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PROJECT ON CRIMINAL ASSET RECOVERY IN SERBIA (CAR)

TECHNICAL PAPER: RECOMMENDATIONS FOR AMENDMENT OF THE SERBIAN LEGISLATION ON THE SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CRIME AND COMPATIBILITY WITH HUMAN RIGHTS PRINCIPLES

Opinion of the Department of the Information Society and Action against Crime (DGHL), Council of Europe, prepared on the basis of the expertise by Mr Kennedy Talbot, Council of Europe expert

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Table of Contents

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1. Introduction

Within the Criminal Assets Recovery (CAR) Project, its expected result one – 'Legal framework developed in line with international standards', Mr Kennedy Talbot, Barrister of England and Wales, was commissioned to prepare the expert opinion on the Serbian Law on the Seizure and Confiscation of the Proceeds of Crime. Request was based on the preliminary assessment of the current Law and on the preliminary demand of the beneficiaries which was accordingly introduced in the project's workplan.

The Expert was tasked to provide the comparative analysis of the Serbian Law and UK legislation and best practice. He also addressed the issues raised through the jurisprudence of the EctHR. The Expert provided recommendations for the amendments, namely:

- which provisions ought to be changed and in which direction;
- are there any *lacunae* and how to remedy them.

According to the statement given at the latest Coordination Body meeting of the CAR project by the Deputy Minister of Justice, Mr Slobodan Boskovic, the Working Group assigned to prepare the changes to the Law on the Seizure and Confiscation of the Proceeds will be established in the near future by the Ministry of Justice. This expert opinion will, therefore, be used as the starting point for legislative changes to be made.

2. Executive Summary

This paper addresses the adequacy of Serbian proceeds of crime law and makes recommendations for improvement consistent with human rights principles.

The paper reviews the provisions in the legislation that address the investigative techniques for tracing assets, the seizing and freezing of assets, the making of confiscation orders, the enforcement of confiscation orders and mutual legal assistance.

The paper reviews the provisions against the background of the European Convention on Human Rights and the judgments of the European Court of Human Rights. Where applicable; recommendations are made for the inclusion of provisions that would strengthen the legislation. These provisions are mostly drawn from similar provisions in the legislation in the United Kingdom.

Although Serbia's current law is modern and human rights compliant, there are significant weaknesses that need to be addressed. 14 recommendations to address these weaknesses are set out in section 8 at the end of this paper.

3. Background

Expert was asked to advise the Council of Europe on the Serbian legislation concerning the seizure and confiscation of the proceeds of crime. In particular, to consider:

(1) Investigative techniques for tracing assets;
(2) Seizing and freezing assets;
(3) Making of confiscation orders;
(4) Enforcement of confiscation orders;
(5) Mutual legal assistance.

This advice is intended to comprise an analysis of Serbian legislation in order to recommend any areas of improvement and to address compatibility of the legislation (and any proposed recommendations) with human rights principles, particularly those found in the European Convention of Human Rights ("ECHR").

3.1 Source Material

In preparing this advice the following material from Serbian legislation was considered: the Constitution of the Republic of Serbia, the Criminal Procedure Code, the Criminal Code, the Law on Amendments and Additions to the Criminal Code and the Law on Seizure and Confiscation of the Proceeds from Crime.

Expert visited Serbia on 2 occasions and met prosecutors, investigators, and judges.

3.2 Terminology

Words and expressions used in one legal jurisdiction do not necessarily have the same meaning in another. Expert will use the following expressions to convey the following meanings:

- *Freezing*. An order (which may be issued by a court or a prosecutor) preventing a person disposing or alienating an asset. It does not amount to a temporary or permanent change of ownership, nor does it involve the State or one of its agencies taking possession of the asset or preventing its use;
- *Temporary seizure.* An interim or temporary measure whereby assets are removed from the possession of the owner and taken into the control of the State or one of its agencies;
- *Confiscation.* An order permanently transferring ownership and possession of an asset from a person (legal or natural) to the State. Such an order is made following conviction of a criminal offence;
- *Civil forfeiture*. A permanent confiscation order transferring ownership and possession to the State, but in civil proceedings without conviction.

3.3 General overview of Serbian confiscation law

In the expert's opinion, Serbia has modern, comprehensive proceeds of crime law. In principle, it is compatible with the ECHR.

There seems to be some overlap between the provisions of the Criminal Procedure Code (art 491-497), the Criminal Code (art 91-93) and the Law on the Seizure and Confiscation of the

Proceeds from Crime ("the Proceeds from Crime Law"). Expert considers the following to be the position:

(1) The Proceeds from Crime Law permits the confiscation of property which represents the proceeds of crime. This is dependent upon conviction. Confiscation is not confined to the proceeds of the actual offence of which the accused is convicted. There are provisions for freezing such property and for temporary seizure by the Directorate (as defined below) in advance of confiscation;

(2) The Criminal Procedure Code empowers the court to "order the confiscation of pecuniary benefit" (art 495). This requires the court to state "the object or amount to be seized" (art 495). It is not clear from the face of the Code whether the court must be satisfied that the object or amount must itself be the proceeds of crime or whether it is sufficient for the court to determine that a defendant had obtained a pecuniary benefit in a certain sum of money and then may order an equivalent amount of money to be paid. There seems to be provision for the ordering of "provisional security measures" but it is unclear what this means;

(3) The Criminal Code lays down a general principle that "no-one may retain material gain obtained by criminal offence" (art 91). This gain is determined by the criminal court which has power to "seize", items of value and "all other material gains" or order the payment of "a pecuniary amount commensurate with obtained material gain." This would seem to empower the court to order payment of a sum of money if the proceeds of crime had been disposed of. There do not appear to be any freezing or provisional seizure methods in the Criminal Code.

In practice, expert understood it to be the Proceeds from Crime Law that is in deployment. Given this fact and that the provisions of the Criminal Code and the Criminal Procedure Code seem unclear or incomplete, expert will confine his comments in this paper to observations on the Proceeds from Crime Law.

4. Investigations

A financial investigation must be instigated when there are reasonable grounds to suspect that the owner possesses considerable assets deriving from a criminal offence (art 15). A financial investigation must also be initiated at the instigation of the public prosecutor who is responsible for the management of the investigation (art 17). It is not clear at what stage the prosecutor becomes involved. If in practice the law is interpreted to mean that the prosecutor and his powers to obtain information from banks and government departments about assets (which are considered in paragraph 12 below) are only available after the criminal proceedings have begun, this is too late. It is essential to be able to conduct covert financial investigation so that temporary freezing and seizure powers can be initiated as soon as an investigation becomes overt and a risk of dissipation of assets arises.

The only powers of financial investigation for which particular provision is made are searches by order of the court (article 18), orders by the prosecutor to "banking or other

financial institutions" directed towards the "owner's" business and private accounts and safety deposit boxes (art 20) and similar orders by the prosecutor against government departments (art 19). Owner includes persons to whom the defendant's assets have passed and co-operative witnesses (art 3).

In expert's opinion, there is scope for increasing the powers available in a financial investigation. The object of a financial investigation is to build up a full financial profile, not only of the accused but also his close family and associates. For example, it is very common for organised criminals to place their assets in the hands of a nominee family member; Serbian law specifically recognises this as it enables proceeds of crime to be recovered from persons who have not paid full consideration (art 33/34). It is therefore important that a financial investigation can thoroughly investigate family members and associates of the accused. Such persons may not come within the definition of owner in art 3 and so the power of the prosecutor to obtain information from their bank or a government department does not seem to be available.

Further, there are other powers which in practice other countries have found useful and which Serbia may consider implementing.

Therefore the following is recommended:

(1) The prosecutor to have power to require data on <u>any person</u> from banks, financial institutions or government departments if he can show that there are reasonable grounds to suspect / substantial grounds for believing that the provision of such material would be of substantial value to the financial investigation into the accused;

(2) The prosecutor to have power to order information to be provided or persons to attend for <u>compulsory</u> interview in respect of a financial investigation. In practice, other countries have found that a power to order such "disclosure" from anyone (including the defendant) to be of great assistance. In common law jurisdictions, the court at the beginning of a criminal investigation nearly always orders the accused to provide written disclosure of his assets and all assets transferred by him to others[1];

(3) The prosecutor to require banks to identify whether the owner is a customer of the bank. It may be that such a power is implicit already in art 20. If it is not, it is a useful power to have. Often financial investigators do not know where an accused banks. This power would enable the prosecutor to send a written notice to every bank simply asking whether the accused (or the owner within the meaning of art 3), has an account or accounts at that bank. Then if he does, the power in art 20 can be deployed;

[1] Such a requirement is not contrary to fair trial provisions found in the ECHR. Material which is provided, even under compulsion may be used in confiscation hearings. These type of confiscation hearings do not involve determining proof of crime to which the presumption of innocence and right not to incriminate oneself apply (see the ECtHR decision of *Phillips v UK*, 41087/98, 5th July 2001). However, information provided by the accused in response to a court order (or order from a prosecutor) cannot (generally) be used to prove guilt of a criminal offence (see eg ECtHR decision of *Saunders v UK* 17th December 1996, Reports 1996-VI 2064)

(4) The prosecutor to have power to require banks covertly to provide contemporaneous information on a daily basis on a suspect's bank account. Such orders enable prosecutors to monitor account activity in real time.

5. Freezing and Temporary Seizure Measures

These measures are of central importance to any proceeds of crime law. Plainly any such law must make provision to prevent the accused dealing with or disposing of assets which may, in due course at the end of the litigation, be subject to permanent confiscation.

Expert understands these laws to operate in the following way. The court has power to order that the Directorate for Management of Seized and Confiscated Assets ("the Directorate")[2] take possession and manage assets belonging to an accused. Such an order may be made whilst a person is under investigation. To obtain such an order the prosecutor must establish reasonable grounds to suspect the asset derives from crime and a risk that without such temporary seizure, a permanent confiscation could be hindered or precluded (art 21). The court may make an exception allowing an owner to retain property for living expenses (art 25).

In principle, such an order is compatible with human rights. Such an order does interfere with a person's property rights but such interference, if necessary and proportionate to the aim of preserving assets for confiscation or preventing their continued use, will be lawful.[3]

The accused (and others within the definition of owner in art 3) has a right to be heard on an application for a temporary seizure order. In order to prevent assets being dissipated before the court decides a temporary seizure application, the prosecutor can issue a freezing order preventing any use or disposition (art 22). Again there is nothing objectionable to this course.

If the court makes a temporary seizing order, the Directorate is required *prima facie* to remove the assets and maintain them (art 37/9). However, the Directorate may leave the assets in the possession of the owner to use provided he undertakes to maintain them (art 39).

The costs of management of assets are borne by the Directorate if it takes possession of them (art 39), although the Directorate has power to sell deteriorating assets to maintain their value (art 42) or in order to meet the costs of management (art 41). If the owner retains the assets, he bears those costs (art 39).

It is plain therefore that the act of temporary seizure is a substantial interference with the owner's property rights and may cause him significant damage. His property may be sold against his will (although only to preserve its value or to pay management costs).

Again, these consequences interfere with property rights. However, again, such interference is provided by law and is in pursuit of a legitimate aim. It is therefore constitutional

[2] Part of the Ministry of Justice

[3] See ECtHR decision of *Raimondo v Italy*, 12954/87, 22nd February 1994

provided it is proportionate. These types of laws are generally proportionate. They will, however, not be proportionate if they impose an excessive burden on the citizen.[4]

The Serbian laws do not impose an excessive burden on an accused or owner. The decision to impose a temporary restraining order is based on an appropriate evidential threshold and is made by a court. There is a right of appeal (art 27). Indeed, I would go further and say that Serbian laws are unnecessarily generous. This is because i) if a temporary seizure order is revoked, then Serbia bears the management costs (art 41) and ii) if the court does not determine that the assets are the proceeds of crime, the owner may bring a compensation claim against Serbia (art 47).

Common law countries, subject to the ECHR, do not go that far. Generally, their laws empower a court to appoint an office holder (called "a receiver", but usually an accountant in a private firm of accountants) to manage the assets. The threshold evidential test for appointment is similar to that in Serbia. The costs of management are borne by the assets subject to management. However, if the defendant is acquitted or the assets are ultimately determined not to be subject to permanent confiscation, there is no right to compensation or recovery of management costs unless there is fault on the part of the prosecutor.[5]

Expert recommends that the costs of management of assets should always be borne by the assets and that (absent fault) there should no right to compensation against Serbia for those costs or other losses caused by a temporary seizure order.

The other comment of the expert on temporary seizure order relates to the prominence of asset management by the Directorate as against mere freezing orders. In most countries, and the UK is a good example, the asset preservation order which generally suffices is a freezing order. Management and control of the assets is left to the defendant or owner who is ordered not to dispose or dissipate his assets. If he does so, he is liable to be imprisoned for contempt of court. Sometimes exceptions are made to such a freezing order to enable a business to be run. In such a case, the defendant is required to maintain records and supply them to the prosecutor who polices compliance with the order. Plainly, a mere freezing order leaves more scope for dissipation than the State taking control of management, but it is far more economic to administer and results in larger sums accruing to the State in the event of permanent confiscation. In practice, defendants find it difficult to dissipate their assets in breach of a freezing order. Only in exceptional cases is a receiver appointed to manage the assets.

Serbian law always requires the Directorate to become involved at the temporary seizure stage. Expert appreciates that there is power for the Directorate to leave the assets with the owner for management (art 39) but this seems to be the exception rather than the norm. It may be that in Serbia the only type of cases where the prosecutor has deployed the Proceeds from Crime Law is serious organised crime, which generally might justify the Directorate

[4] *Raimondo* (supra); *Jucys v Lithuania*, 5457/03, 8th January 2008)

[5] See eg the English cases of *Hughes* [2003] 1WLR 177 and *Capewell* [2007] UKHL 2 where the Court of Appeal and then House of Lords decided that such measures do not impose an excessive burden on an individual and so are ECHR compliant.

taking control of the assets. But the law covers many other types of criminality and many cases might be better served by freezing orders without the extra administrative burden of the Directorate.

Expert therefore recommends a separate freezing order power whereby the court simply orders the owner not to dispose of or dissipate the relevant assets.

6. Permanent Seizure of Assets (including enforcement)

Serbia operates a conviction dependent, tainted property confiscation regime. By this the expert means that a conviction entitles (art 29) the prosecutor to apply for permanent seizure (which expert calls confiscation in this paper), where the ownership of assets is transferred entirely to the State. Without a conviction no permanent confiscation can be ordered. In order to obtain such an order, the prosecutor must show a disparity between lawful income and the extent of the assets (art 33). Consequently, a confiscation order is not merely in respect of the proceeds of the actual offence of which the defendant is convicted, but any assets held by the convicted defendant (or any transferee who has not paid full value for them) which are not explicable by his legitimate income.

The Laws apply only to conviction for the types of criminality specified in art 2.

This law is ECHR compatible. The ECHR regards such a confiscation order as part of the penalty imposed for the offence of which the accused is convicted, although a motion for confiscation is not a further and separate criminal proceeding to which the particular constitutional criminal safeguards apply (ie article 6(2) of the ECHR, broadly corresponding to art 33 of the Serbian Constitution). Such a measure to recover the proceeds of crime is not incompatible with ECHR property rights and fair trial rights, provided it is established in the law and operates proportionately. [6]

The general fair trial rights in article 6(1) of the ECHR do apply[7] (art 32 of the Serbian Constitution), but there is nothing in the Serbian law to support the proposition that they are violated. Confiscation is decided by a court. The court has to give reasons for the decision. The defendant and owner have full litigation rights. Confiscation can only be ordered if there is a significant discrepancy between the accused's legitimate income and his apparent assets, a matter about which the accused will be in the best position to provide evidence. There is a right of appeal. It is these types of features which the European Court of Human Rights found ensured article 6(1) compliance in *Philips* (supra).

6.1 Value based confiscation

It is the opinion of the expert that there is room for improvement in Serbian law. There is no provision to cater for the case where the accused has disposed of the criminal proceeds but has other assets, not traceable to crime which might be the subject of confiscation. In other

[6] *Philips v UK,* 41087/98
[7] *Philips* (supra)

words, some jurisdictions, but not Serbia, allow the court to make "value" based confiscation orders, confiscating substitute assets or ordering the payment of a sum of money equal to the benefit from crime.[8]

In practice, the UK has found value confiscation orders to be of great utility, particularly in white collar type criminality and money laundering. In such cases, the commission of crime may only be part of the accused's activities and the proceeds of crime could well have been dissipated or passed on to others. In almost all these cases, the accused will have a house, a car and some savings or investments, often legitimately acquired. A value based confiscation order enables the court to calculate the value of benefits obtained by the accused and order the accused to pay that amount. His assets may then be forcibly sold (for example by a receiver in the UK or the Directorate in Serbia) to pay the amount ordered. Value based confiscation prevents criminals living the high life from their proceeds of crime (or disposing or hiding such proceeds) confident that their legitimate and visible assets can be retained.

Expert does not know whether crimes of this type are regularly prosecuted in Serbia and, if they are, whether the accused has the sort of financial profiles that the expert has identified. Given that the Serbian Proceeds of Crime Law covers these types of crime (art 2 – see for example tax evasion) Expert suspect that a value based confiscation provision would be of real use in Serbia.

The recommendation of the expert is that it be implemented. The most flexible type of law is one which allows the court to calculate a value to be placed on the criminality and then orders the accused to pay that amount. The order can then later be enforced either i) using the existing civil system for the enforcement of judgments, or ii) the criminal system for fine enforcement or ultimately iii) by the Directorate forcibly realising the accused's assets in satisfaction of the order.

6.2 Confiscation without conviction

As said, confiscation in Serbia is dependent on a conviction entitling the prosecutor to file a motion for confiscation (art 29).

Confiscation (or as expert will call it "civil forfeiture") without conviction has been in place in many jurisdictions for many years. It is common in connection with customs' and duties' evasion. It has been generally in use for organised crime, drug trafficking and certain other crimes in Italy since 1956[9] and the United States of America since 1970.[10]

In the last 20 years civil forfeiture without conviction has become more popular particularly in common law countries. New South Wales (leading for Australia) from 1990 (Criminal Assets Recovery Act 1990), Eire introduced civil forfeiture laws in 1996 (the Proceeds of Crime Act 1996), South Africa in 1998 (Prevention of Organised Crime Act 1998), Ontario

[8] The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8th November 1990, makes express provision permitting signatory countries to consider introducing value based confiscation orders

[9] Law 1423/56

[10] The Racketeering Influenced and Corrupt Organisations Act 1970 (RICO)

(leading the way for Canada) in 2001 (the Remedies for Organised Crime and other Unlawful Activities Act 2001), the UK and federal government of Australia in 2002 (both called the Proceeds of Crime Act 2002) and New Zealand in 2009 (the Criminal Proceeds (Recovery) Act 2009).

All these laws make provision for forfeiture of assets connected to crime without any requirement for a conviction. All of them apply the civil law and require the government to prove its case to the civil rather than the criminal standard. Most only apply to proceeds of crime; others apply both to proceeds of crime and instrumentalities, that is things used in the commission of crime.

The constitutional courts of these countries and the European Court of Human Rights have considered the compatibility of these laws with human rights. In general, provided their operation is kept within proportionate limits, such laws are compatible.

Although criminality is at the core of this type of proceedings, they have not been found to amount to the bringing of criminal proceedings. The ECtHR approaches the issue applying a 3 fold test. First, the classification under domestic law (which is not decisive, indeed rarely relevant). Second, the nature of the offence. Third, the character of the penalty. Applying these criteria, the ECtHR has consistently held civil forfeitures to be civil. This is principally on the basis that such forfeitures do not involve the establishment of particular crimes or imposition of penalties but are preventative measures which remove from circulation the proceeds of crime or property caught up in the commission of crime. The forfeiture of articles in this category is not a punishment.[11] The constitutional courts of other countries have reached similar conclusions.[12] It was neatly put in Ireland in *Gilligan v CAB* [2001] IESC 82 by the Supreme Court which explained that the civil forfeiture law:

> *"concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use."*

The second part of this citation recognises that constitutions (including the ECHR) protect property rights as well as fair trial rights, but property rights are not absolute, but qualified. The ECHR article 1 of protocol 1 qualification which is relevant is that the state is permitted to interfere with property rights in order to control the use of property. There is a similar qualification to the right to property contained in art 58 of the Serbian Constitution.

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[11] See eg *Arcuri v Italy* 52024/99, 5th July 2001; *Butler v UK* 41661/98, 27th June 2002

[12] See for example *US v Ursery* (1996) 135 L Ed 2D549 (USA).; *Charrington* [2005] EWCA Civ 335 (UK); *Chatterjee v Ontario* 2009 SCC 19 (Canada)

The ECtHR approach to qualified rights is to apply a 3 fold test to constitutional compliance. Is the measure lawful (ie provided for by domestic law, ii) is it directed towards a legitimate aim and iii) is the measure proportionate to that aim?

Plainly, written civil forfeiture laws are provided for by law. The jurisprudence of the ECtHR is that forfeiture of proceeds or instrumentalities is directed towards the legitimate aim of crime prevention by controlling the use of property. The issue therefore is one of proportionality.

The Court has consistently held civil forfeiture laws in general to be compliant with article 1 of protocol 1.[13] This does not mean that the Court in such cases has decided that the law cannot be non-compliant, merely that on the facts before the Court, forfeiture struck a fair balance between the interests of the community and the interests of the person suffering the forfeiture.

There are therefore examples in constitutional precedents of civil forfeiture laws operating disproportionately and so unconstitutionally. This usually arises in instrumentalities cases where high value assets are forfeited on the basis of a tenuous connection to criminal conduct. Examples are an order forfeiting a factory running a legitimate business simply because unlicensed gaming machines were in the rest-room used by the workers[14] or forfeiture of a car because it was being driven by a drunk driver.[15]

For similar reasons of proportionality, it is necessary for a civil forfeiture law to have procedural protections, particularly for innocent owners. If such persons do not have an opportunity to advance their case, it is likely that this balance will not properly be struck and that person will bear an excessive burden which is unconstitutional.[16]

As said, the origin of civil forfeiture laws is to tackle serious organised crime. One of the features of criminal organisations is that the principals are often too loosely connected with individual crimes to be capable of prosecution. Civil forfeiture plugs the gap created by the case where the evidence shows (on a balance of probabilities) that property is derived from crime, but there is insufficient evidence to prosecute. Given the particular problems faced by Serbia, expert is of the opinion that there would be a ready market for this type of law.

It is therefore recommended that Serbia introduces such a law. This is not the place to descend to legislative drafting, but in expert's opinion such a law should have the following characteristics to be constitutional and consistent with generally accepted international standards:

(1) The Republic of Serbia must prove its case on a balance of probabilities;
(2) A court to decide the issue and give its reasons;

[13] *Raimondo; Arcuri; Butler* (supra)
[14] *Mohunram v NDPP* [2007] 2 ACC 4 (South Africa)
[15] *NDPP v Vermaak* (1996) 386/06 (South Africa)
[16] See the ECtHR case of *Denisova v Russia* 16903/03, 1st April 2010

(3) No particular crime need be identified or proven, but the court must be satisfied that the property is the proceeds of or traceable to crime;
(4) Rights of all owners or claimed owners to participate in proceedings;
(5) Innocent owner defence.

Plainly, any further power to make permanent confiscation orders (whether a value based post conviction confiscation order power or an independent non-conviction based civil forfeiture power) must be accompanied by powers to make temporary freezing or seizure powers. The expert underlines his recommendations in relation to temporary seizing set out above, particularly that a freezing order power should be available as soon as an investigation is underway with the Directorate taking control of management only in cases which justify such an intervention.

6.3 Removal of categories

As said in order for a motion for confiscation to be filed, the offence of which the defendant is convicted must be one of those listed in art 2. This list does not cover the complete range of criminality. In practice, the UK has found that offences which might not immediately seem appropriate for confiscation often are. For example such orders have been made for illegal overfishing, breach of planning regulations and bankruptcy offences. It is recommended that Serbian Law simply provide that the provisions of the Law should apply to any criminal offence.

7. Mutual Legal Assistance

The Serbian provisions for mutual legal assistance accord with generally accepted standards. They make provision for tracing and identifying the proceeds of crime, temporary freezing and seizing and permanent confiscation.

Generally, the same standards are required as are necessary for the same relief to be granted in a purely domestic setting. Expert has three recommendations for improvement, neither of which raise, or should raise, constitutional concerns:

(1) The law only makes provision for the tracing, freezing, seizure and permanent confiscation of assets which are the proceeds of crime. Where the requesting country is proceeding against an accused in its country and may make a value confiscation order, there is no provision in Serbian law to freeze and confiscate clean property in Serbia in order to realise it in satisfaction of the requesting country's value based permanent confiscation order. This is hardly surprising since Serbia has no provision in its Proceeds from Crime Law to confiscate clean property in a purely domestic prosecution. It does however, in practice, represent a considerable limit on the assistance Serbia can provide requesting countries;
(2) It does not seem that Serbia can act to freeze or temporarily seize property in Serbia at the request of another country until criminal proceedings have been instituted in the requesting State (art 54). This is often too late. In complicated

cross-border cases, it is inevitable that there is a long period of investigation before criminal proceedings are begun. Usually, the intended accused is aware of the investigation in the latter stages. A lack of power to freeze at this point leaves a window of opportunity for the accused and his associates to dispose of assets or place them out of reach of the authorities;

(3) There is no provision for any assistance to be provided by Serbia in cases where the proceedings in the requesting State are civil forfeiture proceedings. Again, as there is no provision in Serbian domestic cases for such action, this is understandable.

It is recommended that these three deficiencies be remedied by:

(1) Assistance to be granted by the Serbian authorities where the permanent confiscation order made or to be made is for the purpose of recovering the proceeds of crime or their value. If this is done (with removal of references in the Law which tie requests to criminal proceedings or actual proceeds), then Serbia can grant assistance in civil forfeiture cases and in value confiscation order cases;

(2) Assistance to be granted to temporarily freeze or seize assets from the moment when the requesting State commences an investigation, provided there are reasonable grounds for suspecting that the property may be required to satisfy any permanent confiscation order which has been or may be made.

8. Recommendations

14 recommendations are therefore made as follows:

Investigations:

(1) The prosecutor to be able to exercise investigative powers from the time a financial investigation begins;
(2) The prosecutor to have power to obtain information from banks and government departments on any person (not just owners of suspect assets) if the material would be of substantial value to the financial investigation into the accused;
(3) The prosecutor to have power to order information to be provided by any person, or any person to attend for compulsory interview in respect of a financial investigation, including the accused;
(4) The prosecutor to have power to require banks to identify whether an asset owner is a customer of the bank;
(5) The prosecutor to have power to order banks to provide contemporaneous monitoring information on the accused or owner's bank accounts.

Temporary freezing / seizure pending permanent confiscation:

(6) The costs of management of assets should always be borne by the owner of the assets out of those assets;

(7) In the absence of fault, there should be no right to compensation against Serbia for costs or other losses caused by a temporary seizure order, whether or not a prosecution is successful;
(8) There should be a separate freezing order power whereby the court orders, without involvement of the Directorate, an owner not to dispose of or dissipate his assets.

Permanent confiscation:

(9) Confiscation should be available in all types of case;
(10) A value based confiscation order provision should be introduced to allow confiscation where the convicted defendant has disposed of the actual proceeds of crime;
(11) A civil non-conviction dependent, permanent confiscation order power should be implemented;
(12) Temporary freezing and seizure powers are necessary to complement the value based and non-conviction based confiscation order powers envisaged by (10) and (11) above.

Mutual legal assistance:

(13) Assistance should be granted by the Serbian authorities where the permanent confiscation order made or to be made in the requesting country is a value based confiscation order or a non-conviction based confiscation order;
(14) Assistance should be granted to temporarily freeze or seize assets from the time when the requesting State commences an investigation.

9. Conclusion

Serbia's current law is modern and human rights compliant; however, as note in this opinion, there are significant weaknesses that need to be addressed.