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

**TECHNICAL PAPER ON PROPOSED REVISIONS AND A SUMMARY OF PRACTICAL  
PROBLEMS IN THE APPLICATION OF THE LAW ON SEIZURE AND CONFISCATION OF  
PROCEEDS FROM CRIME**

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## **Introduction**

The Council of Europe is implementing a project entitled 'Building Up the Capacities of the Directorate for Managing Seized and Confiscated Assets and Support for the Development of a System of Detecting, Seizing and Confiscating Proceeds from Crime, as well as Support for the Development of Key Institutions in Serbia'. The Project's budget funded by the European Union (The IPA 2009 Programme) is 2,140,000 EUR, and the Directorate for Managing Seized and Confiscated Assets is a partner in the realisation of the Council of Europe's project. The three-year project commenced on 1<sup>st</sup> April 2010, and will be completed on 31<sup>st</sup> March 2013.

I was engaged within the project on the basis of contract No. DG-HL/782/2010 to conduct an analysis of the practical implementation of the Law on the Seizure and Confiscation of Proceeds from Crime, i.e., to suggest revisions of the law and point to the problems which have been appearing in its implementation.

For the purpose of drafting the analysis, I visited the following institutions and talked to their representatives:

On 11<sup>th</sup> and 26<sup>th</sup> October and 12<sup>th</sup> November this year, I held meetings with representatives of the Directorate for Managing Seized and Confiscated Assets, attended by the Assistant Director of the Directorate, Dragana Đorđević, and the head of the Department of Professional Management of Seized and Confiscated Property, Vladimir Čeklić.

I met Dragan Lazarević, an investigating judge of the Special Department for Organised Crime of the Higher Court in Belgrade on 9<sup>th</sup> November.

On 12<sup>th</sup> November, I met the head of the Financial Investigations Unit (JFI) of the Ministry of Internal Affairs (MUP) Aleksandar Milojević and his aides. During the meeting, the JFI head told me that I did not have a contract with the Council of Europe (which had not been signed by the CofE owing to a technical error), and that that meant I did not possess proper authorisation, and should therefore make the document available as soon as possible. I was also told that because of my regular employment (attorney at law) I would not be made aware of all the shortcomings of the Law on the Seizure and Confiscation of Proceeds from Crime from the point of view of that institution (which, I was told, they were ready to make public after the formation of a Working Group or any other working body formed by the authorities of the Republic of Serbia), because I could exploit the data against the MUP in the performance of my job as a lawyer. I was informed that the Office of the Council of Europe in Belgrade had been notified about the JFI's objection to the choice of consultant, not in respect of her person, but her profession.

In spite of a number of written and verbal pleas, due to the excessive workload of the Prosecution for Organised Crime, I did not manage to meet with representatives of that institution. The Prosecution will submit its opinions in written form following a collegiate meeting of public prosecutors, after which this Report will be accordingly amended.

## **Comments of the institutions**

The comments made by the aforementioned institutions are given here according to the Articles of the Law concerned, with designation of the institution concerned. No opportunity was given to the institutions to comment mutually on their proposals and objections. However, the footnotes list comments on those parts of the comments which are obviously not in compliance with the regulations in force in the Republic of Serbia:

### **- Article 2 paragraph 2**

It should be considered whether it is possible to abolish the limitation of the value of the proceeds from crime for the criminal offence of receiving bribes from Article 367 of the

Criminal Code, for the reason that numerous perpetrators commit the offence many times, but below the limit defined by the Law, leaving them immune to its effect. **(MUP)**

- Article 3 item 1

It should be explained that the assets concern both natural and legal persons. Furthermore, the Article should be harmonised with the provisions of certain conventions and other laws (for example, the Law speaks about the proceeds from crime, while the Criminal Code refers to material gain). **(Directorate)**.

The possibility should be considered of regulating by the Law a possibility of seizing assets acquired in a legal manner, in cases where proceeds from crime had already been sold, transferred, destroyed, spent, etc. **(MUP)**<sup>1</sup>

- Article 4

More exact details should be given in respect of a possible conflict between the Law on the Seizure and Confiscation of Proceeds from Crime and other laws (for example in the case of privatisation, mortgages, leasing assets, etc.) – the proposal is that provisions of the Law on the Seizure and Confiscation of Proceeds from Crime should be applied. **(MUP)**

- Article 6 paragraph 3

A time-limit for other public institutions to assist the Financial Intelligence Unit should be added, and sanctions prescribed for exceeding it. **(MUP)**

The Unit should be granted broader powers, mainly powers now held by the Public Prosecution.<sup>2</sup> **(MUP)**

- Article 8

The Directorate should be granted the status of an Office, with its own account enabling it to control and manage funds more easily **(MUP)**<sup>3</sup>

- Article 9

The Directorate's competences should be harmonised with the UN's Convention against Corruption. **(Directorate)**.

Decisions on the sale of moveable assets should be taken by the Directorate rather than the court, as the Directorate has been entrusted with the management of those assets, in particular because of a danger of a decrease in their value or for the purpose of securing day-to-day maintenance of immovable assets. **(the Court and MUP)** – see the comment of the **Directorate** to Article 42 paragraph 1.

- Article 12

The status of those engaged in seizing assets should be considered, whether they should have the status of authorised persons pursuant to regulations on the police, or whether they should be subject to the application of all regulations covering the status of civil servants, in particular in respect of their positions and their pay. **(Directorate)**

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<sup>1</sup> This issue is regulated by Article 92 paragraph 1 of the Criminal Code (CC)

<sup>2</sup> The concrete powers were not specified. This is a matter of the Code of Criminal Procedure, which still does not prescribe a prosecutorial investigation.

<sup>3</sup> Article 29 of the Law on the State Administration regulates the types of administrative organs. In contrast to all administrative organs in the Republic of Serbia, the Directorate has the status of a legal person and its own Identification Number, PIB Tax Number and dinar and foreign currency bank accounts.

In view of the fact that seizures take place on the territory of the Republic of Serbia, the article should be amended to include that secondary legislation shall regulate the question of an official ID and official badge of persons authorised to manage seized and confiscated assets in the Directorate. (**Directorate**)

- Article 14

The problem of enforcements on high-value motor vehicles bought from a leasing company – the position is that ‘economical management of property’ implies that the remaining instalments are paid from the Directorate’s budget and then the car is sold (in cases where the majority of the instalments had already been paid). The position is also that there is inadequate control/supervision of the Directorate’s operation in the sense of ‘economical management of property’ – the case of the donation to Trgovište, granting immovable assets for the use of the ‘Parental House’ instead of renting out property under market conditions, etc, whereby, among other things, damage is done to the JFI’s (**MUP**)<sup>4</sup>

The Ministry’s systematisations needs to be changed and someone in the Ministry designated to oversee the work of the Directorate. (**Directorate**)

- Article 15

This provision should be amended in particular in respect of legal persons: the assets of legal persons, the status of legal persons, and their liability (**Directorate**).

The term ‘considerable assets’ should be defined precisely. (**MUP**)

- Article 16

It should be specified whether hearings in cases of seizure of assets should also be held *in camera*, in view of the fact that it is stated explicitly that financial investigations are confidential. If the suggestion is accepted, it must be stated in the Law, failing which it would be in conflict with the Code of Criminal Procedure, which explicitly lists all cases where the public is barred from hearings. (**the Court**)

- Article 18

The provision should be amended to read that the JFI is required to perform an assessment of the state in which the objects were found on the owner’s or other persons’ premises. (**Directorate**).

The Law should provide for an obligation to photograph immovable assets and compile a record by the JFI, because in some cases when the assets reach the Directorate considerable damage is found on them (for example flats where central heating radiators, bathroom fittings, floor coverings etc. were found to have been removed), and for a possibility of punishing the persons who are thereby deliberately damaging property which is to be seized/confiscated from them; the Directorate is then forced to invest considerable funds to make such properties habitable and fit for leasing out, losing money, instead of earning it (**MUP**)

- Chapter b) Temporary Seizure of Assets

The entire chapter should be revised so that it can be seen clearly what is the normal procedure of temporarily seizing assets, given that the chapter is based on Article 21, which

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<sup>4</sup> The decisions on ‘donations’ were issued by the Government rather than the Directorate. Under Article 49 of the Law, 20% is divided after the SALE OF PERMANENTLY confiscated property, which means that this could not have done damage to the budgets of any of the competent institutions.

mentions only the seizure of assets where there is a risk that seizure could be obstructed or precluded (**Directorate**).

The Law's provisions should be amended in respect of temporary seizure of assets during trials where the necessary conditions do not exist for the trial to continue – it should be specified that the trial judge shall act on motions for temporary seizure of property irrespective of whether the trial will resume or not. It should also be specified that appeals against the judge's ruling shall be decided by a higher court, to ensure conformity with the Code of Criminal Procedure. (**the Court**)

- Article 20

Regulate by law situations in which banks do not respond appropriately in the cases of freezes of accounts. (**MUP**)

- Article 21

Article 21 of the Law should be amended by adding to paragraph 2 that the motion should specify that the Directorate would be entrusted with the management of the assets. As it stands, the role of the Directorate cannot be seen in Article 21, that the Directorate is entrusted with the management of the assets seized pursuant to this Article. (**Directorate**)

- Article 22

Article 22 should be amended to specify that the measures and orders of the public prosecutor should also be enforced by the Directorate, i.e., to specify that the regime of seizing and managing assets prescribed by the entire law is also applicable to this regime. It is also necessary that the prosecutor makes an assessment of the assets to be seized. (**Directorate**).

In respect of the fact that the prosecutor's order exists irrespective of the court's ruling, until the final termination of the proceedings, for the purpose of unobstructed enforcement --- in actual practice, prosecutors are reluctant to issue such orders, and are always thinking about what would be the position of the court on the matter.<sup>5</sup> (**MUP**)

- Article 23

It should be specified explicitly that the summons to the hearing should include the prosecutor's motion, to make the defendant aware of the part of the assets that is the object of the proceedings and to prepare for the proceedings accordingly. The fees of lawyers assigned *ex officio* in the procedure of temporary seizure of assets, pursuant to Article 23 paragraph 3 of this Law – should be regulated precisely in view of the uniform court practice – that the lawyer is entitled to compensation just as if he were the representative of the aggrieved party. (**the Court**)

- Article 24

The five-day time-limit for the holding of a hearing from the date of filing the motion for the temporary seizure of assets is inappropriately short, for the court, as many persons are not on the territory of the Republic of Serbia and there are problems with serving summons, and also for defendants, who are unable to prepare for the hearing, preventing their effective and proper participation in it. The deadline should be extended to 15 days (**the Court**)

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<sup>5</sup> This opinion should be viewed in connection with the comment of the Directorate on the chapter on temporary seizure of property, given that Article 22 regulates an exception rather than a rule.

- Article 25

It should clearly be specified that rulings rejecting motions for the temporary seizure of assets must be delivered to the Directorate. **(the Court)**.

It should be added that they should also be delivered to the JFI. **(MUP)**

- Article 26 paragraph 2

There is no reason for appeals not to stay enforcements in the cases of temporary seizure of assets – the time-limit for appealing could perhaps be shortened, but the proceedings should be allowed to be properly completed, so the Directorate can act only on the basis of final rulings, and also so that litigation against the Republic of Serbia is avoided (there already exists a judgement of the First Basic Court against the Republic of Serbia upholding a suit lodged in connection with trespassing, because a ruling on temporary seizure of assets had not been binding). **(the Court)**

It should be added that assets temporarily seized on the basis of a final ruling may not be the object of re-evaluation in other court proceedings (in order to preclude trespassing suits). **(the Court)**

- Article 28 paragraph 3

Permanent seizures of assets should be ruled on by a three-judge panel, rather than only the presiding judge. **(the Court)**

- Article 34 paragraph 4

It should be added that the Decision should also be delivered to the JFI **(MUP)**<sup>6</sup>

- Article 36

There is no provision about to whom final rulings shall be delivered. They should be delivered to the Directorate for Managing Seized and Confiscated Assets. **(Directorate)**

The status of permanently seized assets under this law is not clear in relation to management of assets under the Law on Assets Owned by the Republic of Serbia. **(Directorate)**

- Article 39

There should be a possibility of defining by secondary legislation the costs of safekeeping and maintaining temporarily seized assets. **(Directorate)**

- Article 40

The provision should be revised so as to enable temporarily seized financial assets handed over to the National Bank pursuant to this Article to be kept according to the most favourable fixed-deposit conditions. **(Directorate)**. The financial assets managed by the Directorate, seized or acquired by the sale of moveable assets, by renting out immovables, etc., are kept in a bank on a fixed-deposit basis, which is the customary practice in the West; the benefits would be manifold. One example is the co-operation of the Netherlands with the Bank of Scotland, which in such cases provides interest of 10%, while interest of 6% is payable in the case of returning funds to aggrieved parties, which means that a profit is nevertheless made; a contact was made with the Ministry of the Economy of the Republic of

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<sup>6</sup> During that stage of the judicial proceedings no link exists with the JFI.



Serbia in connection with this proposal – but it was rejected, with the explanation that the law did not provide for any such possibility. **(MUP)**

- Article 42

The provision should be altered so as to empower the Directorate to sell without the approval of the competent court movable assets determined to be losing value. Another option would be to list movable assets that need to be sold immediately, for example motor vehicles, technical goods. **(Directorate, and the Court)**

- Article 44

Paragraph 1 needs to specify that temporarily seized assets are concerned. **(Directorate)**

Furthermore, assets which are donated should go to the areas particularly affected by the criminal offence (the victims of human trafficking, treatment of drug addicts...) **(Directorate)**

- Article 48

This article is not specific enough and its application will create difficulties. All assets permanently seized on the basis of a final decision become the property of the Republic of Serbia. The Law on the Assets Owned by the Republic of Serbia regulates management of assets, both moveable and immovable. That Law determines the powers of the Republican Directorate for the Property of the Republic of Serbia. Under Article 48 paragraph 2, the Directorate assigns permanently seized objects of historical, artistic and scientific value, on the basis of a decision by the competent ministry. It is a question whether the decision is issued by the Government according to the Law on the Assets Owned by the Republic of Serbia, or the competent minister. The Directorate of the opinion that where cultural resources are concerned the decision should be taken by the Government.

Under paragraph 3, the Government issues decisions on permanently seized assets referred to in Article 40 paragraph 2 – foreign currency, foreign cash holdings, objects of precious metals, precious or semi-precious stones and pearls. Under paragraph 4 of this Article, provisions of the law governing the handling of assets in the ownership of the Republic of Serbia shall apply to permanently seized immovable assets. It is unclear what happens to other permanently seized movable assets (furniture, motor vehicles...). The intention of the law was that all temporarily seized assets be sold, which is also a comparative-law solution, but practice has proved to be different. Article 48 will therefore cause problems in practice. **(Directorate)**

- Article 49

The exact type of assets should be specified, for example does this also relate to permanently seized immovables sold by the Republican Directorate for Property after five years? **(Directorate)**

- **Chapter V International Co-operation**

It must be clear in this chapter that international legal assistance in criminal matters is concerned. **(Directorate)**

The chapter makes no mention of the treatment of offshore assets, of the question of who represents the interests of foreign states before our courts or the interests of the Republic of Serbia abroad, who bears the costs of management and safekeeping in foreign countries, and the division of assets in accordance with international standards, and also on the basis of which instrument such assets might be divided. **(Directorate)**

- Article 50

Given that an agreement is mentioned, its exact type should be specified – is it an agreement of two directorates, prosecutions, or ministries of justice, or an international instrument subject to ratification? **(Directorate)**

The relationship of this Law with the Law on International Legal Assistance in Criminal Matters should be specified. **(Directorate)**

- Article 53

It is necessary to specify in this Article that domestic prosecutions may have direct contacts with foreign prosecutions, in respect of direct international legal assistance, and not through the Ministry (differentiate between the central authority and the authority which acts according to the letter rogatory). It is not clear why prosecutorial international co-operation in paragraph 2 has been placed within the competences of the Unit. International agreements speak about transmission via Interpol, rather than the Ministry of Justice. **(Directorate)**

**General Comments of the Directorate**

The Law does not regulate the following at all: seizure of assets of legal persons and assets of natural and legal persons which represent the founding capital of legal persons, the right of possession of stock, voting rights based on possession of stock and management of that stock, as well as all problems that may proceed from those situations. For example, when a company is bankrupt, who represents that company...

International co-operation is also poorly defined, as it concerns international legal assistance procedures that demand close and direct co-operation between the police, the public prosecution and the Directorate. It should also be added that we should discontinue the practice of acting only in cases fulfilling the condition of double criminality.

It is necessary to make possible the adoption of secondary legislation regulating the every-day work of the Directorate, as the Directorate has been active for about 18 months. The status of permanently seized assets under this law, in relation to management of property under the Law on Assets Owned by the Republic of Serbia, remains unclear.

Practice has shown that it is necessary to hold regular meetings, to be attended, besides the representatives of the aforementioned institutions, also by representatives of the Sector for Normative Business and International Co-operation of the Ministry of Justice - the sector responsible for drafting this Law - but also other participants in the seizure of property, and in particularly its management, such as the Ministry of the Economy, the Agency for Privatisation, the Agency for Economic Registers, the Central Depot and Clearing of Securities.

It is necessary that the Ministry of Justice provide its opinions about this Law and distribute them to all the institutions which are enforcing it, with the aim of harmonising practice.

It is unclear whether the Financial Investigations Unit is involved in determining the responsibility of legal persons for criminal offences, as a certain number of legal persons have been impounded, yet no criminal complaints against legal persons have been filed so far.

**General Comments of the Ministry of Internal Affairs (MUP)**

The problem of enforcement on immovables which have not been registered, immovables with bank mortgages, and high-value motor vehicles bought under leasing contracts – the Unit's position is that 'economical management of assets' calls for the last instalments to be paid from the Directorate's budget and then for such vehicles to be sold (in cases where the bulk of the instalments under the contract have already been paid).