no implication for a person's criminal record, the criminal head is less likely to be engaged (*DASSA Foundation v Liechtenstein* App. No. 696/05, 10 July 2007). A civil confiscation measure made as a preventive measure rather than as a criminal sanction has been found not to engage the criminal head of article 6(1) (see *Butler v UK* App. No. 41661/98, 27 June 2002). Similarly, a civil confiscation process in rem that did not involve a criminal charge, a provision criminal in nature, the involvement of the criminal courts or any threat of criminal sanctions in the event of non-compliance has been held not to involve the determination of a criminal charge (*Air Canada v UK* App. No. 18465/91, 5 May 1995). (See also *Walsh v UK* (App. No. 43384/05) (November 2006) and *Arcuri v Italy* App. No. 52024/99, 5 July 2001.)

[87] E.g. this civil head was found to be applicable in *Arcuri v Italy* App. No. 52024/99, 5 July 2001 dec., though the risk of arbitrariness was avoided before the Italian courts, so there was no violation of that head.

Presumption of innocence

Article 6(2) ECHR: "*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*"

The right to a presumption of innocence (like the minimum rights set out in article 6(3) ECHR) applies only to a person charged with a criminal offence. 'Charged with a criminal offence' has an autonomous ECHR meaning.[88] The presumption normally ceases to apply in sentencing proceedings, including in respect of confiscation proceedings following a conviction, unless statements or accusations are made in those proceedings that amount to the making of a new charge.[89] A new charge may be made through a statement imputing criminal liability; a finding a facts made in sentencing proceedings that implicitly points to criminal activity is not enough to engage article 6(2).[90]

The relative clarity of the jurisprudence described above is somewhat muddied by the judgment in *Geerings*.[91] In that case the applicant had been tried for a number of offences and had been convicted of some, but acquitted of most of them. He had not been shown to have assets of unexplained provenance. Nonetheless, the court imposed a confiscation order on him, based on a less stringent standard of proof, in respect of the offences of which he had just been acquitted. The ECtHR judged that this extended confiscation order violated his right to presumed innocence, stating that it amounted to a determination of his guilt, without him having been found 'guilty according to law'.[92] Any proposed confiscation in respect of offences of which a person has been acquitted therefore requires careful consideration in light of this case law.

Retrospective penalties

The second sentence of article 7 reads: "*Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*"

[88] *Engel v The Netherlands* (No. 1) 1976 1 EHRR 647; three criteria have been used by the ECtHR to decide whether confiscation proceedings in sentencing amount to a new charge: the national law classification; the essential nature of the proceedings; and the type and severity of the penalty.

[89] For example, *Phillips* (41087/98) and *Van Offeren v The Netherlands* (dec.) no. 19581/04, 5 July 2005 are cases in which article 6(2) was found not to apply because the confiscation proceedings in question were part of the sentencing in those cases. Common features of those two cases were: the applicant in question had been convicted of drugs offences; the applicant was suspected of additional drugs offences; the applicant demonstrably held assets of no established provenance; those assets were reasonably presumed to have been obtained from illegal activity; and no satisfactory explanation was given by the applicant.

[90] *Y v Norway* (2003) 41EHRR 87

[91] See *Geerings v The Netherlands* App. No. 30810/03, 1 June 2007

[92] Cf. an interesting discussion of this area by the UK Supreme Court in Gale v SOCA [2011] UKSC 49

The retrospective application of an increased penalty is prohibited by this provision.[93] A confiscation order made under a law that came into effect after the alleged offences to which the order relates will violate article 7 if the order imposes a 'penalty'. (The Strasbourg and Warsaw Conventions do not commit on this issue, referring to confiscation as a "penalty or measure".) 'Penalty' is an autonomous ECHR concept. In deciding that a confiscation order made under the UK Drug Trafficking Offences Act in respect of an offence committed before the Act came into force was an additional 'penalty', and therefore violated article 7, the ECtHR gave the following guidance on the matter: "The starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence'. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity."[94] This jurisprudence would require consideration in respect of any retrospective application of confiscation measures.

[93] See, e.g., *Achour v France,* App. No. 67335/01

[94] See paragraph 28, *Welch v UK* App. No. 1744/90, 9 February 1995; see also *DASSA Foundation v Liechtenstein* App. No. 696/05, 10 July 2007

Conclusion

There is a broad consensus in the international standards on the basic elements of a conviction based confiscation regime: ordinary confiscation, value confiscation (including intermingling and related issues), the confiscation of instrumentalities and the confiscation of income and related benefits. The consensus in the international standards is much less marked in respect of extended confiscation, civil confiscation and issues relating to where the burden of proof should lie in establishing the scope of assets liable to be confiscated. In addition, the category of crimes to which each standard relates differs significantly.

Confiscation has been subject to the scrutiny of the ECtHR. With only limited exceptions, clear, prospective confiscation measures that are backed up by fair and effective procedures and intended to combat serious criminal activity are very likely to be compatible with the ECHR. There are, however, areas that may be sensitive to future challenges, perhaps particularly relating to developments in extended confiscation and civil confiscation measures.

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Useful links

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