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**PROJECT ON CRIMINAL ASSET RECOVERY IN SERBIA (CAR)**

**TECHNICAL PAPER ON CRIMINAL ASSETS RECOVERY SYSTEM IN SERBIA  
AND COMPARATIVE ANALYSIS WITH OTHER SYSTEMS IN CENTRAL AND  
WESTERN EUROPE**

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## INTRODUCTION

As Lord Steyn noted in one of the UK's leading asset recovery cases *R v Rezvi*<sup>1</sup>

“It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential.”

The determination of modern states to ensure that criminals do not profit from their criminal activity has become a strong driving motivator. Much legislation is passed, and many appeal courts, are vexed with the questions of how to deal with the issue of recovering the proceeds of criminality in a legitimate and human rights compliant manner. It has led many countries to pass some far reaching, some would say draconian, laws to ensure that the State is in a position of legitimate power in this struggle.

Serbia is therefore no different to many other European countries and of course has a raft of international and EU inspired model laws and regulations to steer it in such a direction. The relatively new law on asset recovery - Law on Seizure and Confiscation of the Proceeds from Crime (Law No. 97/08) – fits perfectly into this new direction and represents a comprehensive package of new legal demands and procedures that supplements the current provisions in the Criminal Code and Criminal Procedure Code. The need for such comprehensive laws and powers in Serbia is of course not without a cultural, political and geographic necessity given its determination to accede to the EU in the future but also because Serbia has suffered from the debilitating effects of organized crime and corruption over recent years.

Serbian organised crime in the sense of trafficking in human beings, smuggling of narcotic drugs and of weapons and vehicle theft has led to proceeds being reinvested into the *“purchase of business companies (privatised ones), real estate, luxurious cars and for lending money with high interest rates. Economic crimes are characterised by serious and complex criminal acts, particularly in banking operations, external trade and in the privatization process. The most widespread form of economic crime is various forms of the abuse of office in all sphere of economic operations”*<sup>2</sup>.

In this context the adoption of new legislation on asset recovery and the management of assets is a considerable step forward.

### 1 DEFINITIONS

Relevant regional and international instruments from the Council of Europe, the European Union and the United Nations, were utilised as benchmarks for the present technical paper, where applicable. When no other definition is compared with the main definitions below, this shall mean that either there is a match to the definitions between one or more of the instruments, or that no direct definition was found.

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<sup>1</sup> [2003] 1 AC 1099, 1146, 1152

<sup>2</sup> MONEYVAL Mutual Evaluation Report Serbia, 8 December 2009, p. 6.

1. "Proceeds" shall mean any economic advantage from criminal offences. It may consist of any form of property as defined in the following paragraph (article 1, Framework Decision 2001/500/JHA; article 1(a) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(a) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141);
  - a. UNTOC and UNCAC define "proceeds of crime" (used interchangeably in the context of the present technical paper) as *any property derived from or obtained, directly or indirectly, through the commission of an offence* (article 2(e) of UNTOC and UNCAC).
2. "Property" shall include property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property (article 1, Framework Decision 2001/500/JHA; article 1(b) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(b) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141);
  - a. The abovementioned definition differs in UNTOC and UNCAC as it includes the notion of *tangible or intangible assets* (article 2(d) of UNTOC and UNCAC).
3. "Instrumentalities" means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences (article 1, Framework Decision 2001/500/JHA; article 1(c) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(c) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141).
4. "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority (article 1(g) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198);
  - a. UNTOC and UNCAC differ from the abovementioned definition, as it does not contain the action *destruction* (article 2(f) of the UNTOC and UNCAC).
  - b. The European Union defines a "freezing order" as any measure taken by a competent judicial authority in the issuing State in order provisionally to prevent the destruction, transformation, moving, transfer or disposal of property that could be subject to confiscation or evidence (Framework Decision 2003/577/JHA).
5. "Confiscation" means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property (article 1, Framework Decision 2001/500/JHA; article 1(d) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(d) of the CoE Convention on Laundering, search,

seizure and confiscation of the proceeds of crime – CETS No. 141).

6. “Value-based confiscation” shall be the definition provided for in article 3 of the Council of the European Union Framework Decision 2001/500/JHA of 26 June 2001 – “Each Member State shall take the necessary steps to ensure that its legislation and procedures on the confiscation of the proceeds of crime also allow, at least in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders. However, Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4000”.
7. Finally, it should be noted that it seems that there is no direct definition in international or regional standards for “non-conviction based forfeiture”. However, this appears to be permissible under article 3(4) of the Framework Decision 2005/212/JHA within the European Union context.

## 2 THE EUROPEAN UNION STANDARDS

Although Serbia is not part of the European Union (EU), it officially applied for EU membership on 22 December 2009. For this, reason, attention should be given the standards of the EU that apply to the asset recovery standards.

The Council of the EU Framework Decision 2007/845/JHA of 6 December 2007 determines in its article 1 that the Member States of the EU are to set up national asset recovery offices (ARO) for the purposes of the facilitation of the tracing and identification of proceeds of crime and other crime-related property.

AROs seek to facilitate the tracing of criminal assets, participate in confiscation procedures, ensure the proper management of the seized assets and act as a central contact point for confiscation activities at the national level<sup>3</sup>. They should have a multidisciplinary structure comprising expertise from law enforcement, judicial authorities, tax authorities, social welfare, customs and other relevant services. This is so because organised crime, corruption, money laundering and other crimes seeking financial gain are multifaceted in nature, and require a co-ordinated effort and response from states at both the preventive and enforcement levels. Thus, these representatives should be able to exercise their usual powers and to disclose information within the ARO without being bound by professional secrecy<sup>4</sup>.

AROs should have access to all relevant databases to identify and trace assets, including financial information, and should have coercive powers to obtain such information. They should have the power to provisionally freeze assets in order to prevent dissipation of the proceeds of crime between the moment that the assets are identified and the execution of a temporary or permanent seizure order issued by the court. They should also be able to conduct joint investigations with other authorities<sup>5</sup>.

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<sup>3</sup> Commission of the European Communities, “Communication from the Commission to the European Parliament and the Council”, COM(2008) 766 final, p. 8.

<sup>4</sup> *id.* p. 8

<sup>5</sup> *id.*, p. 9.

The Council of the EU Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property informs that Member States of the EU “shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty of more than one year, or property to the value of which corresponds to such proceeds” (article 2).

Furthermore, article 3 informs that states shall adopt as a minimum the necessary measures to enable it to confiscate, either wholly or in part, property belonging to a person convicted of an offence committed, among others:

1. Within the framework of a criminal organisation (Joint Action 98/733/JHA of 21 December 1998), when the offence is covered by:
  - a. The Council of the EU Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro;
  - b. The Council of the EU Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;
  - c. The Council of the EU Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings;
  - d. The Council of the EU Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence;
  - e. The Council of the EU Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography;
  - f. The Council of the EU Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

The necessary measures to enable confiscation under article 3(2) include at least:

1. Where a national court based on specific facts is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively;
2. Where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively;
3. Where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

Article 3(3) informs that member states may also consider adopting the necessary

measures to enable it to confiscate, in accordance with points a and b of the preceding paragraph, “either wholly or in part, property acquired by the closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned – acting either alone or in conjunction with his closest relations – has controlling influence. The same shall apply if the person concerned receives a significant part of the legal person’s income”. Finally, under article 3(4) “Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question”. It seems that the latter provision seeks to address non-conviction based (‘NCB’) forfeiture, although it is unclear as to whether such meaning is intended at utilising other means than criminal law (i.e. civil or administrative legislation) or having the property itself subject to seizure and forfeiture, regardless of identification of the perpetrator.

Finally, the Council of the EU Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence informs in its article 3(1) that seizure under said Framework Decision is applicable for the purposes of, among others, subsequent confiscation of property.

### **3 THE SERBIAN CONTEXT**

The Law on Seizure and Confiscation of the Proceeds from Crime lays down comprehensive new requirements for the procedure and for the authorities responsible for tracing, seizing, confiscating and managing the proceeds from crime. It has to be read in conjunction with some of the existing provisions in the Criminal Procedure Code for example, but it represents a significant new step.

The Law governs, according to Article 1, the “requirements, procedures and authorities responsible for tracing, seizing/confiscating and managing the proceeds of crime” and shall be applicable for a list of qualifying offences, which include but are not limited to organised crime, trafficking in drugs and abuse of office, and for those offences whose material gain acquired from crime (the value of the objects acquired from crime) exceeds the amount of 1.5 million dinars<sup>6</sup>. The list of offences appear to include all of those listed under the Framework Decision 2005/212/JHA of 24 February 2005.

It is unclear at this stage whether the Law extends its application for the seizure and confiscation of the instrumentalities of the offences and whether or not a value-based confiscation is also an option. It is also clear that money laundering is not included in the list unless it reaches the threshold financial level within said article. This is a surprising limitation for a modern asset recovery statute.

The list of what constitutes ‘assets’ is dealt with in article 3 and appears to be comprehensive. Definitions include, but are not limited to:

1. “assets” are goods of any kind, tangible or intangible, movable or immovable, estimable or of inestimably of great value, and instruments in any form. It shall also denote revenue or other gain generated, directly or indirectly, from a criminal offence as well as any good into which it is transformed or which it is

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<sup>6</sup> Approximately EUR 14,500 at the time of writing of the present technical paper.

mingled with)

2. "Proceeds of crime" are assets of an accused, co-operative witness or bequeather manifestly disproportionate to his/her lawful income
3. "Accused" denotes a suspect, a person against whom criminal proceedings are instituted or a person convicted for a criminal offence constituted under article 2 of Law No. 97/08
4. "Bequeather" denotes a person against whom criminal proceedings are not instituted or are discontinued, whereas it has been demonstrated in criminal proceedings against other persons that he/she had committed a criminal offence under article 2 of Law No. 97/08 together with the persons concerned
5. "Legal successor" shall mean an inheritor of a convicted person, co-operative witness, bequeather or inheritors thereof
6. "Third Party" shall mean a natural person or a legal entity to which the proceeds from crime have been transferred
7. "Owner" refers to an accused person, a co-operative witness, a bequeather and a legal successor or a third party
8. "Confiscation" shall denote temporary or permanent seizure of the proceeds from crime from the owner.

The definition of "property" contained in the Law, although broad, does not appear to fully encompass those contained in the international and regional standards, as it does not contain within the terms "corporeal or incorporeal" property. Rather, the Law includes the definition of assets of "estimable or of inestimably great value", which seems to indicate assets of historical, artistic or scientific value, as set forth in article 40. Notwithstanding, the definition contained in the Serbian Law is broader in the sense that it includes intermingled property in article 3(1) *in fine*.

The Serbian authorities pointed out in the 2009 MONEYVAL report<sup>7</sup> that that one of the major steps forward regarding efficient regime of seizure and confiscation of the proceeds from crime is the introduction of the term 'bequeather'. The 'bequeather' being the person against whom, due to his/her death, criminal proceedings are not instituted or are discontinued, whereas it has been demonstrated in criminal proceedings against other persons that he/she had committed a criminal offence. It is unclear in the Serbian legislation whether proceedings in such a case would be either civil or criminal; in any event it should be noted that this appears not to be a NCB forfeiture.

Article 8 is vital in that it establishes the Directorate for the Management of Seized and Confiscated Assets (the 'Directorate') within the Ministry of Justice to perform the key tasks under the Law that shall be performed *ex officio* or at the order of the public prosecutor and the court. Article 8 also urges other government and other authorities, organisations and public services to extend assistance to the Directorate which is an important display of its importance and also an adequate treatment by Serbia to the multi-dimensional approach needed to tackle financial crimes and the profits arisen therefrom. It remains to be seen in practice, however, the efficiency of the application of this article and the co-ordination efforts between the relevant Serbian authorities.

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<sup>7</sup> MONEYVAL Mutual Evaluation Report of Serbia (8 December 2009), p. 62.

The main competencies and powers of the Directorate are found at Article 9 of the law. The Directorate shall:

1. Manage the seized and confiscated proceeds of crime which resulted from the commission of a criminal offence (article 87 of the criminal code), material gain obtained by a criminal offence (articles 91-92 of the criminal code) and assets given as a pledge in criminal proceedings,
2. Conduct professional assessment of seized proceeds for crime,
3. Store, safeguard and sell provisionally the seized proceeds of crime, and administer funds thus obtained in accordance with the law,
4. Maintain records of assets managed, including the records on court proceedings deciding on such property,
5. Participate in extending mutual assistance,
6. Participate in training of civil servants and magistrates on seizure of the proceeds of crime, and
7. Perform other tasks in accordance with the Law No. 97/08.

The Directorate is also provided with a power to manage material gain deriving from commercial felony and/or misdemeanour. This appears to be a very broad power with almost no threshold. Although a closer evaluation of the Criminal Code might offer some further assistance on the full interpretation of this measure.

Chapter III (Procedure) of the Law provides important legal provisions on how the financial investigations will be undertaken, what powers exist and in what circumstances the powers can be exercised. The prosecutor remains at the heart of such financial investigations in Serbia (see Article 17), although the established financial investigators may obtain intelligence information by performing its activities ex officio. It is unclear from the Law whether the information gathered ex officio will be considered as valid evidence in court proceedings, or utilised as justification for the ban on the use of the assets ordered by the prosecutor under article 22. This situation may lead to the challenging of such orders by the defence on the grounds of human rights infringements and violation of due process.

Articles 21 to 27 involve important powers in respect of the seizure of assets. The prosecutor, who files a motion to the court, requests the seizure of assets. It appears from the letter of the Law that it fulfils the requirements contained in the international and regional standards.

The motion on seizure of assets is to contain data on the owner, description and legal qualification of a criminal offence, designation of assets to be seized, proof of assets, circumstances establishing reasonable grounds to suspect that assets derive from a criminal offence, and reasons justifying the need for seizure of assets. The investigating magistrate, the president of the trial chamber or the trial chamber conducting the main hearing, depending on the phase of the proceedings, carries out the decision on the application. Such judicial oversight is important.

Although notwithstanding the procedure above, article 22 provides for the possibility of the public prosecutor issuing some form of restraint order himself/herself on seizure of movable assets. There is no explicit timeframe for the duration of this order and the

law simply states that it will remain in force until the court has reached its decision concerning the motion to seize assets. This article may lead to legal challenges under article 23.

The hearing under article 23 will take place within 5 days of the filing of the motion for temporary seizure of assets. It should be noted that there is no specific time frame in the Law No. 98/08 for the prosecution to file such motion after having ordered the temporary seizure of the assets. This may lead to some legal challenges on human rights grounds, as it appears to be non-specific on time frames. Moreover, it is unclear if the court may reach its decision on seizing assets *ex parte* or only after the owner of the property has been heard. Should the latter case prevail in the interpretation of the law, it may lead to the limitation of the applicability of the principle of opportunity, and may also jeopardise the investigation.

Article 27 establishes that the temporary seizure may be in force until ruling on the motion for permanent seizure of assets. Although the court may reconsider its decision in case of death or circumstances that would question the need for the temporary seizure. It would be interesting to see in what circumstances the orders may be lifted. Articles 28 to 36 provide for the procedures for the confiscation of assets. The prosecutor may file a request before the courts 1 year after the indictment and no later than 1 year after the final judgement of the criminal case (see Article 28). The motion shall contain information on the defendant, description and legal qualification of the criminal offence, designation of the assets to be seized, evidence on assets in possession of the defendant and lawful income thereof, circumstances indicating a manifest disproportion between assets and income, and grounds justifying the need for permanent seizure of assets.

The Law appears to indicate that confiscation is possible regardless of the fact that a final judgement has been obtained. If so, confiscation under Serbian law is broader than that of the international and regional standards. The deprivation of property without a final judgment may lead to human rights challenges, especially with regards to the right to property of the defendant. Moreover, this rule appears to be an extension of the possibility of anticipated sale of the seized assets contained under article 41. It is not, however, a form of NCB forfeiture.

Chapter IV (Articles 37-49) provides for the legal basis for the management of seized assets. Article 37 informs that the Directorate shall be responsible for the management of seized assets with due diligence and due and reasonable professional care, during the course of the temporary seizure or until the final conclusion of proceedings for permanent seizure of assets.

The temporary seizure of assets shall be implemented through analogous application of provisions of the Law on Enforcement Procedure (article 39). The Directorate shall bear the costs incurred during the safeguarding and maintenance of temporarily seized assets. However, should the Director decide to leave the seized assets with the owner this can be done under the proviso that the defendant undertakes due diligence in care of the assets, the owner will incur in the costs during the safeguarding and maintenance of the assets concerned. Some of the country examples below and under research envisage such systems but they must be carefully constructed to prevent the

suspects from defeating the course of justice by dissipating the assets or allowing them to be destroyed or to become worthless.

Article 41 states that the movable assets may be sold to offset essential safeguarding and maintenance costs for immovable property, but it does not state if these are to be from the same proceedings, from a specific fund, or only from assets that have been confiscated. Should the decision on temporary seizure of assets be revoked, the State shall bear the costs specified in paragraph 1 of article 41.

Article 42 provides for the possibility of the temporarily seized assets, upon authorisation from the court, being sold. The court may also exceptionally agree to a pledge offered by the owner or another person instead of selling the assets. The amount of the pledge is to be determined taking into account the value of the assets temporarily seized. Once the pledge is deposited (into an appropriate account one assumes) the assets may be surrendered to the pledge depositor.

Article 44 states that movable property that has not been sold within a period exceeding one year may be donated for humanitarian purposes, or destroyed. If the property is to be donated for humanitarian purposes, the decision is to be taken by the government at the proposition of the Directorate, following an opinion obtained from the Ministry of Health or the Ministry of Social Policy. The costs of destruction of the property are to be borne by the Directorate.

Article 45 provides for a separate account through which the amount arising from the anticipated sale of temporary seized assets is to be kept until revoking of the decision on temporary seized assets. These funds are to be used for restitution of assets and compensation of damages and administrative costs. If this fund is insufficient, the outstanding amount is to be paid by the budget of the State.

Article 46 deals with the return of the assets to the owner, should it be determined that the temporarily seized assets do not derive from any criminal offence. The monies are to be returned as well as any benefits arising from it, and are to be returned ex officio or upon request of the owner. Furthermore, the owner may claim compensation of damages within 30 days of the return of the funds subject to the temporary seizure of assets (article 47). If there is no approval or a failure to pass a decision within 3 months from the filing of the compensation, the owner may file a lawsuit for compensation of damages against the State.

The Serbian law will be analyzed in greater detail and in a comparative manner to the selected models that have been chosen from across the EU with a view to considering overall compliance, efficiency and also to provide a number of good, and problematic models, which should assist Serbia in creating a working and efficient model of asset confiscation and management.

## **4 OTHER EUROPEAN MODELS**

### **4.1 Albania**

It is possible under Albanian law to seize property as part of a criminal sanction for the offence that the property was used to commit or was somehow intrinsically connected.

What appears is new to Albania is the sense of a strong desire to invoke new civil forfeiture legislation which aims to recover the proceeds of crime from individuals who cannot be prosecuted or convicted, for example as a result of witness intimidation or because they remain beyond the reach of the judicial system, but benefit, often very considerably, from its profits.

The general rule for the confiscation of proceeds and instrumentalities of crime are provided for under article 36 of the Criminal Code. This rule also includes the confiscation of intermingled and transformed assets, and provides for value-based confiscation. The Albanian legislation resembles that of the general rules on seizure and confiscation of Serbia, although the former is broader than the latter.

This confiscation regime is subject to the rules provided for in the Criminal Procedure Code of Albania. The property can only be confiscated if there is a final judgement of conviction against the defendant, and the Court imposes the confiscation as a supplemental punishment (article 30 of the Criminal Code).

Chapter VI of the Criminal Procedure Code provides for the seizure of assets (article 274) when:

1. When there is a danger that free possession of an item connected to the criminal offence may aggravate or prolong its consequences or facilitate the commission of other criminal offences, the competent court, on application of the prosecutor, orders its sequestration by reasoned decision.
2. Seizure may also be ordered against items, proceeds of the criminal offence and against any other kind of property that is permitted to be confiscated in conformity with article 36 of the Criminal Code.
3. When the application conditions alter, the court, on the application of the prosecutor or interested person, cancels the seizure.

A Court, upon the application of the prosecutor, must issue the seizure of assets. The Criminal Procedure Code, however, is not clear in defining at what stage during the criminal investigation or prosecution such an order may be applied for.

Parallel to the seizure proceedings contained in the Criminal and Criminal Procedures Codes of Albania are those contained in the Anti-Mafia Law (Law No. 10.192 of 3 December 2009). The Anti-Mafia Law provides for the seizure and confiscation of assets or persons where there is reasonable suspicion of having committed, among others, the crimes of money laundering and terrorism financing.

The Anti-Mafia Law is applicable to assets from both the natural persons and their close relative (up to the 4th generation), and natural and legal persons. Notwithstanding, the applicability of the Anti-Mafia Law to legal persons has to be in question as there is no mention of criminal liability of legal persons in the Criminal Code, despite the fact that article 3.2.b states that the provisions of the Anti-Mafia Law are applicable to natural and legal persons.

The procedures of the Anti-Mafia Law are autonomous to the “condition, level or conclusion” of the criminal proceedings against the persons who are subject to it

(article 5). However, although the Law states that its proceedings are autonomous in relation to the criminal proceedings, article 5.3 states that the criminal proceedings and its effects take precedence over the civil proceedings under the Anti- Mafia Law. Moreover, article 24.2 of the Anti-Mafia Law clearly states that the procedures contained therein may be used in the event that the criminal proceedings are dismissed, or the person is found “criminally innocent.” Therefore, there is some confusion as to what exactly is meant by the ‘autonomous nature of the proceedings’.

Article 7 defines jurisdiction and the competent court for receiving and deciding upon the requests for preventive measures under the Anti-Mafia Law, as being those responsible for trying serious crimes and their appeals. It can be concluded from the wording of the law that a criminal court (responsible for serious crime offences) is responsible for carrying out the proceedings initiated under the Anti-Mafia Law.

The question arises whether the rules of connection of proceedings are applicable between the Anti-Mafia Law proceedings and the criminal proceedings, and whether the criminal or civil rules should be applicable. More importantly, since the Civil Code of Procedures complements the rules of the Anti-Mafia Law, these proceedings must observe article 10 of the Civil Code of Procedures (“The court bases its decision only on the facts, which have been presented during the legal proceedings.”). Therefore, if a criminal proceeding has been initiated, and there in fact is a connection of the proceedings to the same court, the impartiality and capability of the court to analyse the Anti-Mafia Law proceedings is tarnished. Not only this, but it also reinforces the idea that the proceedings under the Anti-Mafia Law are not autonomous to criminal proceedings. They are at the most procedurally independent.

Chapter III (article 15-20) of the Anti-Mafia Law brings forth rules and procedures pertaining to the administration of assets subject to preventive measures. The court that ordered the preventive measure does not administer the assets subject to preventive measures; rather, the Albanian Agency of Administration of Sequestered and Confiscated Assets (“Agency”) is tasked to administer them upon the decision issued by the court (article 15.1).

The Agency may further authorise assistance from specialists in order to administer the assets (article 15.2). Although the Anti-Mafia Law does not provide for specific rules, one is led to expect that the Agency has its own sets of laws, rules and regulations which would be applicable whenever the Anti-Mafia Law is silent in that regard.

The administrator must report, within 15 days from his appointment, on the existence and condition on which the asset is to the court, the prosecutor and the Agency (articles 18.1 and 18.3). The administrator must also notify the court, the prosecutor and the Agency of other assets that may be subject to preventive measures, which he/she is made aware of during his/her administration (articles 18.2 and 18.3).

The administrator may not (article 17), unless otherwise authorised by the court, take part in the “the adjudication, to take loans, to sign agreements of conciliation, arbitration, promise, pledge, mortgaging or alienation of the sequestered assets or to perform other legal actions of administration that are not ordinary.” It should be noted, however, that the status of specialists called to assist the Agency in administering the

assets is not clearly defined by the Anti-Mafia Law. As they are not the administrators, one is led to the conclusion that the limitations imposed to the administrators under article 17 are not applicable to the specialists. This, in turn, could bring several problems relating to either the active or passive bribery of said specialists.

In the event that the seized assets are damaged or whose value is highly volatile (i.e. movable property), these may be transferred to bona fide third parties (not including the persons under article 3.2) to administer the assets (article 19). This article thus allows for the use of seized assets by persons or entities that include, but are not limited to, the Albanian Government.

This is a highly controversial topic, as the use of the seized assets may raise several issues that range from corruption of public officials (should the assets be temporarily be transferred to a government agency), to a faster depreciation of an asset whose final owner is still the person under investigation. Although several jurisdictions utilise such measures, its efficiency is highly questionable. The Serbian legislation however, does not seem to contemplate the used of seized assets.

In any event, the management of assets itself is resource intensive – which may be the reason why the Law provides for rules on the expenses had during the administration of the assets (article 20), and may become burdensome for the State, as the investigated person may request for the civil fruits derived from the property and also for the payment of damages by the State due to mismanagement, reduction of value and damages caused to the seized property.

In conclusion then it appears that both the Anti-Mafia Law and the Criminal Code provisions on forfeiture can be utilised with the criminal offences of money laundering – which greatly differs from the Serbian legislation, as there is no mention to money laundering (although it could be indirectly applied in the event that one of the criminal offences contained in the Law on Seizure and Confiscation of the Proceeds of Crime is a predicate offence to money laundering). This is possible because article 36 of the Albanian Criminal Code is a general rule that can be applied to any action established as criminal by the Laws of Albania. The Anti-Mafia Law is also applicable, as the pertinent criminal offences are listed in its article 3. Both rules focus on the persons that have committed the crime, and not the assets.

The approach to confiscation, however, is quite different in nature. Article 36 of the Criminal Code depends upon a final criminal judgement that is non-appealable. Moreover, the confiscation under the Criminal Code depends on a higher threshold of evidence to attain the confiscation, as well as a higher threshold to reach the conviction of the defendant.

The Anti-Mafia Law, however, relies upon the Civil Code of Procedures for much of its basis in how it freezes and confiscates assets. It purports to allow for the civil forfeiture of assets but also seems to use the civil process allows in a more conventional manner to take the property. However, throughout the Anti-Mafia Law there is an uneasy switching between the criminal and the civil processes, which may be the manner in which the Law has been translated but it may not be. Nevertheless, the legal threshold for obtaining evidence (with the exception of search and seizure of documents) does

appear to be lower than that of Criminal Code, as is the decision to confiscate the assets.

Article 36 of the Criminal Code provides for the confiscation of proceeds of crime, its instrumentalities, intermingled (criminal and legal) property, transformed property, as well as value-based confiscation. The Anti-Mafia Law, on the other hand, is not clear as to which property is be subject to its preliminary investigation, seizure and confiscation. Although article 24 of the Anti-Mafia Law states that the simulation of transfer of proceeds is subject to confiscation, it does not specify whether these include instrumentalities, profits and transformed proceeds, as well as intermingled assets.

Confiscation under article 36 of the Criminal Code does not appear to permit a reversal of the burden of proof, which is assumed possible in the Anti-Mafia Law. Also, the criminal confiscation under the Criminal Code may take longer, as it requires the conviction of the defendant. The civil confiscation of the Anti-Mafia Law, on the other hand, is procedurally independent (but not autonomous) to the Criminal Code, which will allow for quicker proceedings.

#### 4.2 Belgium

Belgium has established a sophisticated and comprehensive confiscation and seizure regime under the auspices of the Central Office for Seizure and Confiscation (COSC)<sup>8</sup>, created through Act of March 26, 2003<sup>9</sup> as an institution within the Public Prosecutor's Office (Art. 2). The COSC assists judicial authorities in problems with respect to seizure and confiscation of assets (art. 3. § 1). It is also involved in the enforcement of the court decisions where confiscation of such assets is ordered.

Article 5 § 1 of the Act requires the prosecutor (*Procureur du Roi*) and the investigating magistrate to notify the COSC of the seizures and the methods of storage or preservation of the seized assets as well as any further decisions relating to the assets.

Section 2 (art. 6. § 1 and 2) of the Act provides for the management of seized assets in such a manner that they are maintained and, wherever possible, their value is preserved (this mechanism has been incorporated into article 28 of the Belgian Criminal Procedure Code). The prosecutor is responsible for the management of the seized assets, except during the investigation where the responsibility rests with the investigating magistrate. The state also bears the costs of managing the assets during the investigation.

The COSC provides a centralised management and computerized data system in respect of all its operations, conduct, all matters relating to the authorization of the public prosecutors or judges in the disposition of seized assets, the special management of seized property, coordination of the enforcement of court's decisions and also to provide assistance through mutual legal assistance.

The preservation of the value of the assets means that the assets are either conserved or stored in preparation for their return or confiscation, in a condition reasonably

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<sup>8</sup> Link to the COSC website: <http://www.confiscaid.be>

<sup>9</sup> The full act in French and Dutch is available at: [http://www.confiscaid.be/FR/frameset\\_3.htm](http://www.confiscaid.be/FR/frameset_3.htm)

comparable to that at the point of seizure (with no prejudice to the responsibilities of the person to whom the management or conservation is assigned under law), or are disposed of in accordance with legal requirements

The Act of March 26, 2003 has established summary judgment proceedings within the criminal procedure in order to dispose or to return the seized assets. The proceeding has been introduced by the articles 28<sup>octies</sup> and 61<sup>sexies</sup> of the Belgian Criminal Code. It also allows any person affected by the investigation or the prosecution to request the sale of the seized property or its return. The Public Prosecutor and the investigating magistrate may also apply of their own accord for a similar request but only in the case where the storage of the property, even for a limited period, is likely to lead to a significant depreciation, or the preservation costs are not proportional to its value and only when such properties are replaceable and the exchange value easily determinable. The COSC can make a similar request.

There is an appeal process against summary judgment before the *Chambre des mises en accusation*. Article 28 of the Belgian Criminal Procedure Code defines the procedure for the sale, usually a public sale, usually conducted by the Director of the Registrar of Properties (*le directeur de l'enregistrement des domaines*), and that the costs of the sale, including expenses incurred by the involvement of individuals and representatives from the private sector, are paid by the purchasers.

The management of registered bonds or bearer shares and money is entrusted to the COSC, which can request and involve third parties in the management under stringent guidelines and under its responsibility.

Vehicles that are seized under article 35 § 1 of the Belgian Criminal Procedure Code, and for which the suspect is the owner, may be made available to the Federal Police for use in connection with its normal activities. The prosecutor takes the decision and it is subject to appeal. Compensation for depreciation is provided in case of restitution back to the suspect (article 35 § 2 CPC). The suspect can file a complaint as such a request is sent to the public prosecutor office. The public prosecutor has fifteen days to submit his reply. By law, he may reject the request if he considers that the needs of the investigation require such a course of action. In cases where the law provides for the restitution of such property the public prosecutor may order a full, partial or conditional restitution. The suspect does have a further appeal, in the event of an unfavourable decision by the prosecutor, to the *Chambre des Mises en Accusation*.

#### **4.3 Bosnia**

Bosnia does not appear to have any specific legislation on the seizure, forfeiture and management of assets, as presented in Serbia. There are, however, general rules on seizure and confiscation, which are contained within the Criminal Code and the Criminal Procedure Code of Bosnia.

Article 110 provides for the basis of confiscation of material gain. It informs that nobody is allowed to retain material gain acquired by the perpetration of a criminal offence (article 110(1)). The MONEYVAL mutual evaluation report of Serbia informs that it is a "general provision related to money laundering as well as any other types of

crime”<sup>10</sup>, and applies to the confiscation of proceeds of crime and all sorts of property. The confiscation is possible through the final judgement passed by a court.

The confiscation includes both property and value-based confiscation (article 111(1)), and spans across direct and indirect proceeds, instrumentalities of crime (article 74), as well as intermingled property. In the latter case, the courts may confiscate the property but not exceeding the total assessed value of the intermingled proceeds (article 111(2)). The courts may thus order the confiscation of a specific part of the property (if the property may so be divided), or oblige the perpetrator to pay the equivalent amount<sup>11</sup>.

Confiscation of proceeds when committed by a legal person is also possible (article 140), as is also the case of instrumentalities of crime (article 137 and 74), although value-based confiscation is not possible for the latter<sup>12</sup>. Furthermore, income or other benefits resulting from proceeds, from property into which proceeds of criminal offence have been converted or intermingled shall also be liable to the measures of confiscation (article 111(3)).

Confiscation is also provided for under the criminal offence of money laundering (article 209(4)). It appears that the principle of *lex specialis derogat generalis* is to be applied in this case<sup>13</sup>.

Confiscation can only be rendered by a court upon issuance of final judgement, pursuant to article 285(1) of the Criminal Code and article 396(1) of the Criminal Procedure Code. Moreover, Article 391(1) and (3) of the Criminal Procedure Code appears to permit for NCB forfeiture as it informs that “items (...) shall be forfeited also when the criminal procedure is not completed by a verdict, which declares the accused guilty, if this is required by the interests of general security” and “The ruling on forfeiture of items referred to in paragraph 1 of this Article shall be issued by the court when the verdict, which declares the accused guilty, fails to issue such a decision”. MONEYVAL evaluators point out that the conditions of applicability of such a measure are “unusually insubstantial (‘interests of general security’) so there is too much room left for judicial discretion”<sup>14</sup>.

Article 73 of the Criminal Procedure Code provides for the seizure of proceeds of crime at any time during the proceedings issued by the court at the request of the prosecutor, so as to prevent the use, transfer or disposal of the property. Notwithstanding, an authorised official may seize the property if there is a risk of delay, so as to prevent use, transfer or disposal of such property. In such a case, the authorised official is to immediately inform the prosecutor about the measures taken and the court must confirm them within 72 hours following the undertaking of the measure (article 73(2)). The administrative seizure of assets in Bosnia clearly has a broader scope of authorities that can undertake them when considered with Serbia, where only the prosecutor is allowed to carry out these functions.

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<sup>10</sup> MONEYVAL Mutual Evaluation Report of Serbia (10 December 2009), p. 69.

<sup>11</sup> Id. p. 70.

<sup>12</sup> Id. p. 74.

<sup>13</sup> Id. p. 72-73.

<sup>14</sup> Id. p. 74.

Bosnia also has specific seizure rules concerning bank accounts, contained in article 72 of the Criminal Procedure Code. Moreover, article 48 of the Law on the Prevention of Money Laundering and Financing of Terrorist Activities allows for the Financial Intelligence Unit to issue a written order for a temporary suspension, lasting 5 working days, of transactions. Law enforcement agencies and other bodies and institutions may also issue this order (article 48(1) and article 51(1)).

The general rule for the management of seized assets under the Bosnian Criminal Procedure Code appear to be contained in article 68, which informs that seized objects are to be sealed and inventoried. Moreover, they may not be sold, given as a gift or otherwise transferred (article 68(3)). This appears to be a limitation within the Bosnian law, as the legislation does not allow for the anticipated sale of movable or perishable assets, or allow for the anticipated sale (as is the case with Serbia). Rather, they are to be kept in deposit pending final judgement, which may lead to the current experience dealt by France. Thus, it does not appear that Bosnia has, to date, specific rules for the management of seized assets, a specialised agency or department within an agency, or rules for receivers, all of which would be responsible for the task of management of seized assets.

#### **4.4 Bulgaria**

The general rule for the confiscation of the proceeds of crime is provided for in articles 44 and 45 of the Criminal Code of Bulgaria. This criminal confiscation regime is subject to the rules defined in article 72 of the Criminal Procedure Code. Article 72(1) informs that upon request of the prosecutor, the court may apply securing measures (i.e. seizure) to secure the fine, confiscation and forfeiture of objects for the benefit of the state, according to the rules set forth in the Code of Civil Procedures. It should be noted that neither the Criminal Code nor the Criminal Procedure Code defines a definition of what objects are subject to seizure.

Bulgaria also has specific legislation pertaining to the seizure and confiscation of assets, contained in the Law of Divestment in Favour of the State of Property Acquired from Criminal Activity (Law of Divestment). Said Law provides for the conditions for “imposing securing measures and divestment in favour of the state of property, acquired directly or indirectly from criminal activity” (article 1 (1))<sup>15</sup>. The objective of the Law on Divestment is to prevent and restrict the possibilities of benefitting from criminal activity and preventing of the disposal of property, acquired from criminal activity (article 2). This law is applicable to direct or indirect property acquired from criminal activity that has not been restored to the victim and that has not been divested or confiscated under other laws (article 1 (2)).

Article 3(1) of the Law of Divestment brings forth a list of offences that will allow the applicability of said law. This approach is similar to that adopted by Albania in their Anti-Mafia Law and also Serbia with its Law on Seizure and Confiscation of the Proceeds from Crime. It however differs from the latter two laws in the sense that it does not establish an objective financial threshold for its applicability, choosing to

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<sup>15</sup> Prom. SG. 19/1 Mar 2005, amend. SG. 86/28 Oct 2005. Available at: <http://www.cepaca.bg/?act=content&id=80>.

apply a subjective criteria 'property of significant value'.

While applying a subjective criteria may broaden the scope of application of the law, as it will allow for a case-by-case analysis, it will also mean that the lack of an objective financial threshold may represent a high burden for the enforcement of such legislation by the competent authorities. Thus, the Law of Divestment is applicable when it has been established that a person has acquired property of significant value in which there is reason to believe that it has been acquired from criminal activity, and against whom a criminal prosecution has been initiated for one of the listed crimes under article 3(1), which include a broad range of offences, but is not limited to organised crime, money laundering and bribery.

It should be noted that said Law does not define the term property, although a close analysis of article 1(2) may allow for the conclusion that any direct or indirect property that has been acquired from criminal activity may limit itself to the proceeds of crime and perhaps the intermingled assets. It is unclear whether the definition also includes the instrumentalities of crime. This is a similar limitation that can be deduced from the Serbian legislation.

The procedures contained in the Law of Divestment will also be applicable when "there are sufficient data about property of significant value" and that a supposition can be made that it has been acquired from criminal activity (article 3(2)), but:

1. The criminal procedure has not started or has been terminated due to the fact that the defendant has deceased or has fallen into durable mental disorder excluding sanity or an amnesty has followed; or
2. The criminal procedure has been terminated pursuant to article 25 of the Criminal Procedure Code (Suspension of the Criminal Proceedings).

Although it appears that the Bulgarian legislation limits itself to the criminal seizure and confiscation of the proceeds of crime (albeit the application of the Civil Procedure Code) – which is procedurally autonomous from the criminal prosecution, the possibility to allow for the initiation or continuance of seizure and confiscation proceedings regardless of the fact that the accused is deceased or that the criminal procedure has been suspended is welcomed as an efficient mechanism to recover the proceeds of crime. It should be noted that the Serbian legislation has similar provisions with the introduction of the 'bequeather'.

Article 5 of the Law of Divestment also allows for the divestment to reach the heirs of the person holding the proceeds of crime, to the extent of the acquisition of the property by that person. The Serbian legislation also allows for the seizure and confiscation of the proceeds of crime to reach the legal successors of the convicted person. Furthermore, the seizure and confiscation of proceeds of crime included in the property of a legal person but controlled by the natural person under prosecution independently can also be reached by the rules set for the Law of Divestment (article 6). The Law on Divestment also contains other measures to allow the seizure and confiscation measures to reach criminal property that has been transferred to members of the family and relatives of direct and lateral lines (articles 8 and 10).

There appears to be no asset management office created by the Law of Divestment.

Whereas it creates the Commission for Establishing Property Acquired from Criminal Activity (CEPACA), it is responsible “for implementing check of the property of persons for whom the conditions of art. 3 exist, for establishing of property, which has been acquired from criminal activity” (article 12(1)). CEPACA shall have the right to require co-operation and information from all state and municipal bodies, which cannot be refused or restricted due to considerations for official or commercial secret (article 15(1)).

CEPACA is not an agency responsible for the management of seized assets, but an investigative body that assists prosecutors and courts in obtaining evidence of proceeds of crime. The investigation made by CEPACA is to last no more than 10 months, although it may be exceptionally extended for up to 3 months (article 15(2)). Moreover, it is responsible for presenting requests of seizure and confiscation of proceeds to the court, and the securing measure of the criminal property shall be made pertaining to the rules within the Civil Procedure Code (article 22(2)). Pre-trial proceedings authorities are to notify CEPACA immediately of each case that the prosecution has initiated (article 21(1)). Moreover, should there be a risk of “scattering, destroying, hiding or disposing with the property, acquired from criminal activity (...) the court may order sealing of premises, equipment, transport vehicles etc. in which this property is preserved” (article 21(3)). Therefore, it appears that the seized assets are subject to deposit, upon decision made by the competent court. In any case, the seizure shall include the civil fruits of the property, as well as interest arisen therefrom (article 23(3)).

Notwithstanding the above, article 23(6) allows for the anticipated sale by CEPACA of the criminal property which is subject to perishing, or whose preservation is connected with big expenses, under the rules established in the Tax Procedure Code. The sum arisen from such a sale is to be placed into a special account.

Finally, it should be noted that the court may authorise payments or other disposing actions with the seized property under the conditions established in article 23(4), which include, but is not limited to treatment or other emergency humanitarian needs of the person, on whose property securing measures have been imposed, or of a member of his family and payment of expenses in connection with the procedures under the Law of Divestment. Article 45(2) of the Criminal Code further informs that belongings for the personal or home use shall not be confiscated to the convicted person or his family, if the objects are necessary from practising his profession, contained in a list adopted by the Council of Ministers, as well as the resources for support of his family for a period of one year.

#### **4.4.1 Draft Law on the Forfeiture of Criminal Assets to the Exchequer**

Bulgarian authorities have recently drafted a new law that will deal with the seizure of assets and forfeiture in civil proceedings. The draft law is similar to the Law of Divestment; for this reason, attention will be given to the differences between them. It should be noted, however, that the Additional Provision of the draft law does not repeal explicitly the Law of Divestment. Therefore, it appears that the Law of Divestment will continue in force, with the derogation of its rules and regulations that are similar in nature to the draft law, under the *lex posteriori derogat lex anteriori*

principle.

The draft law is Bulgaria Law of Divestment and the Serbian Law on Seizure and Confiscation of the Proceeds from Crime, as it contains a list of criminal offences that will allow for the applicability of the draft law (article 3). The draft law differs from the Law of Divestment, however, as it defines on §1 of the Additional Provision the term 'substantial value' as any amount exceeding BGN 60,000<sup>16</sup>. It thus converges with the Serbian Law on Seizure and Confiscation of the Proceeds from Crime in that regard, although the former contains a lower monetary threshold for its application.

The draft law also adds the proviso that assets directly or indirectly derived from criminal action can be seized and forfeited if it can reasonably be assumed to have been acquired from criminal activity, regardless of the fact that the perpetrator of the offence remains undetected.

As with the German system for example, the new Bulgarian draft law suggests that if the assets "have been partially or entirely transformed", the "transformed assets" will also be subject to forfeiture.

As far as case law is concerned, there have been several judgments from the European Court of Human Rights on the right to respect for private and family life (Art. 8, ECHR). Transferring the essence of those judgments to the case of Bulgaria would mean that the current practice in Bulgaria, which seems to be to do searches and seize assets without the permission of a judge in urgent cases (159 Criminal Procedure Code) has to be questioned. Therefore, it remains to be seen whether "the judicial practice in Bulgaria, reportedly favouring post-factum approvals as the rule rather than the exception, failing to independently verify the investigation motifs presented, and also falling short of providing reasoned decisions, meets the requisite standard"<sup>17</sup>. It can be said that this practice is not in itself a violation of Art. 8 ECHR but it can potentially become one, if assets are seized on a regular basis without prior approval by a judge not only in cases of urgency but rather as a routine practice.

#### 4.5 Croatia

Croatia established in 2004 the Office of the Prevention of Corruption and Organised Crime (OPCOC) through the Law on the Office for the Suppression of Corruption and Organised Crime. OPCOC is a "special State Attorney's Office" (article 2(1)), responsible for directing the investigative activities carried out by the police, proposing "the implementation of securing measures of compulsory seizure of funds, revenues and property acquired through criminal offence" (article 15(1)). These activities, however, are to be applied to a list of offences specified under article 21, including the criminal offences of misuse of performing government duties, accepting a bribe, offering a bribe, committed in connection with the activity of a criminal organisation, money laundering among others. This is a similar solution to the one utilised in Serbia,

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<sup>16</sup> Approximately EUR 30,000 at the time of writing of this technical paper.

<sup>17</sup> Prof. dr. Fr. van Hoofn and D. Stoitchkova, *COMPLIANCE OF BULGARIAN LAW AND PRACTICE WITH THE ESTABLISHED STANDARDS CONCERNING THE APPLICATION OF ARTICLE 8 OF THE EUROPEAN CONVENTION*, p. 18, available at [http://www.blhr.org/docs/SIM%20Final%20on%20Art.8\\_01\\_12\\_06\\_en\\_.pdf](http://www.blhr.org/docs/SIM%20Final%20on%20Art.8_01_12_06_en_.pdf)

although the latter also contains a monetary threshold for the application of the law.

It should be noted that OPCOC contains other departments within its structure, including the anti-corruption and public relations department, and the department for investigation and documentation (article 12). The latter should “organise and run data basis (sic) which may serve as a source of information in the criminal proceedings from article 21 hereof”, as well as to “encourage and direct the co-operation between the governmental bodies with a view to discovering corruption and organised crime” (article 13(1)). It is unclear whether the sources of information may be considered as legal and valid evidence before a court. It appears, however, that the information gathered by said department is in fact intelligence gathering.

Confiscation and forfeiture under Croatian Law is defined under articles 80 and 82 of the Croatian Criminal Code. Article 80 defines forfeiture as a security measure and applies “to an object which was designed for, or used in, the perpetration of a criminal offence, or came into being by the perpetration of a criminal offence, when there is danger that the object will be used again for the perpetration of a criminal offence or when the purpose of protecting the public safety or moral reasons make the forfeiture of such an object seem absolutely necessary”.

Confiscation under article 82 is applicable to “pecuniary gain acquired by means of a criminal offence”. The order for confiscation of pecuniary gain shall “be ordered by a court decision establishing that a criminal offence was committed” (article 82 (2) of the Criminal Code). Furthermore, if it is impossible to seize in full or in part the pecuniary gain consisting of money, securities or objects, the court shall obligate the perpetrator of the criminal offence to pay the equivalent sum of money (article 82 (2)). The confiscation of pecuniary gain is also applied when the assets are in possession of a third party on any legal ground and that it has not be acquired in good faith. Furthermore, the court will confiscate only the part that exceeds the granted claim of an injured third party (article 82(4)). The definition contained in the laws appears to include both the proceeds and the instrumentalities of crime.

It appears that, in 2009, “amendments to the Criminal Code introduced new rules on confiscation of assets which reverse the burden of proof for persons convicted for organised crime or corruption offence” according to an EC report<sup>18</sup>. It is stated further “the Criminal Code has been amended in order to widen the definition of the money laundering offence and to bring it into line with the requirements of both the Vienna and the Palermo Conventions. The confiscation regime has been extended to all property related to a perpetrator of organized crime or corruption offences; the possibility of reversal of the burden of proof has been introduced<sup>19</sup>.”

When it comes to seizing assets that stem from criminal activity, the OPCOC is responsible for “securing seizure of means, proceeds or assets resulting from criminal offence”<sup>20</sup>. Within that office the Prosecutor’s Department is responsible for

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<sup>18</sup> CROATIA 2009 PROGRESS REPORT *accompanying the* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Enlargement Strategy and Main Challenges 2009-2010, p. 11, available at: [http://www.eu-pregovori.hr/files/Izvjesce/Progress\\_report\\_2009.pdf](http://www.eu-pregovori.hr/files/Izvjesce/Progress_report_2009.pdf)

<sup>19</sup> Id, p. 31.

<sup>20</sup> LAW ON THE OFFICE FOR THE SUPPRESSION OF CORRUPTION AND ORGANISED CRIME, Art. 1(4).

“propos[ing] the implementation of security measures of compulsory seizure of funds, revenues and property acquired through criminal offence (...)”<sup>21</sup>. Seizure of objects is dealt with in article 233 of the Criminal Procedure Act. A court order is needed to seize assets under this act and the police will execute the seizure.

Croatia appears to contain a similar provision to that of Bosnia with regards to NCB forfeiture. Article 482(1) of the Criminal Procedure Code allows for the confiscation of objects when the criminal proceedings do not terminate with a conviction, “provided that this is required by considerations of public safety or the protection of the honour and dignity of citizens”. Similarly to the reasons explained for the Serbian legislation, this is not a NCB forfeiture. It would be interesting to see how this article is applied in practice by the courts.

Article 482-490 inform of the seizure of pecuniary benefit. It includes the proceeds and the instrumentalities of crime, and shall be applicable against the defendant, third parties to whom the pecuniary benefit was transferred as well as the representative of the legal person (article 484(1)). It is unclear what the extent of the meaning if the “third parties whom the pecuniary benefit was transferred” also include close relatives. Moreover, it is possible to have property and value-based confiscation (articles 485 and 486).

The Law on the Office of the Suppression of Corruption and Organised Crime also contains specific provisions of the seizure and confiscation of proceeds and instrumentalities of crime in its articles 44 to 56. Like Serbia, the applicability of the rules contained in said Law are dependant on the list of offences contained in its article 21. It should be underscored, however, that the definition of assets (article 45.3) does not appear fulfil the definitions contained in regional and international instruments. Interestingly, the Law does not contain any provisions for the management of seized assets.

Croatia appears to have limited and generalized rules on the management of seized assets, contained in article 233, 235 and 168 of the Criminal Procedure Code. The general rule, as seen e.g. in France, is that the proceeds are to be sealed and put in deposit, pending final judgement (article 235). However, article 168(3) of the Criminal Procedure Code of Croatia contains the provisions for anticipated sale of seized assets. The court shall decide whether the objects are to be sold pursuant to the provisions contained in the Law on Enforcement procedure, among others. The proceeds derived from such sales are to be assigned to public funds.

#### **4.6 France**

There is currently no specific legislation in France on the management of seized assets, although a new bill is currently undergoing its legislative passage to address some issues, which will be subject to greater analysis below. For this reason, the French authorities currently rely on the rules set forth in the French Criminal Code, the Civil and Criminal Procedure Codes and other legislation. As France is currently proposing changes in the areas of the asset recovery and management processes, the present technical paper is based on the French legislation in force as of July 2010, and a

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<sup>21</sup> Id, Art. 15(2).

separate section reviewing the proposed bill on the seizure and management of seized assets will follow.

The French Criminal Procedure Code does not clearly inform the extent of the meaning of “assets” which are subject to seizure (article 97 of the Criminal Procedure Code). Nevertheless, it is possible to infer, based on the confiscation rules set forth in article 131-21 of the Criminal Code, that the term ‘assets’ includes movable and immovable property used for, or intended to be used for the commission of an offence, and property that is directly or indirectly the product of an offence, save articles subject to restitution to the victim, can be seized. Article 131-21 further informs that proceeds of crime that have been intermingled with funds that have a legal origin, for the purposes of acquiring property, are also subject to criminal confiscation up to the estimated value derived from a criminal offence.

The current French criminal legislation only allows for the seizure of “articles, documents or electronic data useful for the discovery of the truth” (article 56, 6 of the Criminal Procedure Code) and it thus also not well adapted to seizure of intangible or immovable assets, which have to be dealt with according to the rules of the Civil Procedure Code (based on the rule established in article 706-103 of the Criminal Procedure Code). It is through this intricate procedure that the French authorities are currently able to satisfy the international and regional standards.

Once the seizure is ordered to the competent investigating magistrate<sup>22</sup> (article 97, 1 of the Criminal Procedure Code), an inventory of the assets is prepared and they are subsequently sealed (article 97, 2 and article 56, 3 of the Criminal Procedure Code). The assets are then to be managed by the clerk of the competent court. Furthermore, the management costs are entirely borne by the State, at its own cost. This consequently leads to the devaluation of the seized assets, as they are normally placed in deposit and represents an additional financial burden to the state.

The French system provides for value-based confiscation (article 131-21 of the Criminal Code), in the event that the assets cannot be seized nor produced. This is in line with the international and regional standards for this provision.

The French legislation also enables the anticipated sale of seized assets if their conservation is not necessary during the investigation or trial (The 29 October 2007 Law on Forgery). Where the French Domain Service is given the responsibility to proceed with such a sale, the proceeds resulting therefrom are kept for 10 years. In the event of acquittal or if the court does not order the confiscation the owner can demand the return of the assets (art. 99, 2 Criminal Procedure Code), although this is appears not to be done *ex officio*.

The anticipated sale of assets is permissible: (i) in the event that seizure and deposit of the asset would likely to diminish its value, or if maintaining the asset is no longer necessary for the discovery of the truth; and (ii) in the event that the owner of the asset cannot be identified or if the owner did not ask for its restitution within 2 months

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<sup>22</sup> It should be noted that law enforcement may seize certain assets without an order from the investigating magistrate, in the event that these were seized in *flagrante delicto* (article 56 of the Criminal Procedure Code)

following formal notice.

The current French system does not have rules for a seizure of property ordered by the prosecutor without going through the courts (like seen in Serbian legislation). It is necessary to obtain an order from the investigating magistrate during the investigative phase of the criminal proceedings (article 91, 1 of the Criminal Procedure Code). The proposed bill on the management and seizure of assets in criminal proceedings (*Proposition de Loi visant à faciliter la saisie et la confiscation en matière pénale*) would allow the possibility of law enforcement with search warrants to seize assets during the investigative phase of the criminal proceedings.

It does not appear that the current French legislation allows for the use of seized assets while they are being managed by the state.

#### **4.6.1 The Draft Bill on Seizure and Confiscation in Criminal Matters.**

The current French system is loose regarding the management of seized assets, and does not rely on a centralised management system or agency to manage said assets. As mentioned previously, each clerk of the court is responsible for managing the assets seized by that court. The efficiency of the seizure and management of assets during the investigative period is thus questionable under the current system. In most cases, several years elapse between the investigation and the commencement of the trial. It appears that under the current system the procedures lengthy and cumbersome, and do not address the needs of a modern criminal assets confiscation regime.

A proposed bill specifically regarding the seizure of criminal assets is currently being considered by the French National Assembly<sup>23</sup>. It will, for example, clarify the existing articles of the Criminal Procedure Code and create specific provisions on the seizure of immovable assets. The procedure will be quicker and more efficient when compared to the complex system currently used.

The proposed bill aims to overhaul the entire seizure and forfeiture proceedings in criminal cases, following three main pillars: (i) the extension of the assets that may be subject to seizure; (ii) clarifying procedures and criminal seizures; and (iii) improving the management of seized property.

The first pillar seeks to amend article 131-21 of the Criminal Code, defining more clearly the assets that are subject to criminal seizure. It further seeks to enhance the opportunities of seizing assets during the investigative phase, seeking to ensure greater effectiveness of judgements.

The second pillar of the proposed bill seeks to address issues related to the incoherence of the French Criminal Procedure Code on not addressing the seizure of immovable property. For this reason, the proposed bill seeks to add a new chapter into the Criminal Procedure Code, distinguishing the major categories of property that may be subject to forfeiture (real estate, business assets, share, monetary claims), as well as the legal consequences of the seizure with respect to third parties.

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<sup>23</sup> The bill is available at <http://www.senat.fr/leg/pp108-454.pdf>. Commentaries made by the French Senate is available at <http://www.senat.fr/rap/109-328/109-328.html>

The proposed bill further specifies the conditions for carrying out the seizures of such goods and the respective roles of the owner and service areas with regards to the retention of such property pending the release of the assets or the confiscation order. Also contained in this second pillar are measures that will allow the courts to seize assets and have anticipated sale of movable assets susceptible to sharp depreciation of value. The proposed bill also seeks to change article 56 of the Criminal Procedure Code so as to enable the seizure of assets by law enforcement during the investigation.

Finally, with regards to the third pillar, the proposed bill seeks to improve the management of the seized assets, so as to avoid their depreciation throughout the criminal procedure or, instead, that the conservation of the property becomes unnecessary and resource intensive for the state.

The proposed bill also creates the Agency for the management and recovery of seized and confiscated assets (*Agence de Gestion et de Recouvrement des Avoirs Saisis et Confisqués*) with the insertion of Title XXX (articles 706-158 to 706-166) of the Criminal Procedure Code, using as a model the Canadian Seized Property Management Directorate<sup>24</sup>.

The Agency, which will be under the joint supervision of the Ministry of Justice and the State Budget Ministry, will be in charge of managing, selling or destroying the assets. It will have the competence to re-designate or sell the seized assets. The Agency will also have the power to enforce, on the behalf on the public prosecutor, the final judgment pertaining to confiscation, with the exception of confiscated monies.

Under the amendments of the proposed bill, a new section entitled 'special seizures' ("*Des Saisies Spéciales*") shall be introduced into the Criminal Procedure Code. This section shall be to criminal seizures that involve all or part of a person's assets, immovable assets, intangible movable assets or claims, among others.

Furthermore, the costs of management of seized property shall be borne by the owner of the property, or the holder thereof, with the exception of the fees to be borne by the state. It should be noted that it is not clear what the costs to be borne by the state are and what the extent of the term "fees" is. Should the owner or the holder of the property go bankrupt ("*défaillance*"), the prosecutor or the magistrate may authorise the anticipated sale of the seized property or have a receiver appointed for the management of the asset, subject to the rights of the bona fide third parties. On the other hand, prior approval by the court will be necessary for any act that may substantially alter the property or reduce its value.

The proposed bill also allows for the anticipated sale of the seized property in order to satisfy creditors, should the maintenance of the seized property not be required through the appropriate civil proceedings. In such a case, the balance of the purchase of the sale shall be recorded on the criminal proceedings.

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<sup>24</sup> More information on the Canadian Seized Property Management Directorate is available at <http://www.tpsgc-pwgscc.gc.ca/apropos-about/fi-fs/bs-spm-eng.html>

The proposed bill also clarifies that assets, as defined under article 131-21 of the Criminal Code, may be subject to seizure, including both immovable property and intangible movable property.

#### 4.7 Germany

The management of seized assets in Germany is dealt with on the basis of close cooperation between the police and the judiciary. Although there is no Federal asset management office, certain cities within *Länder* (federated states, singular *Land*) have special asset seizure and forfeiture units that consist of members of the police as well as members of the judiciary e.g. *Land* Baden Württemberg has special asset seizure units within the prosecutor's offices in the cities of Mannheim and Stuttgart prosecutor's office.

However, the forfeiture and management of proceeds of crime are closely interconnected in Germany, even when there is no specialised unit in place. This is considered to be a big advantage by the German authorities, as those specialised units that manage the assets know can react quickly to court decisions pertaining to the seizure, confiscation and anticipated sale. This seems to differ from the Serbian model, as the Directorate for Management of Seized and Confiscated Assets has legal personality and is thus appears to be detached from the investigation and court proceedings. An implication of this is that not being part of the criminal proceedings may not allow the Directorate to perceive the connection of seized assets with the initiation or continuance of other investigations and prosecutions.

Notwithstanding the fact that Germany has not centralised management office, they have created an online database (*Abschöpferarchiv*) encompassing all objects that have been seized in the country. Said database also contains standardised templates for legal requests concerning asset forfeiture e.g. request for a forfeiture order to a court.

The German prosecutor is responsible for leading the investigation and managing the seized assets, as well as the reimbursement of victims.

The seizure and confiscation rules in Germany are contained in the Criminal Code and the Criminal Procedure Code (the Criminal Code contains the rules for confiscation, though Section 111b(1) of the Criminal Procedure Code informs that seizure is applicable when the conditions of forfeiture have been fulfilled). Section 73(1) of the Criminal Code informs that if an unlawful act has been committed and something has been acquired as a result thereof or for the purpose of committing it, the court shall order its seizure. The seizure order shall be extended to the benefits derived from the unlawful act (*erweiterter Verfall*) and the instrumentalities, whether owned by the defendant or a third party with knowledge of its use for unlawful acts – Sections 73(2), 73(4) and 73d. It should be noted that Section 73d applies to The German Criminal Code also allows for value-based confiscation under Section 73a, and the amount to be forfeited may be estimated under Section 73b.

It should be underscored that Germany applies the so-called *Bruttoprinzip*, meaning that the court may order a seizure of the object and the civil fruits arisen thereof. Serbia, on the other hand, applies the so-called *Nettoprinzip*, in which only the object

can be seized, but not the civil fruits arisen therefrom. Additionally, Germany does not have a financial threshold to allow for the application of a seizure order, as seen on article 2 of the Law on Seizure and Confiscation of the Proceeds from Crime).

The seizure of objects in Germany extend not only to the perpetrator, but also the third parties which had knowledge of the unlawful act, regardless of their guilt – Sections 73(3) and 74(3). These rules appear to be similar to those found in articles 3 and 28 of the Law on Seizure and Confiscation of the Proceeds from Crime.

Furthermore, seizure is applicable if there is an anticipated risk that the assets may be dissipated (*Gefahr im Verzug*), according to Section 111e(1) of the Criminal Procedure Code. Law enforcement upon initial suspicion that there is a risk that the asset would otherwise be moved may seize movable assets. No further justification is needed other than the initial suspicion, and assets can be seized this way for up to six months. This means that law enforcement can seize movable objects without having to present a high level of evidence – Section 111b(1), (2) and (3). After said period, however, there is to be a court order extending the seizure for an additional 3 months.

Germany allows for the anticipated sale of seized assets (*Notveräußerung*), under the provisions contained in Section 111l of the Criminal Procedure Code. Objects subject to deterioration or substantial reduction of their value, or if their preservation, care or maintenance results in disproportionate costs or difficulties – Section 111l(1). The assets are to be sold by the prosecutor or the court, depending at which stage the criminal proceedings are – Section 111l(2) and (3) – after hearing the accused, the owner and other persons who have rights in relation to the object – Section 111l(4). The anticipated sale shall be carried out according to the rules set forth in Section 764 of the Civil Procedure Code.

#### **4.8 Ireland**

The Criminal Assets Bureau (CAB) was established in 1996. The Bureau's statutory remit is to carry out investigations into the suspected proceeds of criminal conduct.

CAB identifies assets of persons which derive, (or are suspected to derive), directly or indirectly from criminal conduct. It then takes appropriate action to deprive or deny those persons of the assets and the proceeds of their criminal conduct. The legal basis for this action is the Proceeds of Crime Act 1996, as amended by the 2005 Act, and Social Welfare and Revenue legislation.

CAB uses a multi-agency, multi-disciplinary partnership approach in its investigations into the suspected proceeds of criminal conduct. It works closely with international crime investigation agencies, and has successfully targeted proceeds of foreign criminality from countries such as the US and the UK.

CAB also works with international bodies such as the European Commission and Camden Assets Recovery Inter-agency Network (CARIN). CARIN is an informal network of law enforcement agencies, who share knowledge and information on how to trace assets in a member's country. Significant benefits accrue in the international arena from this multi-agency approach.

Criminals are continually becoming more adept at hiding the fruits of their criminal activity. In order to continue to identify and trace such assets and to present testimony before the Courts, CAB has:

1. Established the Bureau Analysis Unit
2. Adopted international best practices in the area of Forensic Analysis
3. Adopted the use of enhanced training

A policy shift towards earlier or preliminary applications relating to lower value assets targets a more middle-ranking criminal than previously. While this approach may not realise extensive financial returns, it demonstrates CAB's ability to react to local community concerns. Accordingly, this approach is seen as an effective use of CAB's resources.

In terms of asset management CAB has usually employed a strategy of selling most assets retained on the basis of the high cost and the bureaucratic demands that follow restraint.

#### **4.9 Montenegro**

Articles 112 to 114 of the Montenegrin Criminal Code contain the general rules for the seizure of assets. Article 112 informs that no one shall be allowed to retain any material gain obtained from a criminal offence. The seizure of assets in Montenegro is conviction based, meaning that it will require a final judgment for the confiscation of the property, although there is regulation on the anticipated sale of assets, as will be seen below in more detail.

"Money, things of value and all other property gains" obtained by a criminal offence are to be seized from the offender. However, should such a seizure not be possible, the perpetrator shall be obliged to pay for the monetary value of the obtained property gained (article 113(1)). Moreover, material gain which has been subject to transfer without real compensation or whose transfer has been inadequate to the real value of the transfer will also be subject to seizure (article 113(2)). Property obtained through a criminal offence for another person is also subject to seizure (article 113(3)).

Articles 85 to 97 of the Criminal Procedure Code provide for the seizure of objects, property gain and property. Article 85(1) informs that objects which have to be seized according to the Criminal Code, or which may be used as evidence in a criminal procedure, may be seized and delivered for safekeeping to the court or be secured in another way, at the proposal of the prosecutor and through a court order.

Article 90 informs that property may be seized from perpetrators, their legal successors or persons whom the perpetrator has transferred their property who are not able to prove the legality of origin of said property, and grounds exist that the said property was illicitly acquired. The request shall be filed by the prosecutor before the investigating magistrate, who will have up to eight days to issue a decision (article 91(1)). Said request is to contain: "a description of objects, property gain and property; information on the person who is in possession of those objects, property gain or

property; reasons for suspicion that the objects, property gain and property were illicitly acquired and reasons to believe that by the time criminal proceedings are completed it would be significantly difficult or hardly possible to confiscate objects or property gain or property obtained through the commission of a criminal offence” (article 91(3)).

Similarly to the Serbian legislation, the power to seize assets derived from unlawful activity is broad and reaches not only the perpetrator, but also third parties who know of the criminal activity (it is unclear as to whether their participation for the commission of an offence is necessary) and legal successors. The Montenegrin legislation, however, does not appear to allow for the continuation of the confiscation proceedings in the event that there the perpetrator has deceased, unlike the Serbian legislation with the concept of the “bequeather”.

Although unclear in the Criminal Procedure Code, it can be inferred that the decision on seizing assets is done *ex parte*, as article 91(4) informs that should the court reject the order for seizure of assets, the ruling is not to be furnished to the person under investigation. The duration of the seizure may last until a final decision is rendered by the courts of first instance (article 94(1)), and an appeal will not stay the seizure. Moreover, the court may revoke the seizure order if it is proven that the measure is not needed or justifiable taking into consideration the gravity of the criminal offence, the financial situation of the person the measure was imposed, or the situation of the persons that the perpetrator is legally bound to support, among others (article 94(3)). However, if the investigation has not been instituted within a term of 6 months, the court must revoke the order *ex officio* (article 94(2)).

Article 96 of the Criminal Procedure Code informs that the competent public authority is to manage the seized property in accordance to the Law on Custody of Temporarily Seized Assets and Permanently Seized Assets. Said Law defines assets as: “money, movable assets, immovable assets, precious items (gold, precious metals, precious or semi-precious stones, pearls and other valuable items), other real property rights, securities in accordance with law, other documents proving proprietary rights in assets, and other proceeds obtained through crime or offence.” (article 2). The definition given by the Law for assets is adequate to the definition of property contained in the international and regional treaties.

It also appears to have equal meaning as to the definition provided for in the Serbian legislation, although Montenegrin legislation has neither a monetary threshold for its application, nor a list of offences. Thus, it can be applied more broadly to all criminal offences in which there may be a financial gain from unlawful activities. However, it is not clear if the extension of the assets are solely for the proceeds of crime, or it also extends to the instrumentalities and intermingled assets.

Article 3 defines custody and management of assets as: value assessment of seized assets, storage, safeguarding, reparation and sale of seized assets, depositing funds obtained from the sale of seized assets, keeping records on seized assets, among others. The management of seized assets shall be exercised by the public authority charged with the management of state property (article 4). The management authority is to manage the seized assets “in such a way as to guarantee the highest value

safeguarding level, at the lowest cost” (article 10). The managing authority may also sell the seized assets in order to preserve its value, in accordance to the law (article 11).

The costs of the management of seized assets are to be borne by the managing authority, until the court ruling becomes effective. The funds obtained from seized assets under management that have been confiscated are to be paid into the budget of Montenegro (article 27).

Articles 14 to 16 of the Law describe the management of assets of historic, artistic and scientific value; foreign currencies and foreign currency deposits and precious items; and immovable assets.

Movable assets are to be sold at their market value, through public auction, but will not be sold below its estimated market price, unless when sold in direct negotiations (article 20) as defined in article 21. Easily spoiled goods and animals may be sold without public auction, and the funds are to be kept on a special account until the rendering of the final judgement (article 23). The anticipated sale of assets, as described in the current paragraph, is to be performed in accordance to the provisions of the Law regulating Enforcement Procedures.

Should the perpetrator be acquitted, the assets are to be returned to him within eight days (article 25 and articles 97 and 244 of the Criminal Procedure Code). However, in the events that there was anticipated sale of assets, the funds resulting therefrom are to be returned to the acquitted person.

#### 4.10 Romania

Romania provides for confiscation under Art. 135 of the Criminal Code. However, since under Romanian law confiscation is a safety measure it does not affect any criminal sanctions that might follow the confiscation and a conviction<sup>25</sup>. It is also mandatory for corruption offences that would fall under Art. 136(1)c of the Criminal Code. This article states that “goods given away to determine the commission of an offence or to remunerate the perpetrator” are subject to confiscation. Article 308(5) also deals with the confiscation of the proceeds of corruption and states that “[t]he money, values or any other goods that were the object of the bribe-taking shall be confiscated, and if they cannot be found, the convict shall be obliged to pay their equivalent in money”.

According to a GRECO evaluation report of 2005, “the prosecution must always bear the entire burden of proof, including during identification of the criminal proceeds to be confiscated, also in connection with a conviction for corruption or money laundering. Confiscation of moveable property held by third persons is possible only if the latter are aware of the unlawful origin of the assets or proceeds”<sup>26</sup>.

According to articles 94 to 111 of the Criminal Procedure Code, the Public Prosecutor

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<sup>25</sup> GRECO Second Evaluation Round *Evaluation Report on Romania*, 2005, available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2%282005%291\\_Romania\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2%282005%291_Romania_EN.pdf)

<sup>26</sup> Id. p. 3

can order to seize assets that constitute evidence. He can also order to freeze assets during criminal proceedings that might otherwise be moved away<sup>27</sup>.

Apart from the Public Prosecutor and the Courts, the National Anti Corruption Directorate, according to article 22 of the Government Emergency Ordinance No. 43 of 4 April 2002 regarding the National Anticorruption Directorate can also confiscate goods under the procedure of the Criminal Code<sup>28</sup>. This body is “a structure with legal personality functioning within the Prosecutor's Office attached to the High Court of Cassation and Justice”<sup>29</sup>.

According to GRECO, there is no specific agency for the management of seized and confiscated assets in Romania at the moment. The report states that “[p]erishable or metal movables, precious stones, foreign currency, domestic securities, works of art and museum items, valuable collections and sums of money” are mandatorily seized and entrusted to the public or private bodies mentioned in Article 165 CCP for storage and valorisation.

Article 165 of the Criminal Code informs for the management of perishable goods that they “are delivered to commercial institutions where the State is the major shareholder, according to their activity profile, which must accept and use them immediately “. Money and other valuable items should be moved to the closet banking institution according to the same article. As far as the length of the seizure is concerned, the only provision is also to be found in article 165, saying that “[t]he attached objects are kept until the suspension of attachment”. The same articles also allows for temporary seizure of items that might otherwise be moved away.

Article 166 of the Criminal Procedure Code states that “[t]he body that enforces the attachment draws up an official report on all acts performed under art. 165, including a detailed description of the goods attached and specifying their value”. The goods exempted from investigation under the law, found at the person to whom attachment was enforced are also mentioned in the official report. Objections of the parties or other interested persons are included as well.”

As far as relevant case law to asset management in Romania is concerned, there were cases that dealt with the question of the right to property. In 2007, the Constitutional Court dealt with such a question, which was centred around the reversal of the burden of proof in cases of illicit enrichment of public servants. The Court stated that the right to property in that case was not violated when “obvious differences are found between the assets disclosed upon appointment and the assets acquired during the term, and there is certain evidence that some assets or values could not be obtained from the legal sources earned by the person in question or in any other legal way”. The Court argued that a reversal of the burden of proof in such specific cases would not mean a “presumption of illegality”, as claimed by the appellant<sup>30</sup>.

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<sup>27</sup> Id. p. 4

<sup>28</sup> THE GOVERNMENT EMERGENCY ORDINANCE no. 43 from April the 4<sup>th</sup> 2002 regarding the National Anticorruption Directorate, Art. 22.

<sup>29</sup> National Anticorruption Directorate, available at <http://www.pna.ro/>.

<sup>30</sup> Constitutional Court decision No. 321, March 29, 2007.

#### 4.11 Switzerland

Switzerland is a Confederation composed of 26 cantons. According to article 123 of the Swiss Constitution, the Confederation is responsible for legislation in the field of criminal law and the law of criminal procedures, while the cantons shall be responsible for the organisation of the courts, the administration of justice in criminal cases as well as for the execution of penalties and measures, unless otherwise provided by law.

Switzerland does not have any specific legislation pertaining to the management of seized assets, relying on different legislation for the seizure of assets that include, but is not limited to the Criminal Procedure Code and the Criminal Code. There is additionally a recommendation concerning the cantonal authorities' intention to seize and manage stolen assets issued by the Organised Crime and Economic Criminality Commission ("Recommendation")<sup>31</sup>. Switzerland also does not have a centralised asset management office.

Articles 69 through 72 of the Swiss Criminal Code establish the general rule to seize assets. Objects that were used or were intended to be used to commit an offence are subject to confiscation, if they jeopardise the safety, morals or the public order (article 69). Proceeds and instrumentalities of crime are to be confiscated, unless they have to be restored to the injured person for restoration of his/her rights. Furthermore, should the assets subject to confiscation not be determined accurately, or if said determination requires disproportionate means, the judge may estimate the amount to be confiscated (article 70).

Article 71 provides for value-based confiscation. Value-based confiscation shall be pronounced when the confiscation of the assets is no longer possible, and is used as a compensatory claim of the state. This compensatory claim may be waived in whole or in part by the court if it is not enforceable, or would seriously hamper the reinsertion of the concerned person.

Furthermore, under article 71, 3 of the Criminal Code, the investigating authority may place the assets belonging to the concerned person under receivership. It should be noted, however, that the receiver does not have a right of preference in favour of the state during the execution of the compensatory claim.

The assets are seized based on a decision issued by the court, based on a request issued by the prosecutor. Article 65, 1 of the Criminal Procedure Code informs that the competent authority can also seize objects and valuables subject to a possible forfeiture. A restriction on the right to dispose of real property may be ordered and referred to the land registry (article 65.2). The seized assets are to be inventoried (article 70).

Notwithstanding the above, the Swiss prosecutor may order the seizure of assets based on the abovementioned article 65 of the Criminal Procedure Code, and article 71 of the Criminal Procedure Code.

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<sup>31</sup> Recommandation de la Commission "Crime Organisé et Criminalité Économique" de la CCDJP à L'intention des Autorités Cantonales de Poursuite Pénale concernant la Gestion des Valeurs Patrimoniales Faisant l'Objet d'une Mesure de Blocage. Luzern, 30 March 1999.

Moreover, in money laundering cases, the financial institution must immediately freeze the assets for up to five days if a suspicious transaction report is filed by the financial institution to the Swiss financial intelligence unit (article 10 of the anti-money laundering law). This is a powerful tool contained under Swiss law that enhances the applicability of the principle of opportunity. Although it appears not to be contained in Serbian legislation, it should notwithstanding be underscored that the Serbian Law on Seizure and Confiscation of the Proceeds of crime is not directly applicable to money laundering offences, which may hinder the prosecutorial ban on proceeds of crime in that country.

As mentioned above, Switzerland does not have a centralised asset management office. According to the Recommendation, however, the prosecutor is responsible for the management of the assets that he/she has seized. The prosecutor is to determine how the seized assets are to be administered, and to achieve this they follow the following principles:

1. The assets are to be placed in order to conserve the capital and the civil fruits derived therefrom;
2. If there is a change in the strategy of placement, the competent authorities need to be aware of the preservation of the interests of the client;
3. Such a change may not be done in an inappropriate moment of time.

#### **4.12 The United Kingdom**

The UK system is based on the fact that although it is the prosecutor who has the legal power to seek asset restraint, or freezing, orders it is for the courts to exercise the discretion to appoint specialised management receivers in respect of realisable orders<sup>32</sup>. Generally the Prosecutor does not have the qualifications or experience necessary to make important decisions relating to the management of restrained businesses etc. It is therefore necessary to appoint someone who is experienced in such areas, for example an accountant.

A balance must always be struck between the need to preserve and realise the defendant's property, with allowing the Defendant to continue with the ordinary course of his life when he is presumed innocent. See *Re P (Restraint Order: Sale of Assets)* [2000] 1 WLR 473. The primary principle to be borne in mind is that the Court must be satisfied that a restraint order alone is insufficient to prevent dissipation of assets, and the appointment of a management receiver is a reasonable and proportionate measure. Given that the fees of a management receiver will almost always be met from the estate under management rather than by the prosecutor the court must always take account of the fact that, if acquitted, significantly depleted assets may be returned to the defendant on the conclusion of proceedings.

Managing may include selling the property or any part of it or interest in it, carrying on or arranging for another to carry on any trade or business the asset of which are part of the property and incurring capital expenditure in respect of the property.

A management receiver should be considered where the defendant's assets are of such

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<sup>32</sup> Section 48(2) Proceeds of Crime Act 2002

a nature that they require active management. It may be that the defendant is in custody and cannot manage the assets himself or that the circumstances of the case suggest that the Court cannot trust him to manage the assets. An obvious example where the appointment of a management receiver would be appropriate is when a defendant's asset includes a business that needs to be operated in order to preserve its value e.g. a defendant is arrested for money laundering, he trades as an ice-cream maker, he is remanded in custody and his stock, business and livelihood is at risk of dissipation. The appointment of a management receiver would protect the defendant's assets and manage them pending the resolution of the criminal case against him.

Other examples are where management receivers have been appointed to operate haulage businesses, factories and bureau de change. They may deal with letting houses, or finishing a partially completed development and securing property.

There remains an issue with potential third parties who may have a legitimate interest in the assets. In such cases the third party may be forced to give possession of the defendant's "realisable property" to the Receiver but must first be given a reasonable opportunity to make representations to the court.

#### **4.12.1 Costs**

The costs incurred by a defendant in mounting his defence to the criminal proceedings that he faces may not be met from the receivership property.

The costs of the management receiver are paid from the assets that he is managing<sup>33</sup>, even where the defendant is ultimately acquitted. If there is insufficient to pay the Receiver's costs then the prosecutor, who will have indemnified the Receiver as to his costs, will pay any remaining costs.

#### **4.12.2 Some of the issues that arise out of asset management in the UK**

The use of management receivers is becoming expensive in the UK. There is an increasing use of the suspects to look after the assets on the basis that to infringe the court order normally attracts a heavy sanction. This is particularly so in cases where the goods themselves are insured and so the State is still able to make a claim even in circumstances where the assets are dissipated or devalued. Where assets are taken into management many assets are often sold and the funds placed into bank accounts. The issue of risk assessments (namely whether there is a real risk that the assets will be sold and the value dissipated to the goods destroyed) becomes very relevant here and it will require a skilful and experienced assessment by the management receivers or in some jurisdictions the prosecutors or court awarding the restraint order.

Some assets such as antiques require special storage facilities, which are expensive.

Businesses that are restrained can be run as a business particularly if they are profitable and easily run however where the business is run as a criminal exercise the receivers will often seek to wind up the business and then realise the assets by selling what they can.

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<sup>33</sup> See Section 49(1)(d) of the Proceeds of Crime Act.

Other relevant issues to consider:

1. Insurance (specialised insurance companies that will help insure the assets, insolvency insurers) becomes a part of the cost of managing the assets
2. Living expenses need to be agreed in advance
3. The speed of obtaining the restraint can be problematic as proceedings can often take far too long! Management receivers in the UK recently concluded a case after 13 years following numerous appeals.

The management receivers provide regular reports to the prosecutors and to the court to explain what is happening – there is a legal obligation on the receivers to explain on a regular basis what they are doing in order to ensure that they are honouring their obligations and that they are being costs effective. This is to avoid the early days where the receivership bills would eat substantially into the value of the assets. This is an important issue to bear in mind for the construction of any worthwhile management of assets system.

It is important to have in place a legal regime that makes it a serious offence for the work of the management receivers of assets to be impeded or obstructed in their legal duties. Such acts may also include putting assets beyond the Receiver's reach and refusing to deliver up assets or documents. All Receivership Orders in the UK are endorsed with a penal notice.

The management receivers should be given a fairly broad discretion, within what is permissible in the law, to exercise other related functions to the management of assets such as the power to hold property, enter into contracts, sue and be sued, employ agents, execute powers of attorney and deeds, and take any other steps the Court thinks appropriate for the purpose of the exercise of his functions<sup>34</sup>.

## CONCLUSION

The challenges posed for jurisdictions that are committed to a well thought out and resourced programme of recovering the proceeds of crime are considerable. Even in countries that have previously had well established asset recovery regimes the problems that have had to be faced, particularly in matters pertaining to the management of assets that have been successfully frozen or even forfeited, have been formidable.

The above analysis of EU states and standards demonstrates that there is no one set means of achieving this ambition without a need for a thoughtful reflection on what it is that is hoped to be achieved and how this will be achieved. What is required is a strategy that gives appropriate weight to some of the following issues:

1. Initially there is a need to promote liaison, cooperation and discussion amongst proceeds of crime practitioners from Government Departments, agencies and public bodies in an effort to establish where the priorities might lie for all concerned (there is no justification for example in the law enforcement agencies

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<sup>34</sup> See Section 49(4) of the Proceeds of Crime Act

seeking freezing orders in circumstances where the asset recovery management agencies cannot cope with the complexity or resourced implications of running the assets, by way of example).

2. There is a need for the asset recovery agencies to promote and assist with effective and efficient systems for the investigation and enforcement of proceeds of crime legislation.
3. There is a need to facilitate the exchange of information on proceeds of crime systems for the regulation, enforcement, seizure, management and confiscation of assets. This would include agency responsibilities and issues impacting on each agencies activity and in particular operational and management practices and procedures, and responses to changing proceeds of crime trends.
4. To identify issues and problems which are seen to impede the efficient and effective proceeds of crime regimes, particularly cross jurisdictional issues
5. To contribute to the wider understanding of proceeds of crime regimes and the development of policy and practice which reflect different jurisdictions legal, historical, cultural and institutional frameworks; and
6. To liaise with other international agencies and constituencies involved in proceeds of crime administration on common proceeds of crime issues so as to learn about best practices and to seek possible collaboration. Other regional initiatives would be worth looking at.
7. To develop a training base for practitioners that will enable the development and sharing of best practice procedures through access to each others training programmes and including possibly a secondment programme so that all arms of the asset recovery process in Serbia are as familiar as possible with each others obligations and practices.
8. The development of a legally permissible regime that allows the asset management team to dispose of assets in appropriate circumstances in an effort to minimise costs and ensure as effective a distribution of resources as possible.
9. Consider the use of other professional organisations, such as the use of professional receivers for example, to undertake some aspects of the asset management in cases where the assets cannot be disposed of or where there is a chance that the assets may have to be returned to the suspects.

Serbia is not alone in trying to achieve this difficult feat and it should try to learn as much as possible from those other systems in the EU who have had such mechanisms in place for a while and indeed those who have only recently had to consider what is best so as to establish what might work in Serbia. There is no one size fits all as Serbia will have to take careful measure of what its legal situation is, what current resources exist and what its true priorities are in moving forward.