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Proposals for the improvement of legal framework

SEIZURE AND MANAGEMENT OF PROPERTY DERIVED FROM CRIMINAL ACTIVITY

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Introduction

This document aims at presenting specific proposals for the improvement of the Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity, based on the experiences of Italy and Croatia.

Part one of this document provides a review of key disadvantages of the legal framework that regulates the seizure and confiscation of material benefit derived from criminal activities, as well as the management of that material benefit.

Part two contains specific proposals with regard to the conditions under which material benefit derived from criminal activities can be seized, the competencies and obligations of the prosecutor's office and the judiciary during the financial investigation, or in connection with the temporary seizure of property.

A special chapter deals with competencies and obligations of institutions in charge of the management of seized property.

The final section provides specific recommendations regarding the management and disposal of both temporarily and permanently seized property.

A) Key reasons for the amendment of the law

The Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity requires form the perpetrator a fairly low and vague standard – to make plausible the legal origin of his/her material benefit. This Law has taken over the earlier decision, which is more favourable for the perpetrator.

Article 2 of this Law removes the previous mismatch between provisions from the Criminal Code (CD) and provisions from the Criminal Procedure Code (CPC) that related to the extended seizure of property. According to a previously applicable provision of the CPC [1], when it comes to the extended seizure from a convicted person, their legal successors or persons to whom the convicted person has transferred their property, the property shall be seized if they **don't prove the legality of its origin**. On the other hand, a provision in the CD stipulated a lower standard, which was much more favourable for these persons – **to make plausible the legal origin of their property**. [2]

We remind that the Government had resolved the inconsistency between the CD and the CPC in the draft Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity in a different manner, giving preference to the solution from the CPC that provided a tougher standard for convicted persons – to prove the legal origin of their property. It remains unclear why that decision has been dropped in the meantime and why a law that is more favourable for convicted persons has been passed.

Further, Article 2 of the Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity has significantly increased the number of criminal offences for which there is a possibility of extended seizure of property, without any limitations in relation to the value of the material benefit derived from those criminal activities. There is still a large number of criminal offences among the crimes for which the extended seizure of property can be carried out that do not belong to the corruption and organized crime.

Therefore, the increase in the number of criminal offences, for which the extended seizure of property can be carried out without additional limitations in terms of the value, opens the space in practice for extended seizure to be applied mostly to less serious criminal offences, that is for criminal offences that are not corrupt and that do not belong to organized crime.

Thus, the data obtained from the Property Administration [3] can lead to a conclusion that most of the property is permanently seized by the decisions of basic courts, which do not judge the criminal offences of corruption and organized crime, as well as the property which type and value indicate that it wasn't acquired through such criminal offences. [4] In this respect, it should be pointed out that some countries even give up seizure if the value of the seized property is low. [5]

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[1] Article 90
[2] Article 113 Paragraph 2
[3] Number:0201/1595 of 20/02/2019
[4] For example textile goods, beach mobilier, fuel pistol, household goods, sweets, juices, cufflinks, pendants, fruits and vegetables, honey etc.
[5] For instance, Romania's National Agency for Managing Seized Goods seizes only movable property that is worth more than 15,000 euros. Swedish law forbids seizure if the value of the property is less than the value of the mortgage and the cost of sales.

Article 11 of this Law stipulates that a financial investigation **can be** initiated by an order of the state prosecutor if there is a suspicion that the property of the holder is manifestly disproportionate to his/her lawful income, if there is a well-founded suspicion that material benefit was derived from criminal activities and if there is a reasonable suspicion that a crime for which the law stipulates a possibility of extended seizure was committed.

Such a formulation leaves room for arbitrary actions of the prosecutor who may or may not initiate a financial investigation when all legal requirements are met. In addition, the failure of the prosecutor to initiate a financial investigation when all conditions are met does not entail any responsibility of the prosecutor in the legal formulation that he/she can do so.

Failures and shortcomings in the past management of seized material benefit, particularly in cases of organized crime, have caused millions of euros in damages that will be paid to persons who are released in these proceedings. One of the causes of such practice is an inadequate legal framework, which regulates the management of seized property.

Management of seized material benefit derived from criminal activities is regulated in Chapter VII of the Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity, by provisions in Articles 53 to 77. [6] Those are provisions that regulate this field in the most general way and do not provide an answer on how exactly the seized property is dealt with in specific cases.

The Law primarily introduces the „competent body" that performs management tasks, that is the Property Administration. However, the Law does not provide details as to who performs specific actions on behalf of the „competent body", therefore, the provisions of this Law are rather general principles than an adequate legal framework for the management of seized property.

The manner of management of seized material benefit is proclaimed in one sentence [7] at the level of the general principle that the competent body performs management duties with **„the diligence of a prudent owner, in a manner which guarantees the highest level of preservation of value of seized material benefit with the lowest costs".**

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[6] This chapter is divided into 9 parts:
1. Seized and Confiscated Material Benefit Management Duties
2. Execution of Provisional Measures to Secure Assets and Decisions on Seizure of Movable Property and Confiscation of Material Benefit Derived from Criminal Activities or Acquired by a Criminal Offence
3. Valuation, Leasing and Granting Free of Charge Utilization of Seized and Confiscated Material Benefit
4. Safekeeping, Storing and Selling Seized and Confiscated Material Benefit
5. Restitution of Seized Material Benefit and Compensation of Damages
6. Depositing Seized Cash and Funds Obtained by Selling Seized Material Benefit
7. Destruction of Seized and Confiscated Material Benefit
8. Management of Confiscated Instrumentalities of Crime, Items Seized in Criminal and Misdemeanour Proceedings and Property Pledged to the Court as Bail
9. Record Keeping on Seized and Confiscated Material Benefit and on Judicial Proceedings within which it was Seized and Confiscated.

[7] Article 54 of the Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity

B) Proposals for the improvement of the law

B.1. Conditions for the seizure of material benefit

Our opinion is that the application of extended seizure of property should be limited to criminal offences under the jurisdiction of the Special State Prosecutor's Office in order to ensure that this institute achieves its primary purpose of fighting against the economic power of organized crime. Therefore, this institute should be applied precisely for this purpose, and not for less serious crimes for which there is already a legal ground for the seizure of material benefit derived from those criminal activities.

Any person who has been legally convicted of one of the crimes under the jurisdiction of the Special State Prosecutor's Office and whose property is manifestly disproportionate to their lawful income should prove the legal origin of their property. Allowing those individuals to keep all material benefit only if they make plausible the legal origin of such material benefit unjustifiably suits the perpetrators of the most serious crimes and allows them to retain material benefit derived from criminal activities easily.

In addition, the formulation to **make plausible the legal origin of such material benefit** is unspecified and could cause problems relating to the interpretation in practice, and any dilemma or suspicion would have to be resolved in favour of the defendants.

In Italy, convicted persons must prove the legal origin of their property, while the financial police, which may require by law **a proof of the legal origin of the acquired property** after the investigation, exercise a special role and powers. Article 12 of Law No. 356 of 1992 stipulates that the seizure of money, assets and other property from the person who is charged with criminal offence (illegal drug trafficking, organized crime, money laundering) is mandatory if the perpetrator does not explain the origin of such property and if the property is disproportionate to his/her income or economic activities. [8]

Further, in Italy, pursuant to Article 2 (3) of Law No.757 of 31 May 1965, in the course of the proceedings for the application of preventive measures against persons suspected of belonging to a mafia organization, the court shall order, and may do so in its own initiative, in an order stating its reasons, the seizure of the goods which are found to be at the disposal, directly or indirectly, of the person in respect of whom the proceedings have been initiated and if there is reason to believe so on the basis of sufficient indications, such as a substantial disparity between that person's standard of living and his/her apparent or declared income or if there are indicators showing that the given property represents material benefit derived from illicit activities or their reinvestment.

The court shall order the confiscation of all other seized goods, whose legitimate origin has not been proven, along with the application of preventive measures. The seizure shall be revoked by the court when the proposal for the application of preventive measures is rejected or when the legitimate origin of the goods has been proven. [9]

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[8] Source: "Regulations on the seizure of property acquired through a criminal offence and the management of such property", Research - a comparative overview, Parliamentary Assembly of Bosnia and Herzegovina, Sarajevo, 2012
[9] A quote from the decision of the European Court of Human Rights in the case Arcuri and others v. Italy of 5 July 2001, Application no. 52024/99

B.2. Financial investigation and temporary seizure

The law should be amended so that it stipulates that the state prosecutor **must** issue an order to initiate a financial investigation whenever the procedure for seizing material benefit derived from criminal activities is initiated, while the existing provision of Article 11 of the Law stipulates that financial investigation **may** be initiated under an order of the state prosecutor.

A precisely prescribed obligation of the state prosecutor to initiate a financial investigation when there are legally prescribed conditions clearly indicates that the eventual failure to do so must necessarily lead to the determination of individual responsibility of that prosecutor.

The Law should be amended so that it enables the court to order a provisional measure of security or to temporarily seize the property ex officio, regardless of the proposal of the state prosecutor.

Article 20 of the Law on the Fight against the Mafia of Italy stipulates that the court can order seizure of property **ex officio** with a reasoned decision. In this way, the seizure of property for which there is a reasonable suspicion that it has been acquired through criminal activity, that is, if the property of the perpetrator of the criminal offence is manifestly disproportionate to his/her legal income, is not conditioned by the prosecution's procedural initiative.

The court in charge of taking a decision on provisional security should take such decision when it is aware that the prescribed conditions are met, without waiting for the state prosecutor to submit a request.

Further, the Criminal Procedure Act of the Republic of Croatia authorizes the court to seize the material benefit obtained through an unlawful act contained in the description of the criminal offence of the charge without the proposal of an authorized prosecutor, as well as to collect evidence in the course of the proceeding and investigate circumstances that are important for the determination of material benefit. [10]

It is necessary that the law stipulate an explicit obligation for the state prosecutor to submit a proposal for the determination of the provisional security measure whenever legally prescribed conditions arise. No provision of the present Law defines such an obligation, while Article 22 only gives the content of the proposal for the determination of the provisional security measure.

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[10] Article 557 of the Criminal Procedure Act

This proposal, with the authority of the court to act ex officio, should provide the possibility of prompt "freezing" of property belonging to persons convicted of organized crime for which there is a suspicion that it has been acquired through criminal activities.

The Criminal Procedure Act of the Republic of Croatia explicitly prescribes the duty of the state prosecutor to undertake actions immediately, if there is a reasonable suspicion that a criminal offence has been committed and that material benefit has been acquired through that criminal offence, in order to determine the value of the material benefit, its location and to ensure the seizure of it, as well as the duty of the state prosecutor to propose the provisional security measure without delay. [11]

Finally, it is necessary to define the obligation of the state prosecutor to submit a request for the permanent seizure of material benefit derived from criminal activities within one year from the finality of the decision in Article 10 of the present Law.

Article 35 Paragraph 2 of the present Law also uses the term **may,** which leads to a conclusion that the state prosecutor does not have to do that and that he/she can arbitrarily decide on a case-by-case basis. In addition, the failure of the prosecutor to submit a request for the permanent seizure of material benefit does not entail any liability, because the law does not define such an obligation, but only the possibility.

[11] Article 206i of the Criminal Procedure Act

B.3. Competence for the management of seized property

B.3.1. Introduction of the judge and the interim administrator

The Law on Seizure and Confiscation of Material Benefit Derived from Criminal Activity introduces a „competent body" that performs management tasks, that is the Property Administration. [12] However, the Law does not provide details as to who performs specific actions on behalf of the „competent body", therefore, the provisions of the Law are rather general principles than an adequate legal framework for the management of seized property.

These tasks require certain expertise of the persons who perform them, as well as which persons should not be in conflict of interest at the same time. A lack of the necessary qualifications and knowledge of persons who carry out the management of seized property, as well as undefined responsibility, lead to poor management of property and a fall in the value of the seized property.

Based on the experience of Italy [13], the law should stipulate that the decision on seizure should determine the judge and the interim administrator. In addition, the law should define the responsibility of persons in charge of the management of seized property. The interim administrator should have a status of an official person within the meaning of the provisions of the Criminal Code.

Further, the interim administrator should be a person appointed by the court to manage the seized property. The first task of the interim administrator would be to take the property, evaluate it, manage it and maintain its value and, if possible, to increase its value.

The interim administrator should work in the public interest, not in the interest of the person from whom the property is seized, and should act under the order of the court. The interim administrator should be directly responsible for his/her work to the judge. The judge and the Property Administration may request a dismissal of the interim administrator should they consider that he/she has violated the provisions of the law or does not perform his/her duties properly and in a timely manner. The court that appointed the administrator should make the decision for the dismissal of the administrator.

The law should stipulate the obligation of the interim administrator to inform the judge of the existence of other property that could be seized, and which was found during administrator's management, as well as the obligation to periodically report to the judge.

There could be more interim administrators in one case if the property management is complex, if the seized immovable property is located in several municipalities, or if the activities of seized legal entities are carried out in several municipalities or if the property is of great value. The interim administrator must obtain an approval from the judge for the engagement of qualified persons when that is required for property management.

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[12] Article 54
[13] The Law on the Fight against the Mafia, Article 35

B.3.2. Conditions for the appointment of the interim administrator

It is necessary to create a register of interim administrators from which interim administrators will be appointed in accordance with the principles of transparency and equitable and fair engagement of administrators.

A subordinate legislation should define criteria for the appointment of interim administrators who will take into account the number of management subjects that are already taken, with that number not exceeding three, the self-management or the collective management, the type and value of the management duty, in the management of legal entities, the number of employees should be taken into account, direct or indirect management, territorial distribution of assets, previous specific professional experience, etc. [14]

If the interim administrator is appointed from among the employees of the Property Administration, he/she should not receive a special remuneration in relation to the existing income for the performance of the duty of managing seized property, except for the extraordinary expenses incurred by him/her.

The law should also contain a provision on the conflicts of interest of interim administrators that should stipulate that persons against whom a judgment was issued or against whom criminal proceedings are being conducted, their spouses and partners, relatives, members of the wider family, persons living together with them and other related persons, may not be appointed as the interim administrator.

In addition, persons who performed work or professional activity in favour of the owner or enterprises associated with him/her, trustees or debtors of the judge who entrusts this task, his/her spouse or partner or close relatives, may not be appointed as the interim administrator.

A spouse or a partner, a relative, a family member or a person who lives together with the judge of the court in which the proceeding is being conducted, as well as a spouse or a partner, a relative, a family member or a person who lives together with the state prosecutor under whose request the proceeding is being conducted, may not be appointed as the interim administrator. [15]

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[14] Article 35 Paragraph 2 of the Law on the Fight against the Mafia of Italy
[15] Article 35 Paragraphs 3 and 4 of the Law on the Fight against the Mafia of Italy

B.3.3. Property report

The interim administrator should, within 30 days from the date of the appointment, submit to the judge a detailed report on the seized property, the location of the property, the individual state of the property, the market value of the property according to the administrator's estimate, possible third party rights to the seized property, a proposal on the manner the administrator finds most conducive for the management of the seized property, if the seized property is a legal person – company, the report should contain the analysis of the possibility of continuation of the company's business operations.

The interim administrator should be obliged to submit to the judge a report on the management of seized property every three months, or every month at the request of the judge, in order to provide property monitoring.

The report on the seized property of the interim administrator should be submitted to the prosecutor's office that initiated the proceeding, as well as to the party from which the property is seized. The parties can file an objection on that report to the judge.

Further, the judge should prepare a comprehensive report on the seized property within 30 days from the date of the submission of the interim administrator's report.

B.4. Managing seized property

The existing legislative framework prescribes mostly a passive treatment of seized property. Therefore, we think that it is necessary to improve the legal framework by amending the legislative provisions that regulate the management of seized property, based on comparative experiences, with Italy in the first place, given that it is a country with a considerable experience and achieved results in this area.

The principal purpose of managing seized property in Italy is to keep or increase the value of the seized property, while the main purpose of the permanently seized property is to use it for the purpose of public interest, **primarily for humanitarian purposes**, for the compensation to the victims of crime and for the return of property to the community.

We think that the law should define more clearly and separate the treatment of temporarily seized property and the treatment of permanently seized property, while prescribing modalities that proved to be very successful in comparative experiences and which would therefore be applied as a priority.

Amendments to the law should essentially provide conditions that would enable the principal purpose of managing temporarily seized property, that is to keep or increase the value of the property, while the main purpose of the permanently seized property would be to use it for the purpose of public interest, primarily for humanitarian and social purposes (children with special needs, disabled people, homeless people etc.) and finally for the compensation to the victims of crime and for the return of property to the community.

B.4.1. Managing temporarily seized property

The interim administrator, with the approval of the judge, as well as the court ex officio, may grant free of charge utilisation of the temporarily seized property to local administrations where the property is located, primarily for humanitarian and social purposes, or, if that is not possible, to state authorities for institutional activities until the decision on permanent seizure or the return of the property to the owner is made. This manner of utilisation of seized property should be defined as a primary one.

If the temporarily seized property cannot be managed without the risk of damage and loss of value, the court shall order its sale. If that property does not have a value and cannot be utilised, the court shall order its destruction.

B.4.2. Managing permanently seized property

Managing temporarily seized property differs from the management of the property which has been seized permanently and which becomes the property of the state. Namely, when it comes to the management of temporarily seized property, the main goal is to keep the value of the property and create preconditions for the future implementation of the final decision of the court on permanent seizure or restitution of the property in case of making a decision according to which the property has been acquired legally.

When it comes to the permanent seizure of property, the main goal is to treat the seized property in a manner that, on the one hand, should send a message that crime will not bring any benefit and in a manner that, on the other hand, should show that the state uses and distributes its resources responsibly. In this respect, following the experience of Italy, permanently seized property should be used as a **gift, donation or given away for humanitarian and social purposes**, and then it can be used for the improvement of the conditions of state authorities in charge of fighting against crime.

B.4.2.1. Immovable property

A gift or a donation for humanitarian and social purposes should be the main means of dealing with seized immovable property.

The sale of the property, as a way of managing seized immovable property, should only be an alternative when that property cannot be utilised otherwise. Firstly, the prices on public sales are mostly unrealistically low, while the procedures take quite a long time. In addition, it is difficult in practice to deny the possibility of the engagement of perpetrators of criminal offences in the purchase of the property that is seized from them through connected persons or in an unauthorized influence or pressure on other persons to give up on the purchase.

Further, handing over the seized immovable property (both permanently and temporarily seized property) for safekeeping and utilisation without remuneration for humanitarian and social purposes should be one of priority modalities of managing seized property.

In Italy, regional authorities may hand over the seized property without remuneration and pursuant to the principle of transparency, disclosure and equal treatment to various associations, such as volunteers, social cooperatives, centres for the treatment of drug addiction, environmental associations, and all other forms of non-profitable associations.

Precise criteria for the assignment of seized property and management of those entities should be defined by a subordinate legislation. [16]

Purpose, trust and utilisation of material benefit, including the use of income derived from economic activity for social purposes, should be published on the official website of the Property Administration and the administration authority of the beneficiary or the receiver. [17]

The law should contain provisions that would prevent the management of seized property from being entrusted to the perpetrator – the owner of the seized property, related persons, persons convicted of criminal offences of corruption and organized crime and persons against whom criminal proceedings have been initiated for the same criminal offences.

This would make it impossible for the seized property to be entrusted, even indirectly, to the perpetrators of criminal offences, to be purchased with money acquired through criminal activity and to be reused for the purpose of crime.

In that context, following the experience of Italy, [18] the Property Administration should be obliged to obtain all information about the person from whom the property is seized, the criminal organization and related persons, in cooperation with the court, the prosecutor's office and the police.

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[16] Article 48 Paragraph 3 Item c-2 of the Law on the Fight against the Mafia of Italy stipulates that those criteria are defined by the National Agency for the management and use of the assets seized and confiscated to the organized crime
[17] Article 48 Paragraph 3 Item c. of the Law on the Fight against the Mafia of Italy
[18] Article 48 Paragraph 5 of the Law on the Fight against the Mafia of Italy

B.4.2.2. Companies

For the purpose of managing temporarily seized legal entities, a special list of interim administrators who would perform management tasks as bankruptcy administrators in bankruptcy proceedings should be made.

Within three months from the date of the appointment, the interim administrator should submit to the judge and the Property Administration a report, which should include the following:

- a review of property, economic and financial situation with the analysis and assessment of the company's business operations;
- a detailed analysis of specific possibilities of the continuation of business operations or the reestablishment of the performance of the activity, taking into account the degree of connection with the perpetrator - the owner and his household members, the nature of the activity, the manner and conditions in which the activity is performed, the existing and future workforce necessary for the regular performance of the company's business operations, production capacity and reference market, including costs related to the legalization of the company;
- if a continuation of business operations is proposed, a plan and a program with the description and deadlines should also be submitted;
- an assessment of the market value of the company;
- an overview of the activities that can be performed only and exclusively with the prior issuance of consent, concessions and decisions on performing activities;
- a list of the names of persons who were employed or who are still employed in the company

Along with the proposal for the continuation of business operations or the reestablishment of the performance of social activities, the interim administrator should submit a list of trustees and all other persons who enjoy personal or real rights, the right to enjoy or secure property.

If the measure of temporary seizure concerns shares in the share capital that provide the majority, the court should decide on the possible dismissal of the executive director of the company whose powers are taken over by the interim administrator.

The judge, based on the report of the temporary administrator, should make a decision on the continuation of business operations of the temporarily seized company.

The interim administrator should submit to the judge quarterly reports on business operations and the management of the company, as well as the final financial report after the decision on permanent seizure of the company or the return of the company to the owner.

In the case of companies with a larger scope of business operations or a special significance for the public interest, the establishment of special supervisory bodies for monitoring the work and business of temporarily and permanently seized companies composed of representatives of the Property Administration, ministries, local self-governments, relevant non-governmental organizations, representatives of local communities on which companies have a negative impact and the like should be enabled.

If there are no possibilities for the continuation of the company's business operations or the reestablishment of its activities, the court, upon receiving the opinion from the prosecutor’s office, the legal representatives of the parties and the interim administrator, should order the liquidation of the company. Immovable property of companies, if possible, should firstly be handed over for humanitarian and social purposes, and then to state authorities and services, otherwise the court should make a decision on its sale.

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