



REGIONAL
ANTI-CORRUPTION
INITIATIVE



The AIRE Centre
Advice on Individual Rights in Europe



Handbook on Effective Asset Recovery

in Compliance with European and International Standards

Handbook on Effective Asset Recovery
in Compliance with European and
International Standards



Title:	Handbook on Effective Asset Recovery in Compliance with European and International Standards
Project:	Strengthening anti-corruption in the South East Europe through improving asset seizure measures
Publishers:	Advice on Individual Rights in Europe (AIRE) Regional Anti-corruption Initiative (RAI)
For publishers:	Biljana Braithwaite Vladan Joksimović
Editors:	Eldan Mujanović Darko Datzer
Authors:	Krešimir Kamber, Will Ferris, Catharina Harby (International and European standards) Eriona Haxhia, Artur Selmani (Albania) Eldan Mujanović, Darko Datzer (Bosnia and Herzegovina) Ganimete Ismajli (Kosovo*) Aleksa Ivanović (Montenegro) Mirjana Lazarova Trajkovska (North Macedonia) Radmila Dragičević Dičić (Serbia)
Translation and proofreading:	Lumnije Ahmeti, Kimete Cimili (Albanian) Maja Andrić, Duška Tomanović (BCMS) Duška Tomanović (English) Zoran Gavriloski (Macedonian)
RAI and AIRE team:	Desislava Gotskova, Aida Trožić
Referencing and DTP:	Adnan Fazlić
Design:	Marko Milićević, Kliker Design

*This designation is without prejudice to positions on status, and is in line with UNSC Resolution 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

Contents

FOREWORD.....	9
ACRONYMS.....	10
I. INTRODUCTION	11
II CONFISCATION OF THE PROCEEDS OF CORRUPTION: AN OVERVIEW OF UNITED NATIONS, COUNCIL OF EUROPE AND EUROPEAN UNION GUIDELINES AND STANDARDS	16
2.1. INTRODUCTION.....	16
2.1.1 What is Confiscation?	16
2.1.2 Why is Confiscation Important?.....	17
2.2. INTERNATIONAL STANDARDS.....	17
2.2.1 United Nations Conventions	17
2.2.2 Council of Europe Instruments	18
2.2.3 European Union Instruments.....	19
2.2.4 Other International Instruments	20
2.3. THE APPROACH OF THE INTERNATIONAL STANDARDS TO KEY ASPECTS OF CONFISCATION.....	20
2.3.1 Freezing Orders and Investigative Powers	20
2.3.2 Ordinary (Conviction Based) Confiscation.....	20
2.3.3 Value Confiscation and Intermingling	21
2.3.4 Confiscation of Instrumentalities.....	22
2.3.5 Confiscation of Income and Other Benefits Derived from the Proceeds of Crime and Corruption.....	22
2.3.6 Reversing the Burden of Proof	22
2.3.7 Third Party Confiscation	23
2.3.8 Non-Conviction Based Confiscation.....	23
2.3.9 International Cooperation	24
2.3.10 Safeguards	24
2.4 COUNCIL OF EUROPE MONITORING BODIES.....	25
2.4.1 GRECO	25
2.4.2 MONEYVAL	26
2.5 THE EUROPEAN CONVENTION ON HUMAN RIGHTS	26
2.5.1 Article 1 of Protocol No. 1	26
2.5.2 Article 6	39
2.5.3 Article 7	44
2.5.4 Article 8	47
III COMPARATIVE ANALYSIS OF ASSET RECOVERY PROCEEDINGS.....	51
3.1. ALBANIA	51
3.1.1. Financial Investigations	51
3.1.2. Provisional Measures (Freezing and Seizing Proceeds of Crime).....	55
3.1.3. Confiscation Procedures.....	60

3.1.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime	65
3.2. BOSNIA AND HERZEGOVINA	68
3.2.1. Financial Investigations	69
3.2.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)	73
3.2.3. Confiscation Procedures	77
3.2.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime	81
3.3. MONTENEGRO	84
3.3.1. Financial Investigations	84
3.3.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)	87
3.3.3. Confiscation Procedures	90
3.3.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime	93
3.4. KOSOVO*	95
3.4.1. Financial Investigations	95
3.4.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)	98
3.4.3. Confiscation Procedures	101
3.4.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime	103
3.5. NORTH MACEDONIA	105
3.5.1. Financial Investigations	105
3.5.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)	109
3.5.3. Confiscation Procedures	111
3.5.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime	113
3.6. SERBIA	115
3.6.1. Financial Investigations	115
3.6.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)	119
3.6.3. Confiscation Procedures	122
3.6.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime	125

IV EXTENDED CONFISCATION IN THE COMPARATIVE PERSPECTIVE 128

4.1. ALBANIA	128
4.1.1. Extended Confiscation Legal Framework	128
4.1.2. Scope of Application.....	128
4.1.3. Evidentiary Criteria (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)	128
4.2. BOSNIA AND HERZEGOVINA	129
4.2.1. Extended Confiscation Legal Framework	129
4.2.2. Scope of Application	130
4.2.3. Evidentiary Standards (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)	131
4.3. MONTENEGRO	132
4.3.1. Extended Confiscation Legal Framework	132
4.3.2. Scope of Application	132
4.3.3. Evidentiary Standards (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)	133

4.4. KOSOVO*	134
4.4.1. Extended Confiscation Legal Framework	134
4.4.2. Scope of Application	135
4.4.3. Evidentiary Criteria (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)	135
4.5. NORTH MACEDONIA	137
4.5.1. Extended Confiscation Legal Framework	137
4.5.2. Scope of Application	137
4.5.3. Evidentiary Criteria (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)	138
4.6. SERBIA	139
4.6.1. Extended Confiscation Legal Framework	139
4.6.2. Scope of Application	139
4.6.3. Evidentiary Criteria (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)	140
V. CONCLUSIONS	141
5.1. OVERVIEW OF UN, COUNCIL OF EUROPE AND EU GUIDELINES	141
5.2. COMPARATIVE ANALYSIS OF THE LEGISLATIONS	141
5.2.1. Financial Investigations	141
OVERVIEW OF FINANCIAL INVESTIGATION ELEMENTS IN THE ANALYSED LEGISLATIONS	144
5.2.2. Provisional Measures	145
OVERVIEW OF THE ELEMENTS OF PROVISIONAL MEASURES IN THE ANALYSED LEGISLATIONS	147
5.2.3. Extended Confiscation	148
OVERVIEW OF ELEMENTS OF EXTENDED CONFISCATION IN THE ANALYSED LEGISLATIONS	150
5.3. COMPARATIVE ANALYSIS OF PRACTICAL EXPERIENCES IN APPLYING ASSET RECOVERY LEGISLATIONS	151
5.3.1. Financial Investigations	151
5.3.2. Provisional Measures	153
5.3.3. (Extended) Confiscation	153
VI. LITERATURE	156



FOREWORD

Asset recovery is a simple idea; the legal retrieval of illegal gains. In practice, however, asset recovery is a complex and multidimensional area of law, often requiring intricate practical procedures and involving multiple parties and jurisdictions. This practical complexity requires the judges and prosecutors working in the field to have a firm understanding of their own domestic legislation in relation to freezing, seizure and confiscation, as well as a solid appreciation of the international standards and instruments that seek to strengthen and harmonise international practice.

In 2017, the AIRE Centre (Advice on Individual Rights in Europe) and RAI (Regional Anti-corruption Initiative) began working together to support jurisdictions in Southeast Europe (SEE) to improve their asset recovery capabilities. In 2018, the two organisations published a study titled *Asset Recovery in the Western Balkans: A Comparative Analysis of Legislation and Practice*, which was completed after extensive consultation with regional and international experts.

This publication concluded that, although the domestic legislation in SEE jurisdictions was, in principle, in accordance with the relevant international and European standards, the powers of asset recovery and confiscation granted by these laws were used neither sufficiently nor effectively. Consequently, one of the publication's key recommendations was to build the capacity of regional law enforcement agencies, prosecution services, and judicial bodies, in order to ensure the effective seizure and confiscation of assets within their jurisdictions.

In response to this recommendation the AIRE Centre and RAI have produced this Handbook as part of a 2-year regional project on asset recovery titled *Strengthening anti-corruption in South East Europe through improving asset recovery measures*. The Project is implemented by the AIRE Centre and RAI and funded by the British Government. The production of this Handbook complements other ongoing capacity building activities in the SEE region and it will be used at a number of training events specifically designed to support authorities engaged in asset recovery.

The Handbook is complemented by another *Handbook: Tools and Best Practices in International Asset Recovery Cooperation*. Both publications have been developed simultaneously, with the same overall objective in mind.

The AIRE Centre and the Regional Anti-corruption Initiative wish to thank the UK Government for its commitment, substantial financial support and guidance; the Konrad Adenauer Foundation for joining us on the journey and supporting the participation of additional beneficiaries; and the Organisation for Security and Cooperation in Europe (OSCE) for supporting the initial undertaking that has led to substantive action in the SEE region.

ACRONYMS

- ACOC - Anti-Corruption and Organized Crime First Instance Court
- AMA - Asset Management Agency
- AML – Anti-Mafia Law
- BD – Brčko District (BiH)
- BiH – Bosna and Herzegovina
- CAMS - Case Management System
- CC – Criminal Code
- CJEU – Court of Justice of the European Union
- CPC – Criminal Procedure Code
- ECHR – European Convention on Human Rights
- ECtHR – European Court of Human Rights
- EU – European Union
- FATF – Financial Action Task Force on Money Laundering
- FBiH – Federation of Bosnia and Herzegovina
- FIU - Financial Intelligence Unit
- GRECO – Group of States against Corruption
- ICHRP - International Council on Human Rights Policy
- JPO - Judicial Police Officers
- LCPC – Law on the Confiscation of Proceeds of Crime
- MIA – Ministry of Internal Affairs
- MONEYVAL – Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
- OLAF – European Anti-Fraud Office
- RS – Republic of Srpska (BiH entity)
- SCPO - Serious Crime Prosecution Office
- SUAK – Specialised Anti-Corruption Unit
- TAK – Tax Administration of Kosovo*
- UN – United Nations
- UNCAC – UN Convention against Corruption
- UNTOC – United Nations Convention against Transnational Organized Crime

Please note that the masculine pronoun is used in the following sections of the Handbook to refer to an antecedent that designates a person of either gender unless the Handbook specifically refers to a female. Both the authors of the Handbook and AIRE Centre and RAI advocate gender equality and in principle support gender neutral language.

I. INTRODUCTION

The old criminal law maxim, actually a principle of civilisation, says that no-one may retain proceeds of crime. Given that corruption, organised crime and grave forms of financial crime aim at the illegal acquisition of property, its efficient confiscation in criminal proceedings against the perpetrators of those offences is explicitly stated and serves as a paradigm of the thesis *nullum commodum capere potest de sua propria iniuria* (no advantage may be gained from one's own wrong). Confiscation of the proceeds of crime dates back to the beginnings of law and states, but it was only after World War II that more attention was devoted to the issue. Even in states such as France, where the law has for centuries provided for confiscation, norms on asset seizure were frequently ignored in case-law. For a long time, the judges focused mostly on handing down fair and adequate penalties, considering the proceeds the perpetrators had derived from crime merely an aggravating circumstance as they were deciding on the type and gravity of the punishment. However, a turn-about occurred in the anti-crime policy in the past few decades, with focus shifting to combatting crime by all possible means. This was particularly evident in the United States of America, in the “war on drugs” paradigm, which led to a new approach to treating proceeds of crime. Numerous scholarly researches, including, notably the one by Robert Martinson (1974), pointed to problems in the correctional treatment and rehabilitation of offenders, wherefore importance was attached to the personal dimension (focus on members of criminal organisations) and especially the benefits from committing crime. The main purpose of involving individuals and groups in crime is to acquire gain, which not only ensures profits from illegal conduct, but creates a basis for the further commission of crime and especially the corruption of public officials as well (Vettori, 2006). If the perpetrators of complex forms of crime (organised, financial, corruption crimes, et al.) act rationally and “weigh” the pros and cons of committing a crime, then the generally preventive function of confiscating the proceeds of such crimes is particularly important and is considered the most decisive action in this field (Kilchling, 2014). Given that effective asset seizure aims at restoring the situation that had existed before the crime was committed (Bavcon and Šelih, 1996; Pavišić, Grozdanić & Veić, 2007), it essentially restores equality in the distribution of goods in society and deprives criminal organisations of the means to commit crimes in the future.

Asset seizure is undoubtedly of major importance for the successful fight against crime. In their estimates, the United Nations and the International Monetary Fund mention genuinely huge amounts of proceeds derived from crime, equalling several percent of the global GDP (or nearly two billion Euro). Only a negligible share of them – less than one percent - are identified and confiscated in criminal and other proceedings. Comparison of the estimates of illicit proceeds in Europe, ranging from several hundred billion to nearly one trillion Euro, with those indicating that only a small share of them – slightly over a billion - are confiscated, corroborates that there is a huge gap between the profits criminals generate and the amounts eventually seized and confiscated (Europol, 2016). It thus comes as no surprise that states have put in place seizure and confiscation systems and have been undertaking numerous activities to advance them. Their systems differ in various aspects: from the legal character of the institute, scope of application of the law, to modalities for proving the existence of illicit proceeds (criminal procedure rules or a combination of them and civil procedure evidentiary institutes) and some other important elements (Mujanović & Sarajlija, 2014).

Boucht (2017) holds that there are several other (theoretical) reasons justifying the existence and application of the asset seizure institute in addition to the fact that crime generates huge gain no serious state can tolerate. The first is **restorative** and concerns the fact that no-one may acquire or retain the benefits of any form of “wrong”, i.e. violation of the law. Restoration of the way things were before the crime was committed is in accordance with the morality of most civilised societies and one

of the principles of contemporary law. The second reason regards **prevention of crime**. A potential perpetrator will refrain from crime if the potential benefits of his criminal conduct are outweighed by the risks and discomfort such conduct may entail. “Hitting” the criminals where it hurts them the most (their gain), i.e. the probability that their illicit proceeds will be confiscated, demotivates them and strongly deters them from any future criminal conduct. Furthermore, it has **retributive** effect to an extent, because confiscation of proceeds is the focus of the criminal law reaction and a much more effective admonition than a penalty. The third reason also concerns prevention, but one that **focuses on property** in this perspective. Such property, once confiscated, cannot be used to commit future crimes, which is extremely important in combatting organised crime. Namely, organised crime groups are almost entirely focusing on gaining assets, wherefore effective confiscation deals a blow to the “bloodstream” of organised crime groups, both eliminating potential for their influence on legal flows and reducing the appeal of involvement in crime among potential new members. The last, fourth reason, is **compensatory**. In many states, the confiscated proceeds of crime correspond to the property claims of the injured parties and these two institutes often complement each other. A number of countries have criminal law provisions on the satisfaction of the injured parties’ property claims from the confiscated proceeds of crime, especially where seizure/confiscation is laid down as a separate criminal law institute and precedes the settlement of property claims. Some countries have established funds which the proceeds of crime are credited to and from which the victims of the crime and the injured parties are compensated, whereby compensation is effected in this manner (indirectly) as well. There are also states that place the confiscated proceeds of crime at the disposal of the police or judicial authorities to facilitate their fight against crime, or at the disposal of the welfare authorities; or they make them otherwise available to the community and thus compensate the damage undoubtedly incurred by crime.

Proceeds of crime may be defined as one of the elements of a criminal offence, in which case they must be determined. That is the case, for instance, with corruption crimes, where proceeds of crime are a constituent element of most offences. In principle, proceeds of crime also entail gain that does not constitute an element of a crime, but a reward for committing an offence or a consequence of the committed offence (Bačić, 1998). The determination of illicit gain is important because of the decision on its confiscation, in accordance with the general principle of criminal law, under which no-one may retain the proceeds of crime, but often also because it serves to determine the existence of the offence itself.

The legal character of the asset seizure institute is regulated differently in various countries. What all the approaches have in common is that the institute strives to achieve the principle of fairness through criminal law, which is important for legitimising the legal and political orders in their entirety. Bačić (1998) sums this up in the following manner: it is “legally inadmissible, unfair and immoral for someone to retain what he gained by committing a crime, including what he got for committing the crime”. The **first approach** considers confiscation of the proceeds of crime a criminal law sanction *per se*. That was the situation, for instance, in the former Yugoslavia, from 1959 to the 1970s, when it was considered a special security measure. Confiscation is still considered a separate sanction in France, where it is treated differently from imprisonment or fines and may be imposed either together with these penalties or independently. In France, confiscation comes in several forms: general confiscation, applied only in case of grave crimes (e.g. those related to drugs, terrorism, human trafficking, et al.), when the defendant’s entire property is confiscated (regardless of whether or not it derives from the crime he is prosecuted for) and special confiscation, which is applied in all cases when the proceeds had derived from the commission of another crime, different from the one described under general confiscation. In the event the proceeds of crime are unavailable, the court may order the defendant to pay a fine corresponding to the value of the proceeds. The **second approach** treats the confiscation of proceeds of crime as a legal consequence of the conviction, which means that its application is linked to the final judgment and that it comes into effect *ex lege*. The **third approach**

considers confiscation of proceeds of crime a special kind of engagement of the state, which need not necessarily have the character of criminal law engagement, but, rather, of administrative engagement. Due to its huge problems with organised crime, Italy introduced so-called personal preventive measures back in the 1950s and, subsequently, in the 1980s, **preventive confiscation measures**. Preventive confiscation measures may be applied provided there is sufficient suspicion of the criminal origin of the property or of the disproportion between the identified property and legal income and economic activities. The European Court of Human Rights confirmed the administrative character of Italian preventive confiscation measures in several judgments. The **fourth approach** views confiscation of the proceeds of crime as a separate criminal law measure, i.e. a mandatory reaction of the state independent of the penal sanctions system. According to this approach, the purpose of confiscating proceeds of crime is primarily restorative, in the sense that it aims to contribute to the restoration of the legal status of the property before the commission of the crime from which the proceeds had derived; it is the purpose of this measure that distinguishes it from penal sanctions. Furthermore, the imposition of sanctions necessitates a conviction, which does not necessarily have to be the case with the confiscation of proceeds of crime (it may be applied against those who pleaded insanity, people who cannot be criminally prosecuted, et al.). Sanctions regard the person of the perpetrator and his entire property, while the confiscation of proceeds of crime regards only the assets and rights that can be linked to the perpetrator's crimes (Datzer, 2017). Therefore, according to the described approach, the confiscation of proceeds of crime is an institute *sui generis* that is applied in case a crime has been committed, but an institute that is partly regulated by civil law as well (e.g. seizure/freezing of property, the enforcement procedure, et al.). It comes as no surprise that Derenčinović (1999) described it as a mixed criminal-civil law institute, the purpose of which is to restore the situation which had existed before the commission of the crime and to prohibit illegal enrichment from criminal activity.

The procedure for determining proceeds of crime entails ascertaining the scope and content of the proceeds or their monetary equivalent. That procedure is provided for in most legislations *in rem*, **adhesively**, which means that it is implemented within the criminal proceedings, wherefore criminal procedure principles have to be complied with. Given that this procedure is ancillary to the criminal proceeding, confiscation is usually conditioned by a conviction. However, in specific circumstances, property may be confiscated from persons not found guilty in criminal proceedings. Such a confiscation procedure is called **objective or independent**, given that it is conducted outside the criminal proceeding (the purpose of which is to determine the existence of the crime and the guilt of the perpetrator). Such a possibility exists, for instance, in the Federal Republic of Germany. Under German law, the independent confiscation proceedings may be conducted if there are actual reasons, such as the unavailability of the suspect because he absconded or cannot be identified, and in case of a judgment acquitting the perpetrator or deferring criminal prosecution. The procedure is initiated by a private or public prosecutor in case the confiscation order is to be anticipated in view of the investigation results. The motion must be reasoned and the assets to be confiscated must be described. The motion is ruled on by the court that would have real jurisdiction for conducting the criminal trial if the described impediments did not exist, i.e. the court in whose territorial jurisdiction the asset subject to confiscation is located. Another special procedure is the one in which the property of the perpetrator or other persons is confiscated based on a mere presumption that it derives from crime. This is usually called **extended confiscation**. In such a procedure, not only proceeds deriving from a crime that the perpetrator is on trial for are confiscated; so are all the proceeds merely presumed to have derived either from that crime or other crimes that had preceded or coincided with it and that do not need to be determined in detail. The main prerequisites that have to be fulfilled for the implementation of extended confiscation usually include: 1) conviction for a grave offence (organised crime, et al.); 2) circumstances indicating the possibility that the perpetrator's other property also derived from (undetermined) criminal offences; and, 3) the failure of the defendant or the holder of the right or property to explain its legal origin. Thus defined, extended confiscation is usually considered subsidiary to

ordinary confiscation given that, in case the prosecutor suspects that the perpetrator had committed one or more specific crimes, he will endeavour to prove that the perpetrator had derived proceeds from those particular crimes, whereas one of the characteristics of extended confiscation is that the state authorities focus their investigation on proceeds of undetermined crimes. Extended confiscation is possible only once all legally admissible evidentiary means for applying ordinary confiscation have been exhausted, which is why a large number of legislations consider it an ancillary and auxiliary form of ordinary confiscation. (Datzer, 2017).

The above models of asset seizure procedures are for the most part laid down in criminal law. There is also a **civil law approach** to confiscation. Under that approach, the property is the “accused” on the basis of the fact that it derived from criminal activity (unlawful act) (Mujanović & Sarajlija, 2014), i.e. it is up to its owner or holder to prove that it had been legally acquired. This model of confiscation is not based on the perpetrator’s guilt, but on the origin of the property. A typical example of such a procedure can be found in the United Kingdom, where civil law confiscation is subsidiary to criminal and the police have to forward information about cases where they lack evidence to initiate or continue criminal proceedings, where there is no public interest in continuing criminal proceedings or there are procedural difficulties precluding further criminal prosecution (the perpetrator died, is at large, et al.). However, the proceeds must be substantial (at least 10,000 GBP) and there must be reasonable suspicion that they derived from crime or are a reward for a crime within 12 years from the day the proceeding was initiated. Civil recovery applications are made in High Court and the civil law evidentiary standard applies. (Datzer, 2016).

The following four key stages of the procedure for confiscating proceeds of crime may usually be distinguished: the (financial) investigation stage, the court stage, the enforcement stage, and the asset management stage (Mujanović, 2017). Financial investigations denote a set of actions implemented simultaneously with the criminal operational measures with a view to discovering and identifying proceeds of crime, the property of suspects and third parties that may be subject to confiscation, and to ensuring confiscation (Council of Europe, 2007). Financial investigations are implemented to collect data on illegal proceeds, determine or estimate them and confiscate them. Typical financial investigation stages in which these goals are achieved include: determination of the proceeds of crime, determination of the property that may be subject to confiscation and submission of a request for provisional measures to secure the property. Seizure of property that may be subject to confiscation in criminal proceedings is the main result of the financial investigation; it prevents the disposition, transfer or concealment of the criminal offender’s income or property and thus creates the prerequisites for its confiscation. Temporary forfeiture of property may take one of the following two forms: freezing and seizure.¹ Freezing involves the prohibition of the transfer, conversion, disposal or movement of property. Seizure entails temporary takeover or supervision of property (i.e. physical disposition of it) pursuant to an order issued by the court or another competent body. Seizure is considered a default provisional measure, while freezing is ordered only if seizure is impossible or impractical, albeit this has recently been changing in favour of freezing (Mujanović, Datzer, & Kadrib- ašić, 2018). Although generally considered an ancillary proceeding within criminal proceedings, the actions and measures undertaken during the **court proceeding** at which a decision on confiscation of proceeds is taken are usually the ones implemented during a criminal proceeding (examination of witnesses, presentation of documents as evidence, et al.), wherefore they are taken together with the other actions and are often not explicitly designated as ancillary proceeding actions, but as actions within the main criminal proceeding (focusing on the existence of the crime and the guilt of the perpetrator). They usually entail an active role of the perpetrator and affiliated parties (e.g. his accomplices, the parties the proceeds have been transferred to, et al.), who need to be provided with the oppor-

1 They are not the only ones; global theory and practice also recognise interim or anticipatory sale, use, destruction of property, et al.

tunity to present any evidence they can to dispute that the property in their ownership, possession or under their control is linked to the perpetrator and the criminal offence and to generally explain the origin of the property allegedly associated with criminal activity. The operational part of the criminal court's decision ordering the confiscation of proceeds should be tailored to the procedure by which it is to be **compulsorily achieved i.e. enforced**. Therefore, if property subject to confiscation had not been seized/frozen, the operational part of the decision ordering its confiscation needs to include a voluntary compliance deadline and an order to the perpetrator of the crime or a third party to surrender a movable item or deliver a specific quantity of replacement items or pay a set amount of money equalling the value of the proceeds of crime. In most legislations, the confiscation decision is considered an enforceable document, while enforcement procedure law applies to outstanding debts. The stage of **managing** confiscated assets involves any form of disposition of the confiscated proceeds of crime by the state authorities, such as prohibition of transfer or conversion of such property, its safekeeping, storage, use, lease, rent, sale, donation, destruction, restitution and any other form of disposition. Some, but not all countries have recently entrusted asset management to bodies established for that purpose.

II CONFISCATION OF THE PROCEEDS OF CORRUPTION: AN OVERVIEW OF UNITED NATIONS, COUNCIL OF EUROPE AND EUROPEAN UNION GUIDELINES AND STANDARDS

2.1. INTRODUCTION

This Handbook provides an overview of the international standards on the confiscation of the proceeds of crime and corruption. First, it addresses the questions of what confiscation is and why it is important. Second, it identifies the key international conventions and gives an indication of the scope of each one. Third, it explains the approach that those standards take on key aspects of confiscation. It focuses primarily on the judicial phase of confiscation proceedings in which the final decision on confiscation is made, although it also touches upon issues such as the freezing of assets with a view to confiscation and on international cooperation in confiscation matters. It then briefly outlines the work of the Council of Europe monitoring bodies in respect of these standards and examines the safeguards developed by the European Court of Human Rights in applying the European Convention on Human Rights.

2.1.1 What is Confiscation?

Confiscation is the final or permanent deprivation of property by order of a court.² It may also include such deprivation of property by order of a competent authority other than a court.³ Confiscation is not necessarily punitive in nature⁴ and it is not necessarily limited to deprivations of property that follow from criminal proceedings.⁵

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

2 Articles 1 of the 1990 Strasbourg Convention, the Warsaw Convention and the 2014 Directive: “‘Confiscation’ means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property.” Articles 2 of UNTOC and UNCAC: “‘Confiscation’, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.”

3 It is so widened in the definition of “confiscation” used in UNTOC or UNCAC, but not that used in the 1990 Strasbourg Convention, the Warsaw Convention or the 2014 Directive.

4 The definitions of “confiscation” in the 1990 Strasbourg and Warsaw Conventions state that confiscation can refer to a “penalty” or a “measure”.

5 It is so limited in its definition in the 1990 Strasbourg Convention, the Warsaw Convention and the 2005 FD, but not in UNTOC, UNCAC or the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

2.1.2 Why is Confiscation Important?

Although there are differing views on exactly what a confiscation regime should look like, confiscation is nonetheless widely recognised and promoted as a powerful weapon in the fight against serious crime and corruption.⁶ It serves a number of purposes in this regard. When successfully implemented it has the potential:

- To protect the legitimate economy from corruption and the infiltration of illegal assets.
- To bolster tax revenues in the legitimate economy.
- To generate assets that can be used for the public good.
- To assist in upholding the rule of law.
- To undermine criminal incentives and thereby to act as a deterrent to illicit activities.

2.2. INTERNATIONAL STANDARDS

2.2.1 United Nations Conventions

1. The United Nations Convention Against Corruption (2005) (“UNCAC”)

The UNCAC, which entered into force in December 2005, addresses the prevention, investigation and prosecution of corruption, both in the private and public sector.⁷

- Article 31 of UNCAC requires states to adopt “to the greatest extent possible within its domestic legal systems” measures necessary to enable the confiscation of the proceeds of the offences established in the Convention, as well as the property used in or destined to be used in those offences. It also sets out the necessary procedures for the seizure and freezing of property related to the offences set out in the Convention.
- Articles 53, 54 and 55 set out requirements for the recognition of confiscation orders between States and the mechanisms through which those confiscation orders are implemented.
- Article 57 provides for the return and disposal of confiscated assets.

2. UN Convention against Transnational Organised Crime of December (2000) (“UNTOC”)

The UNTOC, which entered into force in September 2003, is the main UN instrument in the fight against transnational organised crime. The offences covered relate to participation in organised criminal groups, money laundering, corruption and obstructing justice as well, as other “serious crime”.⁸

- Article 12 of the UNTOC requires states to adopt, “to the greatest extent possible within their legal systems”, measures to allow the confiscation of the proceeds of crime and property involved with criminal offences.

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

7 Further explanatory material can be found in the UNCAC Legislative Guide and Technical Guide: https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf and https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf

8 Further explanatory material can be found in the UNTOC Legislative Guide: https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf

- Article 13 sets out procedures and obligations for international cooperation in confiscation proceedings.
- Article 14 outlines how confiscated property should be disposed of.

2.2.2 Council of Europe Instruments

1. 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198) (the “Warsaw Convention”).

The Warsaw Convention is particularly concerned with the confiscation of funds used to fund terrorism, even where such funds have legitimate origins. It also applies to confiscation measures more generally, although Contracting States are able to limit its application by declaration.⁹

- Article 3 sets out the general obligations on contracting Parties to implement confiscation measures, while Article 5 establishes the necessity of ensuring that laundered property can be subject to freezing, seizure and confiscation.
- Article 9 establishes the acts that will amount to laundering offences under the Convention and the need for Parties to criminalise such acts.
- Article 15 lists the general principles of international cooperation for the effective implementation of confiscation orders, as well as the measures necessary to achieve such cooperation. Article 16 imposes upon the Parties the obligation to assist with international investigations and Article 28 sets out the grounds for Parties to refuse to cooperate with a confiscation order.

2. 1999 Criminal Law Convention on Corruption (ETS 173) (the “1999 Strasbourg Convention”)

This Convention was adopted in pursuance of the 1996 Committee of Ministers’ Programme of Action against Corruption. It entered into force in July 2002 and addresses corruption in both the public and private sector. It covers both the person bribing (“active bribery”) and the person being bribed (“passive bribery”).¹⁰

- Article 2 defines active bribery and obligates the Parties to the Convention to criminalise such an act. Article 3 does the same for passive bribery. Articles 4 to 15 go on to set out the other acts that Parties are obligated to criminalise under the Convention.
- Article 23 establishes measures to be taken by Parties to the Convention for the purpose of gathering evidence of wrongdoing and confiscating the proceeds of any of the offences set out in the Convention.
- Article 25 sets out the principles of international cooperation under the Convention, as well as the measures to be taken to ensure such cooperation. This is supplemented by Article 26, which sets out the Parties’ obligations to provide each other assistance in their investigations and prosecutions.

⁹ Further explanatory material can be found in the Convention’s Explanatory Report: <https://rm.coe.int/16800d3813>

¹⁰ Further explanatory material can be found in the Convention Explanatory Report: <https://rm.coe.int/16800cce441999>

3. 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141) (the “1990 Strasbourg Convention”).

The 1990 Strasbourg Convention has potentially a much wider scope than the three UN Conventions listed above in that it does not limit confiscation to any particular category of offences. However, Parties may limit, by declaration, the application of the Convention’s confiscation provisions to specified offences or categories of offences.¹¹

- Article 2 lays down that each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and allows the Parties to limit the categories of offences to which the Convention’s obligations apply.
- Article 13 places an obligation on the Parties to the Convention to enforce confiscation orders made by other Parties. Article 14 lists the procedures by which such confiscation orders are to be executed.
- Article 18 establishes the grounds for Parties to refuse to cooperate with other Parties, while Article 23 establishes that Parties shall recognise foreign judicial decisions. Article 27 sets out the requirements for requests of cooperation between State Parties in carrying out investigations or proceedings.

2.2.3 European Union Instruments

Corruption is a crime falling under Article 83(1) of the Treaty on the Functioning of the European Union, thereby giving the EU legislative powers to regulate this area. There are various Council Framework Decisions (“FD”) covering confiscation, crime and corruption. Member States (“MS”) are obliged to introduce confiscation measures in respect of the offences covered by them. Accordingly, these EU instruments promote harmonisation between the MS to a significantly greater degree than the international standards described above.

- Article 3 of Framework Decision 2005/212/JHA provides for ‘extended confiscation’ (also known as ‘special confiscation’). This allows for the confiscation of assets not directly related to the offence being heard before the national court. It applies specifically to where an individual’s income is disproportionate to the value of his/her assets and the court is convinced that the assets in question have been derived from his criminal activity.
- The 2014 Directive 2014/42/EU (“2014 Directive”) was introduced in order to further approximate the Member States’ freezing and confiscation regimes in light of continuing differences between their laws. It includes fuller provisions for the harmonisation of confiscation laws within the EU in relation to certain specified serious offences.
- The 2018 Regulation 2018/1805/EU (“2018 Regulation”) was subsequently introduced. It established a system of mutual recognition of freezing and confiscation orders issued within the frameworks of proceedings in criminal matters, setting out when a confiscation order should be recognized and executed and the situations in which MS can refuse recognition. The Regulation also covers the management and disposal of frozen and confiscated property, the MS’ obligations to affected persons and the legal remedies available to the latter.

¹¹ Further explanatory material can be found in the Convention Explanatory Report: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5de>

2.2.4 Other International Instruments

1. 2012 Recommendations of the Financial Action Task Force on Money Laundering (“FATF Recommendations”)

The Financial Action Task Force (FATF) is an inter-governmental policy-making body that aims to set standards and promote the effective implementation of legal, regulatory and operational measures for combatting money laundering, terrorist financing and related financial crimes. The FATF Recommendations are a recognised international standard for combatting these criminal activities, providing relevant tools to combat the laundering of the proceeds of corruption. Whilst the Western Balkans countries are not themselves Member States of FATF, MONEYVAL is an associate member and carries out its country evaluations on the basis of the FATF standards (see below).¹²

- Recommendation B (commonly referred to as Recommendation 4) is concerned with money laundering and confiscation, with Article 4 setting out the Recommendations’ approach to confiscation measures.
- Recommendation G (commonly referred to as Recommendation 38) establishes the FATF Recommendations’ standards on international cooperation.

2.3. THE APPROACH OF THE INTERNATIONAL STANDARDS TO KEY ASPECTS OF CONFISCATION

2.3.1 Freezing Orders and Investigative Powers

Confiscation will often be preceded by the freezing of assets during an investigation, temporarily preventing dealings in those assets. The freezing of assets is a crucially important step in preventing the concealment or dissipation of property that may eventually become liable to confiscation. All major international conventions¹³ addressed in this publication oblige parties to adopt measures allowing for the freezing of assets and other investigative powers. These are developed further in the Directive, including safeguards to ensure that a freezing order does not remain in force longer than necessary and stipulating the return of frozen property that is not confiscated to its legitimate owner.¹⁴

2.3.2 Ordinary (Conviction Based) Confiscation

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

12 Further explanatory material can be found in the FATF Best Practice Paper ‘The Use of the FATF Recommendations to Combat Corruption’: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf>

13 UNTOC, UNCAC, the 1990 Strasbourg Convention, the 1999 Strasbourg Convention and the Warsaw Convention.

14 Freezing orders are subject to the same proportionality tests as confiscation orders, but their temporary and preventive nature is likely to contribute to the perception of them as proportionate (e.g. *Raimondo v Italy* 12954/87, 22 February 1994 and *Arcuri v Italy* 52024/99, 5 July 2001).

All of the international standards listed above impose upon the parties the obligation to adopt any necessary measures to enable ordinary confiscation of the ‘proceeds’ of crimes within their respective scope.¹⁵ The definition of the ‘proceeds’ of crime is therefore important in this regard:

- In both UNTOC and UNCAC, ‘proceeds’ of crime denote any property (including legal documents or instruments evidencing title to, or interest in, such property) derived from or obtained, directly or indirectly, through the commission of an offence.
- The ‘proceeds’ of crime are defined in the 1990 Strasbourg Convention as any economic advantage from criminal offences, which may consist of property of any description and may also include any legal documents or instruments evidencing title to, or interest in, such property. The 1999 Strasbourg Convention adopts the same approach.¹⁶
- They are defined even more widely in the Warsaw Convention as any economic advantage, *derived or obtained, directly or indirectly*, from criminal offences, which may consist of property of any description and also any legal documents or instruments evidencing title to, or interest in, such property. [Emphasis added]
- The Warsaw Convention also provides for the confiscation of laundered property.
- ‘Proceeds’ are broadly defined in the 2014 Directive as: “any economic advantage derived from a criminal offence; it may consist of any form of property [including legal documents or instruments evidencing title to, or interest in, such property] *and includes any subsequent re-investment or transformation of direct proceeds by a suspected or accused person and any valuable benefits.*”[Emphasis added]

2.3.3 Value Confiscation and Intermingling

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

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

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

15 When signing or ratifying the 1990 Strasbourg Convention parties may limit the application of this provision in Article 2(1) on the adoption of confiscation measures to specified offences or categories of offences. The application of the equivalent provision in the Warsaw Convention may also be limited either to offences punishable by a maximum of more than one year’s imprisonment or by reference to a list of specified offences, provided that ordinary confiscation must apply to money laundering and to the categories of offences listed in the appendix of the Convention.

16 See Explanatory Report to the Criminal Convention on Corruption, para. 94.

The 1990 and 1999 Strasbourg Conventions provide explicitly only for an obligation to adopt value confiscation measures and do not directly address issues relating to transformation, conversion or intermingling of assets. These issues are perhaps intended to be addressed through the wide definition of “proceeds”, which covers any economic advantage from a criminal offence. It may be considered that a transformed, converted or intermingled asset that was ultimately derived from an offence could be confiscated, without any explicit additional provisions, on the basis that it remains an economic advantage whether or not its form has changed.

2.3.4 Confiscation of Instrumentalities

Instrumentalities are any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences. They may include, for example, vehicles that are used to conceal goods in trafficking situations or equipment intended for use in carrying out a crime. UNTOC and UNCAC both oblige parties to adopt measures to enable confiscation of property, equipment or other instrumentalities¹⁷ used in or destined for use in offences covered by those Conventions. The 1990 and 1999 Strasbourg Conventions, the Warsaw Convention and the 2014 Directive all provide similarly that each Party shall introduce measures to enable it to confiscate instrumentalities (as defined in the first sentence of this paragraph).

2.3.5 Confiscation of Income and Other Benefits Derived from the Proceeds of Crime and Corruption

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

UNTOC, UNCAC, and the Warsaw Convention all provide expressly for the confiscation of such income and benefits in the same manner and to the same extent as the proceeds of crime. The 1990 Strasbourg Convention addresses the issue differently through a definition of the ‘proceeds’ of crime that encompasses any economic advantage from a criminal offence. This appears to cover advantages in the form of income derived from the proceeds of crime at the very least, although there was perhaps concern that this was not entirely clear, wherefore the 2014 Directive extends the definition of ‘proceeds’ explicitly to cover “any valuable benefits”.

2.3.6 Reversing the Burden of Proof

One important element of a confiscation regime, both in relation to extended confiscation and more widely, is the way in which it determines which assets should be liable to be confiscation. It may be difficult to prove that assets are of illicit origin without the owner’s assistance, so it may be considered appropriate for confiscation measures to place onto the defendant the burden of proving that his assets are of legal origin. A number of international standards¹⁸ tentatively suggest this approach by providing that each State Party may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime/corruption or other property liable to confiscation, to the extent that such a requirement is consistent with the principles¹⁹ of its domestic law, and with the nature of the judicial and other proceedings. The Warsaw Convention is a little less

17 Neither UNTOC nor UNCAC define ‘instrumentalities’.

18 UNTOC, UNCAC, FATF Recommendations.

19 In UNCAC the reference here is to “fundamental principles”; in UNTOC the reference is merely to “principles”.

tentative. It obliges Parties to adopt measures in respect of serious offences (as defined by national law) requiring an offender to demonstrate the origin of property allegedly liable to confiscation, although this obligation can be disapplied by declaration.²⁰ The European Court of Human Rights (“ECtHR”) has found specific systems involving reversed burdens of proof within limits to be compatible with the European Convention on Human Rights (“ECHR”).²¹ However, the ECHR does “[require] States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”²²

2.3.7 Third Party Confiscation

A criminal/corrupt official may attempt to avoid confiscation measures by transferring assets representing the proceeds of crime to third parties, such as relatives or persons over whom the criminal has control. Third party confiscation refers to confiscation of assets in the hands of such third parties. UN and Council of Europe Conventions do not contain special rules on third party confiscation, although it is potentially covered by their general confiscation provisions.

The 2014 Directive, however, contains developed provisions on third party confiscation. It explicitly requires the introduction of measures enabling third party confiscation, where the third party acquired the proceeds, or other property the value of which corresponds to proceeds, from a suspected or accused person at least if the third party, on the basis of the facts and circumstances, knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation. The fact that the property was transferred free of charge or in exchange for an amount significantly lower than the market value are mentioned as possible indications of such imputed knowledge.

In terms of protections for “innocent third parties”, the ECtHR jurisprudence provides very limited protections in this respect.²³ However, confiscation provisions in UNTOC, UNCAC, the FATF Recommendations and the 2014 Directive are expressly not to be construed to prejudice the rights of bona fide third parties, and the 1990 Strasbourg Convention provides that each Party shall adopt such measures as may be necessary to ensure that interested parties affected by confiscation measures under the Convention shall have effective legal remedies in order to preserve their rights. The 1999 Strasbourg Convention is silent on the matter.

2.3.8 Non-Conviction Based Confiscation

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

International standards have not detailed a highly developed approach to civil confiscation. This may be because the operation of confiscation in the absence of a conviction is a particularly sensitive area due to the potentially severe effects of confiscation measures that may be imposed on the basis of civil standards of proof and the fact that confiscation is so often procedurally linked with a criminal

20 See article 53(4).

21 E.g. *Grayson and Barnham v the United Kingdom*, judgment of 23 December 2008.

22 Paragraph 28, *Salabiaku v France*, judgment of 7 October 1988.

23 In *AGOSI v the United Kingdom*, judgment of 24 October 1986 a seizure order against an ‘innocent owner’ was upheld.

trial. UNTOC, UNCAC, the 1990 Strasbourg Convention, the 1999 Strasbourg Convention and the Warsaw Convention do not explicitly make criminal conviction a precondition to confiscation, but their definitions of ‘proceeds’ and their provisions on confiscation of instrumentalities suggest that the focus is very much on conviction-based confiscation.

However, there is some nascent development of the international standards in this area. UNCAC provides that, for mutual assistance purposes, Parties shall “consider” taking measures to allow confiscation of property of foreign origin under an order issued by the court of another Party without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.²⁴ The FATF Recommendations note that countries should “consider adopting” such measures.²⁵ Moreover, the Warsaw Convention, states, in the context of cooperation with requesting states, that the execution of measures may be required “to the widest extent possible under their domestic law” where this is requested “*in relation to a criminal offence*” [emphasis added], and not necessarily as a criminal sanction following conviction.²⁶

Standards recognising civil confiscation are developing within the European Union. The 2005 FD provides, in relation to tax offences, that MS may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence. In 2008, the European Commission suggested that Member States consider introducing civil confiscation measures.²⁷ This has been taken forward in the 2014 Directive, which requires the introduction of non-conviction based confiscation, albeit only in very limited circumstances where the illness or flight of the suspected or accused person causes problems in pursuing a criminal conviction and on the proviso that the person whose property is affected must be represented by a lawyer. According to the Commission’s explanatory memorandum, it allows Member States to choose whether confiscation should be imposed by criminal and/or civil/administrative courts.²⁸

2.3.9 International Cooperation

UNTOC, UNCAC, the 1990 Strasbourg Convention, the 1999 Strasbourg Convention and the Warsaw Convention recognise the importance of international cooperation in relation to confiscation and include details provisions to that effect.²⁹

2.3.10 Safeguards

Both the UNCAC and the UNTOC oblige State Parties to take appropriate measures for the protection of witnesses, experts and victims who give testimony concerning offences established in accordance with those Conventions, without prejudice to the rights of the defendant, including the right to due process. They further state that the rights of bona fide third parties may not be prejudiced. Whilst the 1990 and 1999 Strasbourg Conventions do not lay down specific guarantees, the Explanatory Report to the 1999 Strasbourg Convention acknowledges the potential intrusiveness of special investigative techniques. It therefore affirms that State Parties are free to decide that some of these techniques will not be admitted in their domestic legal system or surround their use “with as

24 See Article 54(1)(C) of UNCAC.

25 Recommendation 4.

26 Article 23(5) Warsaw Convention.

27 Paragraph 3.3.1, Communication from the Commission to the European Parliament and the Council: 20.11.2008, COM(2008) 766 final, “Proceeds of organised crime, Ensuring that ‘crime does not pay”

28 COM(2012) 85 final, p.11.

29 See UNODC Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime: http://www.unodc.org/documents/organized-crime/Publications/Confiscation_Manual_Ebook_E.pdf

many safeguards and guarantees as may be required by the imperative of protecting human rights and fundamental freedoms.”³⁰

2.4 COUNCIL OF EUROPE MONITORING BODIES

2.4.1 GRECO

The Group of States against Corruption (“GRECO”) was established in 1999 by the Council of Europe to monitor States’ compliance with the organisation’s anti-corruption standards. In addition to monitoring the implementation of the above 1999 Strasbourg Convention, GRECO monitors observance of the Guiding Principles for the Fight against Corruption adopted in 1997 by the Committee of Ministers of the Council of Europe (“Guiding Principles”).

Of these, GRECO particularly examined the following principles during its second evaluation round (2003-2006) focused on the identification, seizure and confiscation of the proceeds of corruption, the prevention and detection of corruption in public administration and the prevention of legal persons from being used as shields for corruption:

- **Proceeds of Corruption:**
 - » Guiding Principle 4: to provide appropriate measures for the seizure and deprivation of the proceeds of corruption offences;
 - » Guiding Principle 19: to ensure that in every aspect of the fight against corruption, the possible connections with organised crime and money laundering are taken into account;
- **Public administration and corruption:**
 - » Guiding Principle 9: to ensure that the organisation, functioning and decision-making processes of public administrations take into account the need to combat corruption, in particular by ensuring as much transparency as is consistent with the need to achieve effectiveness;
 - » Guiding Principle 10: to ensure that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provide for appropriate and effective disciplinary measures; promote further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct;
- **Legal persons and corruption:**
 - » Guiding Principle 5: to provide appropriate measures to prevent legal persons being used to shield corruption offences;
 - » Guiding Principle 8: to ensure that the fiscal legislation and the authorities in charge of implementing it contribute to combating corruption in an effective and co-ordinated manner, in particular by denying tax deductibility, under the law or in practice, for bribes or other expenses linked to corruption offences;

GRECO helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practices in the prevention and detection of corruption.

³⁰ Explanatory Report to the Criminal Convention on Corruption, para 114.

2.4.2 MONEYVAL

The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) is another permanent monitoring body of the Council of Europe. It is entrusted with the task of assessing compliance with the principal international standards to counter money laundering and the financing of terrorism and the effectiveness of their implementation, as well as with making recommendations to national authorities in respect of necessary improvements to their systems. It does this through a dynamic process of mutual evaluations, peer reviews and regular follow-ups of its reports. MONEYVAL assesses its 34 members on the basis of the above FATF standards.

2.5 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Whilst the international community is strongly motivated to combat corruption and reclaim proceeds of crime,³¹ it is paramount that measures to this effect are compliant with human rights mechanisms in order to prevent arbitrary seizure of assets and to safeguard individuals' fundamental rights. The European Court of Human Rights ("ECtHR" or "the Court") accepts that the powers of confiscation possessed by States are justified and necessary for the successful fight against organised crime. By applying the European Convention on Human Rights ("ECHR" or "the Convention"), it ensures, however, that a basic minimum level of protection is afforded to the owners of such confiscated property.³²

The process of confiscating proceeds of crime can engage a number of Convention rights. Primarily, these are the right to peaceful enjoyment of property (Article 1 of Protocol No. 1 to the ECHR), the right to a fair trial (Article 6), and in certain circumstances, Article 8 (right to respect for private and family life) when properties considered to be 'homes' are forfeited or searched. Lastly, questions surrounding the legality of offences and penalties may engage the principle of no punishment without law (Article 7).

The purpose of this section is to explain, in relation to the relevant case-law, how these Articles function in relation to the confiscation, seizure, and forfeiture of the proceeds of crime. The content of the Articles, and the key principles developed by the Court, will be examined, followed by summaries of key case-law relevant to the confiscation of assets. The overarching purpose is to help the reader gain a deeper understanding of the different contexts in which these Convention rights may be engaged, and when they may be violated.

2.5.1 Article 1 of Protocol No. 1

2.5.1.1 General Overview

The principle of the right to peaceful enjoyment of possessions is set out in Article 1 of Protocol No. 1 to the ECHR.

31 International Council on Human Rights Policy (ICHRP) and Transparency International, *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*, 2010, p. 63.

32 Frankie McCarthy, *Protection of Property and the European Convention on Human Rights*, 6 Brigham-Kanner Property Rights Conference Journal, pp. 306 – 307 (2017).

Article 1 of Protocol No. 1 states:

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

Article 1 of Protocol No. 1 guarantees the right to property and protects individuals or legal persons from arbitrary State interference with their possessions.³³ Article 1 of Protocol No. 1 imposes both a negative and positive obligation on the State to protect the enjoyment of possessions.³⁴ However, the Court recognises the right of the State to confiscate the property of individuals or legal persons under specific conditions set out in Article 1 of Protocol No. 1. Specifically, any interference must be pursuant to the public interest, conducted in a manner which is in accordance with the rule of law, and proportionate to its aim.

The Court has established a three-stage process to determine whether a violation of this provision has occurred.

(i) Engagement of Article 1 of Protocol No. 1: ‘Possession’ of ‘property’

To fall under the scope of the Convention and its Protocols the individual must ‘possess’ his/her property within the meaning of Article 1 of Protocol No. 1. The term ‘possession’ has an autonomous meaning in the Convention system³⁵ and, under Article 1 of Protocol No. 1, it relates to an individual’s claim/right to property. Crucially, this claim/right must have a basis in domestic law and it is incumbent on the applicant to establish the exact nature of their entitlement in national law. For instance, in *Novikov v. Russia*³⁶, the Court noted that the applicant had a claim to fuel that had been seized by the Russian police as an object of crime because he was the beneficiary of an assignment agreement concerning the fuel that was enforceable under Russian law.

To be recognised as a ‘possession’, any right/claim to property in the future must fall within the scope of a lawful claim or legitimate expectation. A legitimate expectation is enforceable under domestic law and is regarded as an asset for the purposes of Article 1 of Protocol No. 1. *Denisova and Moiseyeva v. Russia*³⁷ involved a man who had been convicted of treason and had his property confiscated by the authorities. The man’s wife and daughter subsequently claimed that they partly owned the property that had been confiscated. In assessing the wife’s claim, the Court found that domestic law provided for joint ownership of property acquired by spouses in marriage and that the wife therefore had a legitimate expectation to a portion of the family property equal to that of her husband.

33 *Marckx v. Belgium*, judgment of 13 June 1979.

34 *Öneryıldız v. Turkey*, judgment of 30 November 2004.

35 *Gasus Dosier und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995.

36 *Novikov v. Russia*, judgment of 11 July 2013.

37 *Denisova and Moiseyeva v. Russia*, judgment of 1 April 2010.

The term 'property' is broadly construed and not limited to physical goods. It includes the following:

- tangible, moveable and immovable property (goods, buildings, land);
- intangible property (monetary funds, shares, intellectual property, pensions, social security entitlements);
- legal claims (binding judgments of courts and tribunals, debt obligations).

In the context of seizure, confiscation, or forfeiture of assets, possessions have included confiscated aircraft,³⁸ property seized in criminal proceedings,³⁹ as well as assets seized in a foreign country.⁴⁰

(ii) Interference with Article 1 of Protocol No. 1 – The Three Rules

After the first step the Court will proceed to determine whether there is (or has been or will be) interference with the enjoyment of a possession. This will involve examining the relevant acts or omissions to see whether they affect the enjoyment of the possessions in question. The Court's decision will be determined by an examination of which of the three rules apply to the situation at hand.⁴¹

1. First rule

The first rule establishes the overall principle that individuals are entitled to the peaceful enjoyment of their possessions (a catch all formula). The second and third rules are to be construed in the light of this general principle.

2. Second rule

The second rule concerns the deprivation of possessions, meaning the extinguishment of an individual's rights of ownership. To determine whether there has been or will be a 'deprivation' the judge considers whether the individual is (or will be) able to use, sell, donate, or otherwise exercise his rights over the possession in question.

A deprivation can be *de facto* or *de jure*. Generally speaking, *de facto* deprivation occurs when the relevant authorities (i.e. a State body) interfere with the enjoyment of property without officially removing the owner's title. It should be noted that the Court is wary about recognising *de facto* deprivations of property for the purposes of Article 1(2) of Protocol No. 1 unless the owner's rights have been formally extinguished. In *Hentrich v. France*⁴², the Court held that the tax authority's pre-emption of the applicant's property, after it was sold at too low a price to the applicant, amounted to *de facto* expropriation of the property as the pre-emption amounted to deprivation of the applicant's possessions as defined under Article 1 of Protocol No. 1.

Not all acts restricting an owner's property rights are considered deprivations under the second rule; they may fall under the third rule.

38 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005.

39 *Tandem v. Spain*, judgment of 13 July 2010.

40 *Saccoccia v. Austria*, judgment of 18 December 2008.

41 *Gogitidze and Others v. Georgia*, Grand Chamber judgment of 12 May 2015.

42 *Hentrich v. France*, judgment of 22 September 1994.

3. Third rule

The third rule concerns the control of the use of property in accordance with the general interest. A control of the use of property will occur when a relevant body has established rules in the general interest which will restrict an owner's enjoyment of their property but will not amount to a deprivation of possession. The State has a wide, albeit not unlimited, margin of appreciation in its power to control property. The control of property must be implemented in line with a general rule and cannot be arbitrary.⁴³ Forfeiture provisions under enforcement laws are often cited by the Court as an example of control of property under the third rule.

A State's control of use of property can have a much wider scope than deprivation of property. The State may effect 'control' by implementing rules requiring a positive action by an individual,⁴⁴ or by rules imposing restrictions on their activities – for example:

- Planning control
- Environmental orders
- Confiscation orders
- Forfeiture orders

The Court emphasises that the three rules are not distinct and unconnected. The latter two are both instances of an interference with peaceful enjoyment of property and as such they should be construed in the light of the general principle set out in the first rule.⁴⁵ If the interference with property rights cannot be classified under the second or third rule, the first rule applies.

(iii) Justification for an interference

The final step the Court must take to assess whether there has been a violation of Article 1 of Protocol No. 1 is to determine whether the interference with the applicant's property rights was justified. To be justified, the State's actions must pass three distinct tests: they must be lawful, serve a legitimate aim, and have struck a fair and, proportionate balance between the rights of the individual and the legitimate aim pursued.

a. Lawfulness

Firstly, the State's interference with the applicant's property must have been lawful, meaning the interference must have had a clear basis in domestic law and adhered to the principles of the rule of law. Lawfulness does not just require that the State complies with precise domestic law, but also that it follows a fair and proper procedure – the measure in question should issue from and be executed by an appropriate authority and should not be arbitrary.⁴⁶ In short, for interference to be lawful, it must have a basis in national law⁴⁷ and be clear, foreseeable to those concerned, and precise.⁴⁸ States are not, however, prevented from amending their laws so as to retrospectively regulate continuing factual situations or legal relations.⁴⁹

43 *Pine Valley Developments Ltd v. Ireland*, judgment of 9 February 1993.

44 *Denev v. Sweden*, judgment of 18 January 1989.

45 *James and Others v. the United Kingdom*, judgment of 21 February 1986.

46 *Winterwerp v. the Netherlands*, judgment of 24 October 1979.

47 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005.

48 *Carbonara and Ventura v. Italy*, judgment of 30 May 2000 and *Beyeler v. Italy*, judgment of 5 January 2000.

49 *Gogitidze and Others v. Georgia*, Grand Chamber judgment of 12 May 2015.

Baklanov v. Russia concerned the confiscation of \$250,000 of the applicant's money on grounds of smuggling after he was searched at an airport after failing to declare that he was carrying the sum in cash. After being sentenced to a two-year suspended sentence, the money was confiscated as an object of smuggling. The applicant complained to the Court that his money had been confiscated without any basis in law under Article 1 of Protocol No. 1. The Court held that the relevant domestic law had not been created with sufficient clarity to “enable the applicant to foresee, to a degree that is reasonable in the circumstances, the consequences of his actions”. This was because the new Criminal Code no longer included the provisions of the prior Criminal Code that allowed for confiscation in such circumstances and the inconsistent domestic case law did not clarify the issue. Therefore, there was a violation of Article 1 of Protocol No. 1.

b. Legitimate Aim

Secondly, State interference with the right to peaceful enjoyment of property must serve a legitimate aim in the public or general interest.⁵⁰ Due to the wide variety of policies developed by the States, which may impact on property in some way, shape or form, the Court recognises that States have a wide margin of appreciation in determining what may or may not be in the public or general interest.⁵¹ Where State interference includes social and economic policy implemented via legislation, the Court “will respect the legislature’s judgment as to what is “in the public interest unless that judgment is manifestly without reasonable foundation”.⁵²

In *Riela and Others v. Italy*, the Italian authorities had confiscated the applicants’ property on the grounds that it was, or had been acquired, through the proceeds of crime. There was significant evidence that the first two applicants were members of a Mafia-type criminal organisation, and that the confiscated property had been acquired through their activities in this organisation. The applicants complained under Article 1 of Protocol No. 1 that the confiscation measure infringed their right to respect for property. The Court stated that while the confiscation measure had unquestionably infringed the applicants’ rights under Article 1 of Protocol No. 1, the legitimate aim of combating Mafia-type criminal organisations in Italy was so significant that the interference with the Convention was not disproportionate to that aim. Therefore, there was no violation of the Convention and the application was declared manifestly ill-founded.

c. Proportionate Interference

Finally, the State’s interference with property must be proportionate. A fair balance must be struck between the rights of the applicant to the peaceful enjoyment of their property and public interest requirements.

⁵⁰ *James and Others v. the United Kingdom*, judgment of 21 February 1986.

⁵¹ *Ibid.*

⁵² *Ibid.*

In *AGOSI v. the United Kingdom* the applicant had sold 1,500 Krugerrand gold coins to a pair of men, who were then arrested attempting to smuggle the coins into the UK. The coins were confiscated as objects of smuggling. The sale contract for the coins stipulated that title to the coins would not transfer until payment was received by the company, and, as the cheque presented to AGOSI for payment was not honoured, the company argued in proceedings in the UK that, as they still had title to the coins, they should be restituted to them. The applicants complained to the Court that the confiscation of the coins violated Article 1 of Protocol No. 1 as they were innocent of any wrongdoing. In its assessment of proportionality, the Court in *AGOSI* stated:

“The State enjoys a wide margin of appreciation with regard to both choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”

The Court has recognised that striking a fair balance is contingent on many different factors:

- The owner’s behaviour (relating to the act causing the State to take action e.g. a criminal act).⁵³
- The degree of fault or care the owner had displayed in their behaviour and whether applicable procedures allowed the State to take account of the applicant’s degree of fault or care.⁵⁴
- The aims and objectives of the policy/legislation in question. In particular, it must be open to the legislature to take measures to give effect to the aim of the adopted policy.⁵⁵
- Whether the State has exceeded its margin of appreciation.⁵⁶
- Further considerations for the Court have included: timeliness,⁵⁷ certainty in the exercise of state power,⁵⁸ the impact of the interference on the individual,⁵⁹ procedural safeguards,⁶⁰ and the payment of compensation.⁶¹

53 *AGOSI v. the United Kingdom*, judgment of 24 October 1986.

54 *Ibid.*

55 *Mellacher v. Austria*, judgment of 19 December 1989.

56 *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995.

57 *Erkner and Hofauer v. Austria*, judgment of 23 April 1987.

58 *Hentrich v. France*, judgment of 22 September 1994.

59 *Erkner and Hofauer v. Austria*, judgment of 23 April 1987.

60 *Hentrich v. France*, judgment of 22 September 1994.

61 *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986.

The state's wide margin of appreciation in the fight against corruption is exemplified in the case of *Gogitidze and Others v. Georgia*.⁶²

Gogitidze and Others v. Georgia concerned the confiscation of property owned by a former government minister of Ajaria, in Georgia. He was charged with abuse of authority and extortion in relation to allegations of corruption made in relation to his time in office. While the applicant had not been convicted of any crime, five of his properties, reduced from six after appeal, were confiscated by the Georgian authorities on the basis that it would have been substantially impossible for him to have acquired property of the value of €450,000 on official salaries that ranged between €1,644 and €6,023 per annum. The applicant argued before the Court that the confiscation violated his rights under Article 1 of Protocol No. 1, as well as Article 6. The Court noted that the confiscation procedure pursued the legitimate aim of preventing unjust enrichment through corruption by sending a signal to public officials that their ill-gotten wealth could be seized even without a criminal conviction. The Court considered it justified for the burden of proof to be placed on the applicant, relying on the fact that international conventions on corruption specifically allowed for such measures. Moreover, the Court noted that the confiscation procedures in question, implemented on the advice of MONEYVAL and GRECO, had been effective in helping Georgia to combat corruption. The Court also found it legitimate that the applicant's assets were confiscated prior to a determination of criminal guilt as there was overwhelming circumstantial evidence suggesting that the applicant's lawful income could not have sufficed to acquire the property in question.

While it must be open to domestic authorities to take measures to give effect to the aim of their adopted policies, these measures must also be proportionate.

The applicant in *Gabrić v. Croatia* was stopped by police as she crossed the border between Bosnia and Herzegovina and Croatia. They seized 20,000 Deutsche Marks and 61 cartons of cigarettes from her car. The applicant was convicted of avoiding customs controls and given a six-month suspended sentence and had her cigarettes confiscated. She was also convicted of an administrative offence related to the 20,000 Deutsche Marks for which she was fined and had the money confiscated. The applicant argued that such measures were excessive and violated her rights under Article 1 of Protocol No. 1. The Court recognised that the authorities' confiscations were lawful and amounted to control of the use of property. However, as the applicant had already been fined in relation to the non-declaration of the money, had not been subject to a criminal conviction in relation to the money, and had lawfully obtained said money, the Court decided that Government had not convincingly shown that the initial fine had not been a sufficient deterrence and punishment. Therefore, the confiscation was disproportionate and amounted to a violation of the Convention.

⁶² *Gogitidze and Others v. Georgia*, Grand Chamber judgment of 12 May 2015.

The approach to proportionality in *Gabrić* is mirrored in the CJEU case of *Chmielewski v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám-és Pénzügyőri Főigazgatósága*.⁶³

Chmielewski v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám-és Pénzügyőri Főigazgatósága concerned the levying of a fine on Mr Chmielewski equivalent to 60% of a sum of cash that the applicant had not declared as he entered the EU from Serbia into Hungary. Mr Chmielewski brought an action against the decision, claiming that the law under which he had been fined was incompatible with EU law. The CJEU emphasised that the severity of a penalty must be commensurate with the seriousness of the infringements for which it is imposed. While Member States have a margin of discretion in deciding how to ensure compliance with their obligations to implement EU law, the value of the fine in this case was not judged to be proportionate as it went beyond what was necessary to achieve compliance. A fine of a lower amount, together with a measure to detain the undeclared cash, would have been capable of proportionately attaining the objectives pursued by the relevant regulations.

The CJEU emphasised that the severity of a penalty must be commensurate with the seriousness of the infringements for which it is imposed. While Member States have a margin of discretion in deciding how to ensure compliance with their obligations to implement EU law, the value of the fine in this case was not judged to be proportionate as it went beyond what was necessary to achieve compliance. Further examples of where the Court has held State action to be disproportionate can be seen in the following cases :

- ***Grifhorst v. France***:⁶⁴ Confiscation of the applicant's cash was in violation of Article 1 of Protocol No. 1 as no evidence could be produced that the cash was related to any illegal activity and the confiscation order was vastly more severe than the usual penalty in such circumstances.
- ***Tendam v. Spain***:⁶⁵ The Court held that, in case the owner of the property is acquitted of the relevant charges against him/her, reasonable measures must be taken for the preservation of the seized property.
- ***Gladysheva v. Russia***:⁶⁶ Dispossessing a bona fide purchaser of her flat without compensation, in circumstances in which there were no conflicting private interests at stake and without sufficient justification that it was in the public interest, constituted a disproportionate interference.

63 *Chmielewski v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága*, CJEU judgment of 16 July 2015.

64 *Grifhorst v. France*, judgment of 26 February 2009.

65 *Tandem v. Spain*, judgment of 13 July 2010.

66 *Gladysheva v. Russia*, judgment of 02 December 2011.

2.5.1.2 Bona Fide Third Parties

A notable issue arises where a third party, acting in good faith, suffers the consequences of asset seizure or confiscation. The Court has sympathised with such applicants in the past, accepting that third parties had suffered severe ramifications due to seizure and confiscation orders. When ruling on the claims of third parties in relation to Article 1 of Protocol No. 1 the Court will consider two main factors. Firstly, the Court will consider whether the affected third party was able to effectively raise their claims to the property, and have those claims considered, in enforcement proceedings. Secondly, the Court will have regard to the applicant's conduct and degree of fault, and whether these factors had been sufficiently considered by the domestic courts.⁶⁷

Significant third party cases include *AGOSI v. the United Kingdom* (above) and *Air Canada v. the United Kingdom*⁶⁸ where the Court has accepted that third parties had suffered severe ramifications due to seizure and confiscation orders.

In *Air Canada v. the United Kingdom*, UK Customs and Excise seized an aircraft belonging to Air Canada after a large quantity of drugs were found on board. The seizure occurred after a long history of drug trafficking related incidents involving Air Canada and British airports, as well as multiple requests by the British authorities for Air Canada to tighten their security procedures at Heathrow Airport, where the seizure occurred. The aircraft was held for several hours and only released after a payment was made by the applicant company of £50,000 for its return. The applicant company complained before the Court that the seizure of the aircraft, and the conditions placed on its return, had violated its rights under Article 1 of Protocol No. 1 and Article 6. In *Air Canada*, as in *AGOSI*, no violation of Article 1 of Protocol No. 1 was ultimately found. In this case, the applicant's history of drug trafficking incidents and failure to tighten security had been factored into the Customs and Excise Commissioner's decision to seize their asset. Furthermore, the Court noted that the decision to confiscate property had been subject to judicial challenge and that the applicant had been able to effectively argue their case and provide evidence to support their arguments. The applicant also had the opportunity to bring a judicial review of the decision but did not do so. Therefore, there was no violation.

The applicant in *Air Canada* can be distinguished from the one in *Gladysheva v. Russia*.⁶⁹

⁶⁷ *AGOSI v. the United Kingdom*, judgment of 24 October 1986.

⁶⁸ *Air Canada v. the United Kingdom*, judgment of 5 May 1995.

⁶⁹ *Gladysheva v. Russia*, judgment of 6 December 2011.

In *Gladysheva v. Russia* the applicant had been evicted from her flat by the State because the property had been obtained fraudulently by the prior owner. The applicant complained that she had been deprived of her possessions in violation of Article 1 of Protocol No. 1 and that the eviction was a violation of her right to respect for her home under Article 8. The Court noted that the applicant had taken all the required steps and lodged all the relevant paperwork (with the relevant bodies) to become the lawful owner of the property. In contrast, the fraud had occurred in the course of procedures conducted by the State authorities. The Court, considering the applicant's conduct and degree of fault, therefore found a violation of Article 1 of Protocol No. 1. The previously mentioned case of *Denisova and Moiseyeva v. Russia* also put emphasis on the innocent party's knowledge and conduct: the Court found that confiscation orders could only include the guilty spouse's share of the marital property in a situation where the property was acquired criminally and subsequently registered in the innocent spouse's name in order to prevent its confiscation.

The Court's approach in considering whether the affected third party was able to effectively raise their claims to the property can be seen in *Andonoski v. The Former Yugoslav Republic of Macedonia*.⁷⁰

In *Andonoski v. The Former Yugoslav Republic of Macedonia* the applicant's car was seized after he was stopped by police with several undocumented foreign nationals as passengers. Both he and his passengers were arrested and the car was temporarily seized. The applicant was subsequently charged with human smuggling, although the charges were subsequently withdrawn as he had not known that his passengers were illegal immigrants. One of the passengers was, however, convicted of human smuggling and the domestic court ordered the confiscation of the applicant's car as it had been the means by which the criminal offence had been committed. The applicant complained to the Court that he had suffered a violation of his rights under Article 1 of Protocol No. 1. The Court considered that the confiscation of the car was a permanent and conclusive transfer of ownership amounting to a deprivation of property under the second rule of Article 1 of Protocol No. 1. While the Court ruled that it was clear the applicant had acted in good faith and that the confiscation was disproportionate, it also noted that, in particular, domestic law imposed automatic confiscation of any vehicle used for human smuggling without exception. This deprived the applicant of any possibility to argue his case or to claim compensation. Therefore, there had been a violation of Article 1 of Protocol No. 1.

In some cases, such as *B.K.M. Lojistik Tasimacilik Ticaret Limited Siketi v. Slovenia*,⁷¹ the Court will consider other factors unique to third party cases to determine whether there has been a breach.

⁷⁰ *Andonoski v. The Former Yugoslav Republic of Macedonia*, judgment of 17 September 2015.

⁷¹ *B.K.M. Lojistik Tasimacilik Ticaret Limited Siketi v. Slovenia*, judgment of 17 January 2017.

In *B.K.M. Lojistik Tasimacilik Ticaret Limited Siketi v. Slovenia*, the applicant company's lorry was stopped by the border police who went on to find 105 kg of heroin hidden inside. The driver was consequently arrested and the lorry and its trailer seized. While the legitimate goods in the lorry were eventually delivered, and the trailer returned, the driver was convicted of drug trafficking and the lorry confiscated. The initial decision of the Slovenian court to return the lorry to the applicant company was reversed on appeal. The applicant company complained to the Court that their rights under Article 1 of Protocol No. 1 had been breached. The Court ruled that the domestic authorities had not taken into account the applicant company's responsible conduct when adjudicating on whether they could have any possibility of securing the return of the lorry. The Court also ruled that in cases involving the confiscation of a third party's property, a deprivation could only be justified if the third party's interest in having the property returned to him was outweighed by the risk that the property's return would undermine the legitimate aim of the authorities. As the lorry was not adapted for smuggling, had not been used for smuggling in the past, and its driver had been convicted and sentenced to nine years in jail, the Court saw no reason to conclude that the lorry would be used for smuggling in the future. Therefore, the authorities' actions were unjustified, disproportionate, and in breach of Article 1 of Protocol No. 1.

It is important to note that whilst third party considerations are important for the Court, they are not decisive in finding a violation of Article 1 of Protocol No. 1. The ruling will ultimately be a fact-sensitive question of balance.

2.5.1.3 Cooperation with a Foreign State

All of the international instruments mentioned in the second part of this Handbook include obligations on States to collaborate with each other. *Saccoccia v. Austria*⁷² demonstrates how State collaboration with the aim of seizing assets can be consistent with Article 1 of Protocol No. 1, provided that the domestic law of the executing Contracting State ensures respect for Article 1 of Protocol No. 1.

In *Saccoccia v. Austria* the applicant had been convicted in the United States of running a vast money laundering operation for a drug cartel that involved over \$100 million. A forfeiture order for the applicant's property was issued by the US, including for \$9 million held in Austria. The Austrian authorities subsequently issued an interim confiscation order, with the applicant then complaining to the Court that the national authorities had violated his rights under Article 1 of Protocol No. 1 and Article 6. The Court found that the execution by the Austrian authorities of a forfeiture order made in the United States had a basis in Austrian law, as well as a legitimate aim, specifically enhancing international cooperation to ensure money derived from drug dealing was forfeited and seized. Alluding to the difficulties faced by States in fighting drug trafficking and the need for preventative measures, the Court found that a fair balance had been struck between the rights of the applicant and that legitimate aim.

⁷² *Saccoccia v. Austria*, judgment of 18 December 2008.

2.5.1.4 Judicial Review Requirements

Despite the lack of explicit procedural requirements in the second paragraph of Article 1 of Protocol No. 1, the Court has held that the proceedings as a whole must afford the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake. Thus, domestic courts are under an obligation to exercise their powers of further review on request, specifically to determine whether a requisite balance had been maintained between the applicant's right to peaceful enjoyment of his property and the authorities' legitimate aim. In *Paulet v. the United Kingdom*, a case concerning the confiscation of earnings obtained through illegal work, the Court found the appellate court's scope of review was too narrow to satisfy the requirement of seeking fair balance inherent in Article 1 of Protocol No. 1.⁷³

2.5.1.5 Key Points

In summary, the Court has asked the following questions when considering whether there has been a violation of the right to property:

- Is there a right to property or possession within the scope of Article 1 of Protocol No. 1?
- Has there been interference with that possession?
- Under which three rules does the interference fall?
- Does the interference comply with the principle of lawfulness?
- Does the interference serve a legitimate objective in the public or general interest?
- Is the interference proportionate – has a balance been struck between the demands of the general interest of the community and the need to protect the individual's fundamental rights?

In conclusion, the scope of Article 1 of Protocol No. 1 is wide and establishes both the right to peaceful enjoyment of possessions and an extensive margin of appreciation allowing States to interfere with that right. However, as set out in this section, there are a number of questions and criteria the Court will have to assess before such a violation is found.

The case summaries below provide an overview of important cases where applicants have argued a violation of Article 1 of Protocol No. 1 in the context of the seizure and confiscation of assets and proceeds of crime.

2.5.1.6 List of key cases

- ***AGOSI v. the United Kingdom***:⁷⁴ The confiscation of smuggled coins did not automatically amount to a deprivation of property.
- ***Raimondo v. Italy***:⁷⁵ Maintaining the preventative seizure of assets in relation to the proceeds of mafia-type crime 4 years and 8 months after the applicant had been acquitted of the offences amounted to a violation of Article 1 of Protocol 1.
- ***Air Canada v. the United Kingdom***:⁷⁶ The requirement to pay £50,000 (€60,000) to release the applicant company's seized aircraft was not disproportionate to the aim of preventing the importation of prohibited drugs into the country.

⁷³ *Paulet v. the United Kingdom*, judgment of 13 May 2014.

⁷⁴ *AGOSI v. the United Kingdom*, judgment of 24 October 1986.

⁷⁵ *Raimondo v. Italy*, judgment of 22 February 1994.

⁷⁶ *Air Canada v. the United Kingdom*, judgment of 5 May 1995.

- **Arcuri v. Italy:**⁷⁷ The confiscation of family members' assets, suspected of having been acquired through unlawful means, was not a violation of Article 1 of Protocol No. 1. The persons concerned had been able to raise the objections and adduce the evidence that they considered necessary to protect their interests
- **Gabrić v. Croatia:**⁷⁸ The confiscation of the applicant's 20,000 Deutsche Marks in cash as she crossed the border from Bosnia and Herzegovina to Croatia was held to be in violation of Article 1 of Protocol No. 1. A proportionate balance had not been struck between the rights of the applicant and the legitimate aim of the government as the authorities had not demonstrated that the applicant's initial fine had not amounted to sufficient deterrence and punishment.
- **Grifhorst v. France:**⁷⁹ Confiscation of the applicant's cash was in violation of Article 1 of Protocol No. 1 as no evidence could be produced that the cash was related to any illegal activity and the confiscation order was vastly more severe than the usual penalty in such circumstances.
- **Chmielewski v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám-és Pénzügyőri Főigazgatósága:**⁸⁰ The applicant had been fined after he had failed to declare the amount of cash that he was carrying when crossing the border from Serbia to Hungary. The CJEU ruled that the law under which this fine had been ordered was incompatible with EU law because it lay down fines that were not proportionate, going beyond what was necessary to ensure compliance.
- **Riela and Others v. Italy:**⁸¹ A margin of appreciation is afforded to States in respect of Article 1 of Protocol No. 1 when controlling the use of property in the fight against organised crime
- **Butler v. the United Kingdom:**⁸² The forfeiture of cash on the basis of a statutory presumption in the context of drug trafficking was not a violation of Article 1 of Protocol No. 1 where the applicant had the opportunity of rebutting that presumption.
- **Webb v. the United Kingdom:**⁸³ It was not a violation of Article 1 of Protocol No. 1 to confiscate the applicants' property on the basis of civil standard of proof.
- **Baklanov v. Russia:**⁸⁴ The forfeiture of the applicant's asset, without any legal basis in domestic law, constituted a violation of Article 1 of Protocol No. 1.
- **Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland:**⁸⁵ The confiscation and impoundment of the applicant's aircraft, due to implemented EU Regulations, did not constitute a violation of Article 1 of Protocol No. 1.
- **Saccoccia v. Austria:**⁸⁶ The seizure of the applicant's assets in Austria, following a United States forfeiture order, did not violate Article 1 of Protocol No. 1.
- **Grifhorst v. France:**⁸⁷ The confiscation and fine imposed on the applicant for failing to declare a sum of money to the customs authorities was disproportionate, in violation of Article 1 of Protocol No. 1.
- **Tendam v. Spain:**⁸⁸ The refusal to award compensation for loss and determination of property

77 *Arcuri v. Italy*, judgment of 5 July 2001.

78 *Gabrić v. Croatia*, judgment of 5 February 2009.

79 *Grifhorst v. France*, judgment of 26 February 2009.

80 *Chmielewski v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám-és Pénzügyőri Főigazgatósága*, CJEU judgment of 16 July 2015.

81 *Riela and Others v. Italy*, judgment of 4 September 2001.

82 *Butler v. the United Kingdom*, admissibility decision of 27 June 2002.

83 *Webb v. the United Kingdom*, admissibility decision of 17 December 2002.

84 *Baklanov v. Russia*, judgment of 9 June 2005.

85 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005.

86 *Saccoccia v. Austria*, judgment of 18 December 2008.

87 *Grifhorst v. France*, judgment of 26 February 2009.

88 *Tendam v. Spain*, judgment of 13 July 2010.

seized in criminal proceedings resulting in an acquittal, was a violation of Article 1 of Protocol No. 1.

- ***Denisova and Moiseyeva v. Russia***:⁸⁹ Being unable to challenge a confiscation order which was made during criminal proceedings to which the applicants were not a party to, was a violation of Article 1 of Protocol No. 1.
- ***Gladysheva v. Russia***:⁹⁰ The failure of the State authority to assess proportionality when evicting a bona fide purchaser from a flat, fraudulently obtained by the previous owner, violated Article 1 of Protocol No. 1.
- ***Silickienė v. Lithuania***:⁹¹ The confiscation of property from the wife of a corrupt police officer was not a violation of Article 1 of Protocol 1, as the wife must have known that the confiscated property could only have been bought with the proceeds of the criminal organisation's activities.
- ***Paulet v. the United Kingdom***:⁹² The failure of the domestic court to conduct an extensive review as to whether a requisite balance was maintained in a manner consistent with the applicant's right to peaceful enjoyment of property amounted to a violation of Article 1 of Protocol No. 1.
- ***Gogitidze and Others v. Georgia***:⁹³ The forfeiture of a civil servant's wrongfully acquired property as part of domestic anti-corruption measures was not a violation of Article 1 of Protocol No. 1.

2.5.2 Article 6

2.5.2.1 General Overview

The right to a fair trial is guaranteed by Article 6 of the European Convention on Human Rights (the Convention or ECHR). Article 6 states:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
 - a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - b) *to have adequate time and facilities for the preparation of his defence;*
 - c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - d) *to examine or have examined witnesses against him and to obtain the attendance and ex-*

89 *Denisova and Moiseyeva v. Russia*, judgment of 1 April 2010.

90 *Gladysheva v. Russia*, judgment of 6 December 2011.

91 *Silickienė v. Lithuania*, judgment of 10 April 2012.

92 *Paulet v. the United Kingdom*, judgment of 13 May 2014.

93 *Gogitidze and Others v. Georgia*, judgment of 12 May 2015.

- amination of witnesses on his behalf under the same conditions as witnesses against him;*
e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

Article 6 is applicable to ‘civil rights and obligations’ and ‘criminal charges’. These terms have been interpreted autonomously, and may have a different meaning in terms of the Convention than in domestic law.

Briefly, ‘the determination of civil rights and obligations’ includes disputes of a genuine and serious nature as to the rights and obligations of private persons under, for example, contract law, commercial law, family law, property law and employment law. The applicant must be able to claim, on arguable grounds, a right that is already recognised in domestic law as Article 6 does not facilitate the creation of new rights. Article 6 only applies to civil rights that are central to the proceedings at issue. ‘Civil rights and obligations’ can, for instance, be affected by disputes relating to property in the context of expropriation and civil confiscation.

As regards the criminal context, Article 6 may apply even if the charge is not classified as ‘criminal’ but e.g. as ‘administrative’ in domestic law. Account needs to be taken of the nature of the offence and the purpose, nature and severity of the penalty when considering whether Article 6 applies. The term ‘charged’ also has an autonomous meaning, including the official indication given to an individual that he is suspected of having committed a criminal offence, and a situation in which the suspect has been substantially affected because of suspicion to that effect.

Importantly, Article 6(2) requires a presumption of innocence; meaning that members of a tribunal should not possess a preconceived notion that the accused has committed the offence with which they are charged. Importantly, however, the forfeiture of property ordered as a result of civil proceedings does not in itself give rise to an issue under Article 6(2).⁹⁴

2.5.2.2 Article 6 – Confiscation of Assets

Article 6 is most often invoked in the context of anti-corruption and confiscation proceedings because an applicant’s assets had been confiscated in the absence of any procedure compatible with Article 6(1),⁹⁵ the confiscation orders were based on charges of which the applicant has been acquitted,⁹⁶ or the applicant believes that the court that had ruled on the criminal charge and confiscation order against him was not competent.⁹⁷

The European Court of Human Rights (the Court or ECtHR) established basic principles applicable to confiscation proceedings and Article 6 in *Phillips v. the United Kingdom*.⁹⁸

94 *Gogitidze and Others v. Georgia*, Grand Chamber judgment of 12 May 2015.

95 *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 5 September 2016.

96 *Geerings v. the Netherlands*, judgment of 1 March 2007.

97 *Iliya Stefanov v. Bulgaria*, judgment of 22 May 2008.

98 *Phillips v. the United Kingdom*, judgment of 5 July 2001.

Phillips concerned a British national convicted of involvement in cannabis smuggling, for which he was sentenced to nine years' imprisonment. The judge applied a provision under domestic law which enabled the national court to assume that all property obtained within the preceding six years by persons convicted of a drug trafficking offence represented the proceeds of drug trafficking. A confiscation order was consequently made against the applicant for £91,400 (€102,954.18). The applicant argued that this statutory assumption violated his right to be presumed innocent as set out in Article 6(2). The Court found that the confiscation order did not amount to a determination of guilt under Article 6(2), and that the assumption, instead, amounted to a process to allow the court to assess and set the amount at which the confiscation order should be properly fixed, akin, or analogous, to the domestic court determining the fine or length of imprisonment to impose on a convicted offender. As the confiscation procedure was determining the character and conduct of an accused as part of a sentencing process, the conviction of drug trafficking was not at stake. Article 6(2) would not apply therefore unless such a determination amounted to the bringing of a new charge within the autonomous meaning of the Convention. However, the Court found that Article 6(1) was applicable by relying on its case-law according to which Article 6(1) applies throughout the entirety of proceedings for "the determination of ... any criminal charge", including proceedings whereby a sentence is fixed. Thus, since the making of the confiscation order was analogous to a sentencing procedure, Article 6(1) was applicable. On the merits of this provision, the Court found that the opportunity presented to the applicant to rebut the assumption that his property had been acquired through legitimate means was a sufficient safeguard for his rights. Furthermore, the Court was of the opinion that the domestic law was proportionate, in as much as it struck a fair balance between the rights of the applicant and the legitimate aim of the government. Therefore, there was no violation of Article 6(1).

This finding in *Phillips* in regard to Article 6(2) can be contrasted with the facts and the Court's judgment in *Geerings v. the Netherlands*.⁹⁹

⁹⁹ *Geerings v. the Netherlands*, judgment of 1 March 2007.

In *Geerings* the applicant was charged with several offences, of which he was convicted of some but acquitted of most. The prosecution then submitted an application for a confiscation order in relation to all of the offences on the ground that sufficient indications existed that the applicant had committed all the crimes. Relying on Article 6(2) of the Convention, the applicant alleged that the confiscation order violated the principle of the presumption of innocence as it had been based on charges of which he had been acquitted in the substantive criminal proceedings brought against him. The Court reiterated that the right to be presumed innocent under Article 6(2) only arose in connection with the particular offence with which a person has been charged. Once a person has been proven guilty of an offence, Article 6(2) has no application in respect of the process by which the court assesses and sets the amount at which the confiscation order should be properly fixed, unless such a process amounts to the bringing of a new charge.

The Court distinguished *Geerings* from *Phillips*, noting that the applicant in *Geerings* had never possessed assets whose origin he could not adequately explain. Confiscation after a conviction was inappropriate in relation to assets that were not known to be in the possession of the convicted offender, particularly when such confiscation related to crimes of which the person had not been found guilty. Indeed, in this case the confiscation order was made in relation to offences for which the applicant had been acquitted. Article 6(2) does not allow for the voicing of suspicions of guilt over offences of which an individual has been conclusively acquitted. There had been a violation in this case as for all intents and purposes, the applicant had been treated as guilty without being found guilty according to law.

The findings in *Phillips* relating to Article 6(1) are further elaborated in the judgment of *Grayson and Barnham v. the United Kingdom*.¹⁰⁰

In *Grayson and Barnham v. the United Kingdom* the applicant had been proved to have been involved with drug trafficking for a number of years. He was then made subject to a confiscation order for certain sums of money, alleged to have been derived from drug trafficking offences. During these proceedings the burden of proof was shifted onto the applicant, for him to show on the balance of probabilities that the money in question had come from a legitimate source. While he argued that this violated Article 6(1), the Court held that in the context of his proven drug dealing it was not unreasonable to expect him to explain the legitimacy of his money. The Court therefore found no violation and confirmed that these confiscation procedures were compatible with the Convention.

¹⁰⁰ *Grayson and Barnham v. the United Kingdom*, judgment of 23 December 2008.

This finding can be contrasted with the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*.¹⁰¹

Al-Dulimi and Montana Management Inc v. Switzerland concerned the freezing of the Swiss assets of Mr. Al-Dulimi and Montana Management Inc., pursuant to United Nations Security Council resolutions imposing economic sanctions against members of the former Iraqi regime. The applicants complained that the procedure that led to the confiscation of their assets had been incompatible with Article 6(1) of the Convention. The Court stressed that the applicants should have been entitled to have their claims examined by a national court and to submit appropriate evidence. The fact that they were unable to challenge the confiscation over a long period (years) was not in accordance with what was necessary in a democratic society. Notably, this was despite the sanctions in question having been ordered pursuant to a UN Security Council resolution. Compliance with Article 6 requires persons targeted by confiscation orders to be able to ask national courts to examine any measures/sanctions taken against them. Courts must, at the very least, verify that the measures imposed are not arbitrary, which, in turn, requires that the courts are provided with sufficiently precise information, from both parties, to be able to come to such a conclusion. It is also vital that persons affected by search and seizure orders have the possibility of obtaining a judicial review before an independent tribunal of both the orders and their implementation.

Building on this principle, the Court's judgment in the case of *Ravon v. France* demonstrates that it is not sufficient for domestic law to merely provide the opportunity to contest the legal basis of a confiscation order. Irregularities in the implementation of the orders must also be open to contest, and any protections afforded in this context must be real and effective, not merely theoretical.¹⁰²

2.5.2.3 Key Points

- Article 6 will not apply to confiscation orders related to criminal proceedings unless the order amounts to the bringing of a new "charge".
- Confiscation orders cannot be implemented in relation to crimes an applicant has been acquitted of when such an order would imply his criminal liability.
- Safeguards must be in place to ensure that applicants can rebut any presumptions that their assets were obtained with illegal money.
- Applicants are entitled to have their claims examined by national courts i.e. when they wish to challenge a confiscation order.

2.5.2.4 List of Key Cases

- ***Phillips v. the United Kingdom***:¹⁰³ The statutory assumption that all the property held within the preceding six years by a person convicted of a drug-trafficking offence had been illegally obtained did not violate the presumption of innocence or the right to a fair trial under Article 6.
- ***Geerings v. the Netherlands***:¹⁰⁴ The issuing of a confiscation order although the applicant was acquitted of the crime was in violation of Article 6(2).

101 *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 5 September 2016.

102 *Ravon v. France*, judgment of 21 February 2001.

103 *Phillips v. the United Kingdom*, judgment of 5 July 2001.

104 *Geerings v. the Netherlands*, judgment of 1 March 2007.

- **André and Another v. France:**¹⁰⁵ The impossibility of appealing the implementation of a search and seizure order on points of fact was a violation of Article 6(1).
- **Grayson and Barnham v. the United Kingdom:**¹⁰⁶ Placing the burden of proof on the defendants found guilty of drug trafficking requiring of them to rebut the presumption that he had illegally acquired his property did not violate Article 6.
- **Al-Dulimi and Montana Management Inc. v. Switzerland:**¹⁰⁷ Not allowing persons and entities listed on UN Security Council lists under a sanctions regime to request examination by national courts of measures taken pursuant to such regimes violates Article 6.
- **Janssen Cilag S.A.S v. France:**¹⁰⁸ The search and seizure operations carried out at a company's premises did not breach Article 6(1) of the Convention.
- **Matanović v. Croatia:**¹⁰⁹ The absence of an effective procedure to determine the disclosure of evidence gathered by secret surveillance violated the applicant's Article 6 defence rights.

2.5.3 Article 7

2.5.3.1 General Overview

Article 7 mandates that there shall be no punishment without law in the context of criminal law: *nullum crimen, nulla poena sine lege*.¹¹⁰ It embodies an essential element of the rule of law, and is an absolute right. Article 7 states:

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
2. *This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.*

The fundamental purpose of Article 7 is to ensure effective safeguards against arbitrary prosecution, conviction and punishment.¹¹¹ The Article embodies the general principle that offences must be based in law, and that an individual should be able to know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation, what acts and omissions will make him criminally liable. The law must therefore be adequately accessible and foreseeable. Absolute certainty is not required, the standard of "reasonable foreseeability" is sufficient.

It is also worth noting that the second sentence of Article 7, prohibiting the imposition of a heavier penalty than that applicable at the time of the offence, has been extended to include the right of a defendant to benefit from any more lenient penalty that may have entered into force subsequent to the offence.

¹⁰⁵ *André and Another v. France*, judgment of 24 July 2008.

¹⁰⁶ *Grayson and Barnham v. the United Kingdom*, judgment of 23 September 2008.

¹⁰⁷ *Al Dulimi and Montana Management Inc. v. Switzerland*, judgment of 21 June 2016.

¹⁰⁸ *Janssen Cilag S.A.S. v. France*, decision of 21 March 2017.

¹⁰⁹ *Matanović v. Croatia*, judgment of 4 April 2017.

¹¹⁰ *Kafkaris v. Cyprus*, judgment of 12 February 2008.

¹¹¹ *Streletz, Kessler and Krenz v. Germany*, judgment of 22 March 2001.

2.5.3.2 Interplay between Article 7 and confiscation

Allegations of Article 7 violations have mostly arisen in cases where the applicants sought to challenge the penalty imposed on them by domestic courts. The applicability of Article 7 to confiscation measures consequently depends on whether the Court determines that the measure in question is a penalty, within the autonomous Convention meaning of the word, or some other measure.¹¹²

In *Welch v. the United Kingdom* the applicant was found guilty of importing large quantities of cannabis and was sentenced to 22 years' imprisonment. The judge also imposed a confiscation order to the amount of £66,914 (approximately €75,000) pursuant to the 1986 Drug Trafficking Offences Act (1986 Act). The confiscation order had been imposed before the 1986 Act came into force, and the applicant complained that the confiscation order therefore amounted to the imposition of a retrospective criminal penalty, contrary to Article 7. Noting the autonomous nature of the definition of penalty under Article 7, the Court held that, in order to ensure that Article 7 remained effective, it had to determine whether the confiscation amounted to a penalty in substance. To this end, the Court considered whether the measure was imposed following a criminal offence; and looked to the nature and purpose of the measure, its characterisation under national law, the procedures involved in the making and implementation of the measure, and the severity of the confiscation order. The imposition of the 1986 Act depended on the existence of a prior criminal conviction and the Court did not consider the preventative and reparative aspects of confiscation to exclude its punitive aspects. In fact, the Court noted that prevention and reparation may be seen as constituent elements of punishment. While the severity of the measure was not deemed to be relevant, the procedures related to the imposition of the measure, including the possibility of prison time in the event of non-compliance, strongly indicated that the measure amounted to a penalty. Therefore, considering the substance of the measure, Article 7 of the Convention applied to the confiscation order and had been violated.

112 Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights'. 31 December 2017. Available at: http://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf.

A Court judgment that the confiscation order amounts to a penalty is important, but not always decisive, as demonstrated in *G.I.E.M. and Others v. Italy*.¹¹³

G.I.E.M. and Others v. Italy concerned the construction of tourism related buildings on land that was protected from development under Italian law. While all the applicants were acquitted of any criminal wrongdoing during their respective criminal proceedings, their land and built properties remained seized or confiscated. In its ruling, the Court stressed the need to look at the substance of any measure to determine whether it amounted to a penalty under its autonomous Article 7 meaning. It emphasised that the absence of a criminal conviction did not automatically exclude the possibility that confiscation amounted to a penalty, but that a range of factors must be considered. In domestic law, the confiscation measures were listed under the heading 'Criminal Sanctions', the nature and purpose of the confiscation proceedings were punitive in nature and purpose, and the confiscation of such property was judged to be particularly harsh and intrusive, and, finally, confiscation measures were ordered by the criminal courts, which were held not to be acting in an administrative capacity. The Court thus ruled that the confiscation measure was, in substance, a penalty under Article 7. The Court concluded that there had been no violation of Article 7 in the case of one applicant, whose domestic court proceedings had in substance established his liability. However, as the majority of the applicants were limited liability companies, and so not party to the criminal proceedings that led to the confiscation orders, they were found to have suffered a violation as they had been, in substance, punished for an act for which they were not criminally liable.

The judgments in *Welch* and *G.I.E.M.* are in contrast with the one in *M v. Italy*.¹¹⁴

In *M v. Italy*, the applicant was convicted, *inter alia*, of 'membership of a criminal organisation' and sentenced to multiple periods of imprisonment. Preventative measures, including the seizure of the applicant's property, were sought. A confiscation order was subsequently instituted against him on the basis that the only way he could have accumulated his extensive property was through his unlawful activities. The applicant argued that the Italian domestic courts had deprived him of his property through retroactively applied provisions, the property having been acquired by him before the relevant domestic law came into force. In this instance, the Court ruled that the preventative measures of confiscation pursued the legitimate aim of "striking a blow against mafia-type organisations" and their resources. In Italian law, such preventative measures were not criminal in character and did not amount to punishment for an offence. The Court therefore concluded that the measure did not involve a finding of guilt subsequent to a criminal charge and thus did not constitute a penalty.

113 *G.I.E.M. and Others v. Italy*, judgment of 28 June 2018.

114 *M. v. Italy*, admissibility decision of 15 April 1991.

This principle is further explored in *Yildirim v. Italy*.¹¹⁵

In *Yildirim v. Italy*, the applicant owned a bus which he hired out. While under hire, the bus was found carrying illegal immigrants. The drivers were then arrested and given custodial sentences and the bus was seized. The applicant brought proceedings to recover the bus. Relying on Article 1 of Protocol No. 1 and Article 7, the applicant disputed the rejection of his application to reclaim the bus and the refusal to return his vehicle. In respect of Article 7, the Court noted that there had been no criminal charge levelled against the applicant, that the confiscation proceedings did not concern a criminal charge against the applicant, wherefore the confiscation could not have involved a finding of guilt subsequent to a criminal charge. Therefore, the confiscation at issue could not be a penalty under Article 7.

2.5.3.3 Key Conclusions

The interplay between Article 7 and Article 1 of Protocol No. 1 is often subtle, with the Court's judgment on whether or not confiscation amounts to a penalty dependent on marginal differences in fact. Crucial to the Court's reasoning is whether the confiscation measures are a consequence of criminal charges, and whether such measures are themselves characterised as criminal penalties under national law.

2.5.4 Article 8

2.5.4.1 General Overview

Article 8 provides for the respect for private and family life, which comprises also the right to respect for the home and correspondence. It is a qualified right.

Article 8 states:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The concept of private life applies to natural and legal persons and encompasses personal identity, autonomy, personal information, sexuality, self-development, relationships with other individuals, reputation and physical and moral integrity (i.e. physical and psychological well-being). Family life encompasses biological, legal and social family units, for example, the relationships within a traditional family between married couples, parents and children, grandparents and grandchildren, and siblings. It also covers engaged couples, cohabiting couples, separated parents of children, homosexual couples, adoptive parents and children, and foster parents and children. Finally, the concept of home has been given a wide definition by Convention organs: it applies to *de iure* and *de facto* homes, and to natural and legal persons, with the definition linked more to occupation than any legal basis. Further, since "home" and "private life" may overlap with business and professional activities, the protection of Article 8 has been found to extend to personal offices and, in the case of companies, to company premises.

¹¹⁵ *Yildirim v. Italy*, admissibility decision of 10 April 2004.

The State has a negative obligation not to interfere with an individual's private life, family life, home and correspondence. Where the State introduces measures affecting such rights, a violation will be found unless the interference was "in accordance with the law", pursued a legitimate aim and satisfied the requirement of proportionality. Article 8(2) lists a number of these legitimate aims including national security, the prevention of disorder or crime, and the protection of the rights and freedoms of others. In some circumstances, the State will have a positive obligation to take steps to ensure effective respect for Article 8. This concerns relationships not only between the State and the individual, but between the individual and private bodies, and also between private individuals.

2.5.4.2 Interplay between Article 8 and Article 1 of Protocol No. 1

It is not uncommon for applicants alleging a violation of their right to respect for home under Article 8 to also rely on Article 1 of Protocol No. 1 – particularly where the home is the applicant's place of residence. The entry of the police into a residence or a place of work, with the view to seizing items, has been used to argue breaches of both Article 8 and Article 1 of Protocol No. 1, as illustrated in *Niemietz v. Germany*¹¹⁶.

Niemietz v. Germany concerned a tax investigation that led to a criminal charge of defamation. A search warrant was issued for the search of the applicant's law office to discover the identity of the author of a letter. During the search, filing cabinets concerning confidential client information that had not been the object of the warrant were searched. The applicant complained under Article 8(1) and Article 1 of Protocol No. 1 that the search had violated his right to respect for the home and correspondence, that the search was disproportionate and that it had been ordered to circumvent confidentiality laws. The Court noted that the warrant was broad in its terms in that it ordered a search for and seizure of "documents", without any limitation. It was therefore disproportionate and not necessary in a democratic society, violating Article 8. The applicant's complaint under Article 1 of Protocol No. 1, that the search warrant ruined his reputation as a lawyer, had already been considered in the context of Article 8 and so no further examination under Article 1 of Protocol No. 1 was deemed necessary.

116 *Niemietz v. Germany*, judgment of 19 December 1992.

In cases concerning confiscation orders, however, the Court has been willing to find a violation of both Article 1 of Protocol No. 1 and Article 8.

In *Gladysheva v. Russia*, the applicant had been evicted from her flat by the State on the basis of the property having been obtained fraudulently by the prior owner. The applicant complained that she had been deprived of her possessions in violation of Article 1 of Protocol No. 1 and that the eviction was a violation of her right to respect for home under Article 8. In respect of Article 1 of Protocol No. 1, the Court stated that confiscating the applicant's flat, without providing her with alternative accommodation, placed an excessive burden on her as an individual. Therefore, a fair and proportionate balance had not been struck between the general interest of the community and the individual's fundamental rights and there had been a violation of that Article. The Court went on to note that an interference with Article 8 has occurred once an eviction order has been issued, regardless of whether it has been carried out. The Court further noted that the margin of appreciation in housing matters is narrower under Article 8 than Article 1 of Protocol No. 1 because of the central importance of Article 8 to an individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others, and a settled, secure place in the community. As the applicant's Article 8 rights had been ignored by the Government, independent issues arose under both provisions and so violations of both Articles were found.

2.5.4.3 Article 8 and Searches of Property

All the international conventions and standards mentioned in Section II of this Handbook impose or encourage, in general terms, the implementation of investigatory and search powers so that law enforcement can be implemented effectively. Article 8 may therefore apply prior to the seizure of assets, for instance while investigating allegations of corruption. Where domestic authorities are required to search an applicant's home or business premises, Article 8 prescribes that such a search be "in accordance with law." This requires that the search not only be based on accessible and foreseeable legislation, but also that this legislation offers adequate guarantees against arbitrariness. Thus, in general, searches must be conducted with a judicial warrant.

Where there is no judicial warrant, the search may be legitimised post-facto through judicial scrutiny of the lawfulness of the search, and the availability of judicial redress should the search have been unlawful. In *Gutsanovi v Bulgaria*,¹¹⁷ the Court found that it was not sufficient for the domestic judge to simply sign and stamp a record of the search with the word "approved", without giving any reasons for his approval; this did not amount to a sufficient safeguard against abuse. Moreover, the scope of any judicial search warrant will be relevant to its 'necessity'. For instance, in *Iliya Stefanov v. Bulgaria*¹¹⁸, the Court found that the excessive breadth of the terms of the search warrant, reflected in the way in which it was executed, could not be considered necessary and proportionate in line with the requirements of Article 8.

2.5.4.4 Key Conclusions

Article 8 and Article 1 of Protocol No. 1 can be engaged and interact in a number of ways. It is important to note that the State must take reasonable steps to ensure that the seizure of assets does not extend beyond the necessary limits i.e. search and seizure warrants should not be unfettered. Such measures have, as explained above, been found to violate both Article 1 of Protocol No. 1 and Article 8.

¹¹⁷ *Gutsanovi v. Bulgaria*, judgment of 15 October 2013.

¹¹⁸ *Iliya Stefanov v. Bulgaria*, judgment of 22 May 2008.

2.5.4.5 List of Key Cases

- ***Iliya Stefanov v. Bulgaria***:¹¹⁹ The excessive breadth of the search and seizure warrant violated Article 8.
- ***Gutsanovi v. Bulgaria***:¹²⁰ The lack of reasons in the judicial approval of the search of the applicant's home did not satisfy the requirements of lawfulness inherent in Article 8.

119 *Iliya Stefanov v. Bulgaria*, judgment of 22 May 2008.

120 *Gutsanovi v. Bulgaria*, judgment of 15 October 2013.

III COMPARATIVE ANALYSIS OF ASSET RECOVERY PROCEEDINGS

3.1. ALBANIA

Asset recovery legislation in Albania comprises the Criminal Code (CC, 2017) and the Criminal Procedure Code (CPC, 2017), which govern ordinary confiscation, based on a strong link between criminal offences and proceeds of crime. Extended confiscation, as a measure based on a flexible connection between the criminal offences and the proceeds of crime, is governed by the Anti-Mafia Law (AML, 2017), which is a *lex specialis*.

3.1.1. Financial Investigations

3.1.1.1. Initiation of a Financial Investigation

Financial investigations are carried out within criminal and preventive proceedings. As to the relations between these two kinds of proceedings, it must be stressed that, as provided by Article 5 of the AML (2017), they represent two separate and autonomous proceedings. This means that preventive proceedings are not affected by the status or stage of the criminal proceedings and *vice versa* and may be initiated independently from criminal proceedings.

A Special Section attached to the Serious Crime Prosecution Office (SCPO) with nationwide jurisdiction was recently established under the General Prosecutor's Instruction No. 6 "on Investigation of Assets, the Seizure and Forfeiture of Criminal Proceeds" (of 20 November 2018). Under Article 1 of the Instruction (2018), the Special Section is entitled to handle all preventive proceedings. According to Article 3 of the Instruction (2018), all prosecution offices in the country must inform the Special Section attached to the SCPO of the results of their financial investigations carried out within criminal proceedings in their jurisdictions.

Financial investigations are not regulated explicitly as a special category of investigation within the framework of criminal proceedings. They are initiated on a case to case basis and carried out pursuant to the provisions of the CPC (2017), which apply to all criminal investigations in general. The goal of a financial investigation in a criminal proceeding is to find and produce evidence proving before the court the guilt of the defendant, pursuant to the standard of "beyond reasonable doubt", as well as to ensure the execution of any penalty against him, be it a fine, confiscation or payment of dues he owes the state or the victims of the crime.

In preventive proceedings, financial investigations are regulated by a *lex specialis*, namely Law No. 10192 "on the Fight against Trafficking and Organised Crime through Preventive Measures against Property", of 3 December 2009 as amended by Law 24/2014 and Law 70/2017, known as the Anti-Mafia Law (AML, 2017). Financial investigations aim to collect evidence in order to meet, based on the standard of "probable cause", all the required conditions for the seizure or confiscation of assets owned, possessed or under the control of a person suspected of a specific category of criminal activities.

There are no provisions in the law laying down any general requirements that must be met in order to initiate a financial investigation.

The need to initiate a financial investigation during a criminal proceeding is freely assessed by the prosecutor or the Judicial Police Officer (JPO) on a case to case basis. Such a financial investigation

may be initiated without the formal adoption of any enactment. The initiation of the criminal proceeding itself is the only basic requirement to launch a financial investigation.

On the other hand, in a preventive proceeding, the basic requirements to initiate a financial investigation can be inferred from Articles 3 and 6 of the AML (2017). Under Article 6, a financial investigation aims to verify the financial means, assets etc., belonging to the persons referred to in Article 3 of the AML (2017). Pursuant to this Article, the AML shall apply to the assets of persons where indications give rise to reasonable suspicion that they have committed or participated in one of criminal offences enumerated in this Article.¹²¹

No enactment of the prosecutor or the court to initiate a financial investigation is required by the law (either the CPC or the AML), neither during a criminal proceeding nor a preventive proceeding because, at this stage, the law does not provide for any judicial control yet. An enactment is required only for launching a criminal proceeding. In such a case, according to Article 287 of the CPC (2017), prosecutors initiate criminal proceedings by issuing an enactment called “registration of criminal proceeding”. Under Instruction No. 6 (2018), a Special Section prosecutor shall issue an enactment only to initiate a preventive proceeding after he concludes that the financial investigation carried out either in relation to a criminal proceeding or a preventive proceeding suffices to initiate seizure/confiscation proceedings before the court.

3.1.1.2. Goals of Financial Investigations

In a criminal proceeding, the goal of the financial investigation is to bring evidence to the court to conclude, under the standard of beyond reasonable doubt, that a certain asset constitutes proceeds or instrumentalities of crime, as well as to bring evidence of the guilt of the defendant on a criminal charge.

The analysis of the AML (2017), especially Articles 2, 3, 6, 9, 11 and 12/a, indicates that the main goal of a financial investigation is to bring evidence to the court allowing it to conclude, under a probable cause standard, that specific assets constitute proceeds of a category of criminal offences,

121 This analysis leads to the conclusion that the only requirement to start a financial investigation in a preventive proceeding is the existence of some indications giving rise to reasonable suspicion of the suspect's involvement in a criminal activity. The AML (2017) does not lay down any other requirements for initiating a financial investigation, e.g. a specific monetary threshold or a specific amount of proceeds.

wherefore they must be seized or confiscated.¹²²

3.1.1.3. Specificities of Conducting Financial Investigations

The operational actions before the initiation of a financial investigation are governed by *leges speciales*, such as Law No. 9917 “on the Prevention of Money Laundering and Financing of Terrorism” (of 19 May 2008) as amended (AML). Under this Law (2008), specific legal persons and professionals are obliged to report all suspicious financial transactions to the Financial Intelligence Unit (FIU), an agency under the authority of Ministry of Finance.

The FIU carries out financial analyses based on data provided by the above persons and entities and data entered in the databases of state institutions and public registries. It also analyses the information exchanged with law enforcement agencies in Albania or abroad.

The results of FIU operational actions may be used to initiate either criminal or preventive proceedings. In both cases, under Article 22(1) of the AML (2017), that information cannot be used as evidence before the court and serves only as a basis to initiate a criminal or preventive proceeding.

The investigative (evidentiary) actions undertaken in criminal proceedings, including financial investigation actions, are governed by the CPC (2017). There is no special regime or any restriction of investigative actions related to financial investigations. Financial investigations are carried out on the same procedural basis as all other types of investigations and there is no any special regime governing them.

The investigative (evidentiary) actions used in a preventive proceeding are mainly laid down in the AML (2017) and complemented by CPC (2017) provisions.

Pursuant to Article 6 of the AML (2017), the prosecutor and the JPOs are entitled to take statements from witnesses, as well as to carry out forensic examinations. They may also avail themselves of international mutual legal assistance pursuant to the concluded agreements.

¹²² More specifically the financial investigation aims at clarifying:

1. Which assets are legally owned or under the control of the suspect, his relatives or legal successors and what is their legal source, pursuant to Article 3 of the AML (2017).
2. The overall legal income of the suspect, as well as his relatives and his legal successors.
3. Whether any natural or legal persons are under the control or influence of the suspect, what assets they legally own and whether these assets are of legal origin.
4. Whether there is any disproportion between the overall value of such assets owned or possessed by the above mentioned persons and the overall value of their legal income, as provided for by Articles 2, 11 and 24 of the AML (2017).
5. Whether there is a real risk of loss or alienation of assets subject to confiscation under the AML (2017). Or, whether there is reasonable doubt that possession of those assets is at risk of being under the influence of a criminal organisation or facilitating its activities. In his seizure request, the prosecutor must specify the indications underlying his reasonable suspicion, as thoroughly laid down in Article 11 of the AML (2017).
6. Which assets legally belonging to the above mentioned persons may be subject to equivalent seizure or equivalent confiscation, as provided by Article 12/a of the AML (2017). Under this Article, in case any of the assets that may be subject to seizure or confiscation have been transferred, alienated, concealed or devaluated by their legal owners with a view to precluding seizure/confiscation, their seizure or confiscation may equivalently be extended to their other assets of legal origin.

The prosecutors and JPOs are also entitled to require from any public office or natural or legal person to surrender information or documents at their disposal, as provided by Article 9 of the AML (2017). Under that Article, with the prosecutor's consent, the JPOs are entitled to seize documents that will be used as evidence in court, following the same procedural rules of seizure of documents prescribed by the CPC (2017).

These are the only investigative (evidentiary) actions that may be undertaken without court approval in preventive proceedings. The prosecutor and JPO may apply investigative means provided by the CPC (2017), only with court authorisation, which is issued *ex officio* or on the request of the prosecutor or the parties, as provided by Article 10 of the AML (2017). For example, the CPC (2017), allows the JPOs or prosecutors to carry out, in emergencies, searches of places and homes and even the covert surveillance of phones or private homes, without the authorisation of the court; they must, however, request of the court to convalidate their investigative actions within the following 48 hours. This is not possible in a preventive proceeding since Article 10 of the AML (2017) allows for the use of investigative means prescribed by the CPC (2017), other than those prescribed by AML, only with the authorisation of the court.

The Prosecution Office recently introduced its own database system, known as the Case Management System (CAMS). That system provides all prosecutors, in accordance with information safety rules approved by the General Prosecutor, with direct access to some important databases such as: (1) TIMS – Trafficking Information Management System, (2) National Property Registry, (3) National Registry of Motor Vehicles, and (4) National Business Centre.

The CPC (2017) and AML (2017) do not specify which entities may be ordered by the prosecutor or the court to disclose data for the purposes of a financial investigation. In principle, under Article 9 of the AML (2017), the prosecutor is entitled to order any state institution and public or private office or agency to disclose data in its possession for the purpose of his financial investigation within a preventive proceeding. The same applies to criminal proceedings. Under Article 191 of the CPC (2017), the prosecutor is entitled to have access to any document he deems necessary for the criminal proceeding from whoever is in its possession, be it a natural or legal person or a private or public office. Under Article 203, the prosecutor and the JPO, with the prosecutor's approval, may search bank data on transactions or documents in order to identify any documents or data the seizure of which they may seek in order to present them as evidence in court (CPC, 2017).

3.1.1.4. Completion of the Financial Investigation and Use of Its Results

There is no provision in the CPC (2017) that explicitly sets out when a financial investigation is formally considered initiated or concluded. But indirectly, a financial investigation is deemed formally concluded when the prosecutor submits a motion to indict to court. When the prosecutor issues an enactment discontinuing the criminal proceeding, the financial investigation is deemed formally concluded when the court confirms the prosecutor's enactment.

Before the prosecutor files a motion to indict to court, the financial investigation is deemed completed when, based on the evidence collected within that investigation, it can be concluded beyond reasonable doubt that the asset constitutes an instrumentality or proceeds of crime, a reward or even a promised reward for committing the crime.

The AML (2017), governing preventive proceedings, does not set a formal time period or deadline by which financial investigations must be concluded either. In case the prosecutor files a request for seizure or confiscation, the financial investigation is bound by the deadlines laid down for seizure until the court issues a confiscation order. Under Article 12 of the AML (2017), assets may be seized

pending a confiscation order for up to six months; this period may be extended but may not exceed two years. On the other hand, under Article 23 of the AML (2017), a confiscation order must be issued by the court within three months, or one year at most from the day the confiscation request was filed by the prosecutor. Given that financial investigations may be extended even during the hearing on the confiscation request, as provided by Article 6 of the AML (2017), a financial investigation may last between six months and three years as of the moment the court issues a seizure order; it goes without saying that the prosecutor promptly filed his confiscation request.

On the other hand, the absence of any provisions in the AML (2017) on time limits of a financial investigation in a preventive proceeding appears problematic when the prosecutor does not file a seizure request with the court. In such cases, the financial investigation is practically not bound by any deadlines at all. In theory, it can be extended forever.¹²³

Furthermore, there are no provisions in the AML (2017) providing for reopening a closed investigation.

In criminal proceedings, the prosecutor uses the financial investigation results to substantiate his request for seizure or confiscation of any asset constituting an instrumentality or proceeds of crime, a reward or promised reward for the commission of a crime, or to support a criminal charge, like in any other investigation in general. The prosecutor presents those results in the motion to indict that he files with the court. Article 331 of the CPC (2017) lays down the form of such an enactment.

There is no provision either in the CPC (2017) or the AML (2017) on the kind of evidence the prosecutor must present to the court in support of criminal charges or a seizure or confiscation request. However, given the character of financial investigations, the prosecutors almost always avail themselves of financial expertise, especially on the value of the assets and the nature of financial actions related to them.

3.1.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)

3.1.2.1. Legal Framework for Provisional Measures

“Seizure” of proceeds of crime is the most common concept in Albanian legislation. There are still some differences between the concepts of seizure and freezing; seizure is considered the blocking of an asset based on a court order, while freezing is considered blocking of that asset only on the order of the Government.

Two cases of freezing may be distinguished on the basis of this conceptualisation.

The first case is provided by the Law No. 9917 “on the Prevention of Money Laundering and Financing of Terrorism” (adopted on 19 May 2018) as amended (Art. 22). Under Article 22 of this Law, the Financial Investigation Unit (FIU) attached to the Ministry of Finance, is entitled to issue an order freezing or blocking specific financial actions or transactions (for up to 72 hours) in case it considers it necessary to take actions to verify the real nature of those transactions.¹²⁴

123 In an attempt to introduce some self-control given the absence of financial investigation time limits, the prosecutors have adopted the practice of issuing an enactment discontinuing the financial investigation, by analogy with their enactments discontinuing criminal investigations. Given that this enactment is not foreseen by the law, the court cannot exercise any judicial control over it, due to the absence of provisions on such control in the law.

124 When the FIU concludes that evidence gives rise to reasonable suspicion that a transaction constitutes a form of money laundering or any other related criminal offence, it immediately forwards such information to the Prosecution Office. The Prosecution Office then considers whether to file a seizure request with the court, which it usually does in the framework of a criminal or preventive proceeding.

The second case is related to the special regime of “freezing” provided by the Law No. 157/2013 “on Measures against Financing of Terrorism” as amended by Law 43/2017, which is more similar to the freezing concept than the seizure concept. According to this special regime, the Ministry of Finance is entitled to order the temporary blocking and seizure of the assets belonging to people who are, pursuant to a Council of Ministers decision, included in the list of people declared terrorists under UN Security Council resolutions.

Seizure as a provisional measure can be issued during two types of proceedings: criminal proceedings and preventive proceedings.

Seizure as a provisional measure in principle differs from freezing in both criminal and preventive proceedings inasmuch as seizure (or confiscation) is in any case conducted only on the basis of a court order. Freezing, on the other hand, constitutes blocking of assets based on an order issued by the Government (the Ministry of Finance or the FIU).

a) Seizure during Criminal Proceedings

During a criminal proceeding, seizure (and confiscation) is governed by the CC (2017), as well as the CPC (2017).

As provided by the CPC (2017), the prosecutor and the court may order two types of seizure: seizure as evidentiary means and seizure as a security measure.

Seizure as evidentiary means. Evidentiary seizure, as provided by Article 208 of the CPC (2017), may be ordered by the prosecutor, as well as by the court *ex officio*. Any item or asset that is deemed important and that may be presented to the court as material evidence during a criminal proceeding may be seized. Pursuant to Article 300 of the CPC (2017), even JPOs are entitled to conduct evidentiary seizure in emergencies. The JPOs may conduct such seizure when they consider that the items are likely to be used as material evidence and that there is a risk that they will be lost or changed and they are unable to immediately to contact a prosecutor.

Seizure as a security measure. Two kinds of seizure may be ordered during a criminal proceeding: 1) preventive seizure and 2) conservative seizure. These two seizures are always required by the prosecutor and conducted only pursuant to a court order.

- 1) Preventive seizure. Article 274(1) of the CPC (2017) provides that preventive seizure may be conducted in the event the assets are related to a criminal offence and there is a risk that their availability might aggravate the consequences of a criminal offence or facilitate the commission of other crimes. As to the kind of assets, any asset “related to a criminal offence”, including instrumentalities or proceeds of crime, may be subject to preventive seizure.
- 2) Conservative seizure. Under Article 270 of the CPC (2017), conservative seizure may be conducted in the event the defendant cannot offer any guarantees that he will pay for the financial damages he has caused the victims or the state. As to the kind of assets, as opposed to preventive seizure, conservative seizure does not target the assets related to a criminal offence. Only assets of legal origin are subject to conservative seizure, which aims to guarantee the defendant’s payment of his financial dues to the victim or the state, in case he is found guilty at the end of the criminal proceedings.

b) Seizure during Preventive Proceedings

Under Article 5 of the AML (2017), the seizure/confiscation procedures in preventive proceedings are based on the provisions of the AML itself, as amended, complemented by CPC (2017) provisions. Where an order to seize/confiscate the same assets is issued both within criminal and preventive proceedings, the court that issued the order during the preventive proceeding orders the suspension of such measures, up to the moment the seizure/confiscation order issued during the criminal proceeding is revoked by the court in charge of that criminal proceeding.¹²⁵

The AML also allows so-called equivalent seizure/confiscation, a form of extended sequestration/confiscation. Under Article 12/a of the AML (2017), assets other than those subject to seizure or confiscation, even of legal origin, may be subject to seizure/confiscation in case their legal owner transfers, misuses, destroys, conceals or devaluates the assets subject to seizure/confiscation in order to preclude the enforcement of the seizure/confiscation order. This mechanism may be applied even to assets acquired by third parties in bad faith. Finally, Article 12/b of the AML (2017) also allows equivalent seizure/confiscation pursuant to an agreement concluded between the prosecutor and the legal owner of the assets.

The elements of or the legal grounds for seizure within preventive proceedings are laid down in Articles 3 and 11 of the AML (2017) and can be summarised as follows:

3.1.2.2. Motion or Request for Provisional Measures

There are no provisions specifically prescribing the form of the prosecutor's request for seizure or confiscation either in criminal or preventive proceedings. The respective laws (CPC and AML) do not attach much importance to its form. The law lays down as a general requirement that the request must always be reasoned and based on legal grounds.

As to the name of the prosecutor's enactment seeking seizure:

Re seizure during criminal proceedings, if it is an evidentiary seizure – it is called a decision (as provided by Article 208 of the CPC [2017]). If seizure is ordered as a security measure (preventive seizure or conservative seizure) – it is called a request (as provided by Article 270 and 274 of the CPC [2017])

Enactments requesting seizure during preventive proceedings are called requests.

The prosecutor has no possibility of cumulatively requesting of the court to freeze assets in the same enactment in which he is requesting seizure or confiscation of assets, given that freezing measures are not within the jurisdiction of the court. Assets may be frozen under an order of the Ministry of Finance or the FIU (see above).

3.1.2.3. Ordering of Provisional Measures

In principle, the court may order seizure/confiscation only on the request of the prosecutor during a criminal proceeding. Evidentiary seizure is the exception, as provided by Article 208 of the CPC (2017), which may be ordered by the court *ex officio*, in the absence of a prosecutor's request, when it holds that a specific item needs to be presented at the trial as material evidence. If the prosecutor decides

¹²⁵ According to Article 12 of the AML (2017) as amended, a prosecutor's request to revoke the seizure order is not binding on the court, which is entitled to issue a confiscation order regardless of the prosecutor's request.

to seek the revocation of the seizure/confiscation order later during the criminal proceeding, he must lodge a request to that effect with the court; only the court may revoke a seizure/confiscation order.

The same applies to seizures ordered during preventive proceedings. The court is entitled to order seizure/confiscation only on the request of the prosecutor. In case the prosecutor requires the revocation of seizure, the court may order the confiscation of the seized assets if it considers it lawful, as provided by Article 12 of the AML (2017).

During a preventive proceeding

The legal grounds of a court seizure order are the same as those described above where we explain the legal grounds of seizure in principle.

The court issues an enactment in the form of a decision.

As to the procedure, as provided by Article 12 of the AML (2017), the request for seizure is examined in the presence of the prosecutor, within five days from the date of its filing and based on the documents submitted as evidence by the prosecutor, which are attached to the request. The court decision becomes enforceable upon its announcement and remains valid for a period of six months. No later than five days before the expiration of this deadline, the court schedules a special hearing, in the presence of the prosecutor, as well as any interested parties and their lawyers if they have them. At the end of this hearing, the court decides either to revoke the seizure order or order confiscation, even in the event the prosecutor requires the revocation of the seizure order. The seizure order shall be voided in the event the court fails to call a special hearing.

During a criminal proceeding

The legal grounds of a court seizure order in a criminal proceeding are the same as those described above where we explain the legal grounds of seizure in criminal proceedings in principle.

The court issues an enactment ordering seizure in one of the following forms:

A decision – when evidentiary seizure is at issue (as provided by Article 208 of the CPC [2017]).

A decision – when a security measure (preventive seizure or conservative seizure) is at issue (as provided by Articles 270 and 274 of the CPC [2017]).

The CPC (2017) does not prescribe in detail the elements of the procedures in which the court orders evidentiary seizure.¹²⁶

Likewise, the CPC (2017) does not prescribe in detail the elements of the procedures in which the court orders seizure as a security measure (preventive seizure and conservative seizure). However, since this kind of seizure is requested by the prosecutor during the investigation stage of the criminal proceeding, the court renders its decision in a closed session (council chamber) and only in the presence of the prosecutor. After the execution of the seizure order, the court decision is served on the parties, which may appeal it with the appeals court within 10 days from the day of service.

¹²⁶ The court very rarely adopts such decisions in practice, because evidence is in principle presented in court by the parties to the proceedings. However, this decision is in principle taken by the court only during the trial stage, wherefore it is taken in the presence of the parties attending the hearing. This court decision may be appealed only once the court's decision on the criminal charges becomes final.

In a criminal proceeding

Under Articles 217 and 218 of the CPC (2017), the same individual judge of the court or the same prosecutor, who ordered evidentiary seizure, is entitled to order its revocation, in the event he deems that the seized item is no longer necessary as evidence in the criminal proceeding.

Even with regard to security seizures (preventive seizure and conservative seizure), the conservative seizure order may be revoked by the same individual judge of the court that had issued it, as provided by Article 272 of the CPC (2017), in case the defendant offers another adequate legal guarantee (mortgage, down payment, bail, etc.). On the other hand, under Article 275 of the CPC (2017), preventive seizure can be revoked by the judicial panel in case of an acquittal or dismissal of criminal charges at the end of the trial.¹²⁷

In a preventive proceeding

Under Article 12 of the AML (2017), the preventive seizure order is reviewed by the same judge who had imposed it, no later than five days before the expiration of the six-month period of validity. The court schedules a special hearing to this end, which is held in the presence of the prosecutor as well as any interested parties and their lawyers if they have them. At the end of this hearing, the court adopts a decision either to revoke the seizure order or to order confiscation, even in case the prosecutor requires the revocation of the seizure order. The seizure order shall be voided in the event the court fails to schedule a special hearing.

Under Article 12/b of the AML (2017), the same judge that ordered the seizure of an asset may revoke that order and order the seizure of another asset of the same value, but only with the consent of the parties.

The principle of proportionality in the imposition of provisional measures is not mentioned directly or specifically either in the CPC (2017) or the AML (2017), but it is indirectly governed by various provisions of these laws.

Pursuant to Article 12/b of the AML (2017), during a preventive proceeding, the court may, on the request of the parties, release the seized assets even before the expiry of the six-month deadline referred to in Article 12 of the AML (2017). The court may even revoke the order on the seizure of a particular asset and order the seizure of another asset if the parties agree.

In a criminal proceeding, as foreseen by Article 272 of the CPC (2017), the court may revoke the conservative seizure order if the defender offers a guarantee in the form of a mortgage, down payment, bail, etc.

3.1.2.4. The Appeal Procedure

As for the review of the ordered provisional measure by a higher court:

Review of seizure orders in criminal proceedings

The evidentiary seizure order may be appealed with the appeal court only after the court's decision on the criminal charges becomes final, and only cumulatively, together with the appeal of the court decision on the criminal charges.

¹²⁷ The conservative seizure order cannot be revoked even in this case if it is ascertained at the end of the trial that the seized assets are instrumentalities or proceeds of crime. In case of a guilty verdict, the conservative seizure order remains in effect.

Review of security seizure orders

The interested parties are entitled to appeal both preventive and conservative seizure orders with the appeal court, as provided by Article 276 of the CPC (2017), within ten days from the day of service. The appeals shall be reviewed within 15 days from the day they are filed.

Review of seizure orders in preventive proceedings

As per court jurisdiction for preventive proceedings, it must be noted that, under Article 7 of the AML (2017), such jurisdiction is vested in the District Criminal Courts and the Anti-Corruption and Organised Crime First-Instance Court, (ACOC) respectively, depending on their criminal law competences, as prescribed by Article 75/a of the CPC (2017). The review of their decisions is under the jurisdiction of the Anti-Corruption and Organised Crime Appeal Court, but, pursuant to the transitional provisions of the AML (2017, Art. 38), this new rule on jurisdiction shall not apply until the ACOC is established. Until then, jurisdiction for preventive proceedings will rest only on the Serious Crime Court and the Serious Crime Appeal Court, respectively.

Under Article 27 of the AML (2017), a court decision ordering seizure or revocation of the seizure order may be appealed with the appeal court, notably the Serious Crime Appeal Court, until the ACOC is established. Such appeals may be filed within 15 days, like appeals of District Criminal Courts, as provided by Article 415 of the CPC (2017).

3.1.3. Confiscation Procedures

3.1.3.1. Types of Procedures and Their Basic Characteristics

Confiscation in criminal proceedings

There are two kinds of provisions on confiscation in criminal proceedings, namely the CC (2017) provisions on confiscation as punishment and the CPC (2017) provisions on the confiscation procedure.

1. Confiscation as Punishment

Under Article 36 of the CC (2017), the court may order confiscation, as a form of auxiliary punishment alongside the principal punishment, of all assets found to be instrumentalities or proceeds of crime, rewards acquired or merely promised for the commission of the crime. In case the proceeds of crime are transformed, alienated or intermingled with other assets, either in part or in entirety, confiscation as punishment may be extended to those assets originating from them. It may be extended even to profits or any income deriving from the assets constituting proceeds of crime or to profits generated from other property created by the intermingling of assets with the proceeds of crime or by transformation or alienation of the proceeds of crime. In any case, confiscation as punishment applies to such assets up to the value of the proceeds of crime themselves.

Under Articles 329/b and 387 of the CPC (2017), in the event the defendant dies during the criminal proceeding, the court adopts a decision terminating the criminal proceeding. In such cases, no confiscation of the proceeds of crime may be ordered as punishment. Similarly, the court may not order confiscation in such a case even if the assets had already been seized (evidentiary seizure,

preventive seizure or conservative seizure).¹²⁸

2. Confiscation Procedure

In principle, the confiscation procedure is triggered when the assets have already been seized. In case of evidentiary seizure, the confiscation procedure is implemented pursuant to Article 190 of the CPC (2017). In such cases, the seized assets are confiscated in the event they constitute instrumentalities or proceeds of crime, rewards or promised rewards for the commission of the crime, but on condition that the legal owners of those assets had participated in the commission of the crime. Otherwise, the seized assets are returned to their legal owners, who had not participated in the commission of the crime, even if they constitute instrumentalities or proceeds of crime, rewards or promised rewards for the commission of the crime.

In case of preventive seizure, the confiscation procedure is implemented pursuant to Article 275 of the CPC (2017). The assets are confiscated if, at the end of a criminal proceeding, the court orders in its final decision, confiscation as auxiliary punishment alongside the principal punishment of the defendant. Otherwise the seized assets are released and returned to their owners.

Finally, in case of conservative seizure, the confiscation procedure is implemented pursuant to Article 271 of the CPC (2017). In such cases, the assets remain seized even when the court decides to dismiss all criminal charges, until its decision becomes final. Those assets remain seized even after a judgment of guilty becomes final, if the defendant has to pay a fine, either as a principal or auxiliary punishment, or the defendant has some other outstanding financial dues to the state or the victim. Otherwise the court releases the assets and returns them to their owners.

Confiscation in a preventive proceeding

In a preventive proceeding, confiscation is implemented in accordance with the AML (2017), complemented by CPC (2017). Under Article 24 of the AML (2017), the court may order confiscation when it deems that all of the following requirements have been met:

- a) there are reasonable doubts, based on evidence, of the suspect's participation in criminal activities under Article 3 of this Law (2017);
- b) The property is directly or indirectly, in full or partial possession of the suspect, his relatives, or any natural or legal person under his control;
- c) The suspect, his relatives or natural or legal persons under his control have not proven the legal origin of their property; and
- d) The value of the property legally owned by the above mentioned persons is estimated to be substantially disproportionate to their income from legal sources.

Under Article 3 of the AML (2017), the court may order seizure or confiscation even after the death of the suspect, his relatives or natural or legal persons under his control. Their assets can be confiscated from their legal successors. In principle, there is no time limit for ordering confiscation in a preventive proceeding, except with respect to confiscation of the legal successors' assets, where it is set at five years from the day of death of the person whose assets subject to confiscation they inherited.

¹²⁸ In the event the defendant died, the prosecutor, during the preliminary investigation stage, or the court, during the trial stage, orders the release of the seized assets and their return to their owners. No exceptions to this rule are provided either in the CC or the CPC. On the other hand, the court is not prohibited from ordering confiscation as punishment against a fugitive defendant.

Under Article 5 of the AML (2017), during a preventive proceeding, the court may order confiscation regardless of the stage of a potential criminal proceeding against the legal owners of the assets subject to confiscation in preventive proceedings. Nor does it depend on how that potential criminal proceeding ends.

During a preventive proceeding

As provided by Article 22 of the AML (2017), the confiscation procedure is based on AML provisions, as well as CPC provisions as far as possible. According to this Article, the hearings are held by the court notwithstanding the absence of the parties, in the event they are not found at their addresses or have fled abroad after they were summoned. In such cases, the court declares them “not found” and appoints them a lawyer *ex officio* unless they are represented by a lawyer his relatives have engaged.

The AML does not include detailed provisions on the procedures the court has to follow during trial. It lays down that the procedure may be based on CPC provisions but does not specify them.¹²⁹

During a criminal proceeding

Confiscation is ordered by the court at the end of the hearing on criminal charges. The CPC does not provide for a special court hearing on confiscation as an action independent from the main hearing on the criminal charges. This means that, in a criminal proceeding, the prosecutor presents to the court all the evidence of the case during the main hearing, without drawing any distinction between evidence related to criminal charges and evidence related specifically to confiscation.

3.1.3.2. Procedural Rights of Persons Whose Property is Subject to Confiscation

During a preventive proceeding

Pursuant to Article 22 of the AML (2017), court hearings must as a rule be held in the presence of the prosecutor, as well as the interested parties, namely the people whose assets may be subject to confiscation, the suspect, his relatives or natural or legal persons under his control.¹³⁰

The AML provides that the procedure may be based on CPC provisions but fails to specify which ones. In practice, the court hearings are open to the public, and the prosecutor, interested parties and their lawyers, if they have them, participate in them. The hearing starts with the prosecutor’s presentation of the confiscation request and evidence he collected during his financial investigation. The parties then present their defence and ask the court to hear their evidence. They are entitled to ask the court to hear any evidence they consider appropriate, and the court is entitled to uphold or dismiss their request, as provided by the relevant CPC provisions. The parties also have the right to cross examine the witnesses and experts and ask questions about the evidence. The parties even have the right to make their own declarations. However, the AML is not so clear on the status of the

129 In practice, the court hearings are open to the public, with the participation of the prosecutor, interested parties and their lawyers. The hearing starts with the presentation of the confiscation request by the prosecutor, as well as of evidence he collects during his financial investigation. The parties then present their defence and ask the court to hear their evidence. The hearing may last up to three months, but in any case may not last longer than one year, as provided by Article 23 of the AML (2017).

130 The court can, however, hold hearings even in the absence of the interested parties, when they are not found at their addresses or have fled abroad, after having been summoned. In this case, the court declares them “not found” and appoints them an *ex officio* lawyer, unless his relatives have already engaged one on their behalf.

parties when they make declarations before the court, whether these declarations are considered declarations of witnesses or just of defendants, like in criminal proceedings.

During a criminal proceeding

Confiscation is ordered by the court at the end of the hearing on the criminal charges. According to the CPC (2017), court hearings are as a rule held in the presence of the prosecutor and the defendant. But, under Article 352 of the CPC (2017), in the event the defendant is not found after he was served his summons, the court adjourns the hearing and orders the police to search for him. The hearing may be adjourned for up to one year. After that, the court resumes the hearing, declares the defendant a fugitive and appoints him an *ex officio* lawyer. Victims of the crime may participate in criminal proceedings with court approval. In such cases, the victims have the status of civil plaintiffs and attend the hearings. As provided by Article 67 of the CPC (2017), victims may be represented by their proxies or lawyers.

The defendants are entitled to present their case, request access to and contest the prosecutor's evidence and cross examine experts and witnesses.

The CPC provisions do not provide for the implementation of the confiscation procedure as a special court hearing, or as an action independent from the main hearing on the criminal charges. This means that, in a criminal proceeding, the prosecutor presents to the court all the evidence of the case during the main hearing, without making any distinction between evidence related to criminal charges and evidence related specifically to confiscation.

3.1.3.3. Confiscation Decisions

In a criminal proceeding

During a criminal proceeding, a confiscation order is in principle issued by the court in case the assets are already subject to evidentiary, preventive or conservative seizure. In such cases, according to Article 190 (confiscation of assets under evidentiary seizure or preventive seizure) and Article 273 (confiscation of assets under conservative seizure) of the CPC (2017), the court may issue a confiscation order *ex officio*, i.e. the prosecutor does not need to file a confiscation request.

The court issues the same confiscation order *ex officio* in the event it decides to punish the defendant with confiscation at the end of the criminal proceeding, as provided by Article 36 of the CC (2017). In this case, confiscation as punishment extends not only to assets under the seizure order, but also to other assets of legal origin, in case the assets subject to seizure are missing, transformed, alienated or intermingled with assets of legal origin.

In a preventive proceeding

Pursuant to Article 21 of the AML (2017), the court may, as a rule, order confiscation during a preventive proceeding only on the request of the prosecutor.

But there is an exception to this rule. Under Article 12 of the AML (2017), the court has to schedule a special hearing not later than five days before the expiry of the six-month period of validity of the seizure order; this hearing is to be attended by the prosecutor and the interested parties. Even if the prosecutor asks the court to revoke the order at the end of that special hearing, the court is entitled to order confiscation *ex officio*; there is no need for the prosecutor to file a confiscation request.

Neither CPC nor the AML attach much importance to the form of the decision by which the court orders confiscation.¹³¹

3.1.3.4. The Appeal Procedure

In a criminal proceeding

The court's confiscation order issued during a criminal proceeding may be appealed with the appeal court that has territorial jurisdiction over that court. The appeal of the court's confiscation order cannot be presented as a separate appeal, but only within the same appeal of the court's decision on the criminal charges. The right of appeal may be exercised by the prosecutor, as provided by Article 408 of the CPC (2017), the victims of the crime, under Article 409 of the CPC (2017), the defendant, under Article 410 of the CPC (2017), and the civil plaintiffs, under Article 411 of the CPC (2017). The appeal must be lodged in writing within 15 days from the day of service of the court decision, as provided by Article 415 of the CPC (2017).

Under Article 417 of the CPC (2017), an appeal shall suspend the enforcement of all parts of the court decision, and, consequently, the confiscation order incorporated in that court decision.

In a preventive proceeding

Appeals of court confiscation orders in preventive proceedings are governed by Article 27 of the AML (2017). The same formal rules and terms of appeal provided by the CPC apply. It must be noted that an appeal of a court confiscation order in a criminal proceeding does not have suspensive effect. On the other hand, an appeal filed by the prosecutor against a court order revoking the seizure order or dismissing the confiscation request stays their enforcement until the appeal court's decision becomes final.

3.1.3.5. Notification of the Assets Management Agency or Other Entities

The procedure for the enforcement of a court confiscation decision starts immediately after its announcement, as provided by Article 28 of the AML (2017). During the enforcement stage, the court's council chamber delivers the orders to the relevant actors participating in the enforcement process, requiring of them to perform actions or take special measures within the specified deadlines and instructing them how to perform the assigned duties. The confiscation decision and court orders are at the same time delivered to the prosecutor in charge of enforcement of court decisions.

As provided by Article 29 of the AML (2017), after the court confiscation decision becomes final, it shall be forwarded immediately to the Asset Management Agency (AMA). The AMA has 90 days to submit a report on the technical and financial evaluation of all confiscated assets to the Ministry of Finance.

The Ministry of Finance determines the manner and conditions of use of immovable assets and issues instructions thereto within 30 days. The designated AMA administrator is in charge of the use of movable assets according to the criteria set in Article 32 of the AML (2017).¹³²

131 There are no special provisions in the law laying down the elements of a court decision, such as the operational part of the judgment, kind of proceeds, their value etc. However, such formal elements of a decision, although not present in the law, have been developed by the courts in practice.

132 It may be said that the AML does not govern the procedure by which the court notifies the prosecutor or the participants in the enforcement procedure thoroughly, but, rather, in a very simplified way.

3.1.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

3.1.4.1. Procedures for the Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

Enforcement of decisions ordering freezing of financial transactions

The freezing of assets by the FIU is governed by Law No. 9917 “on the Prevention of Money Laundering and Financing of Terrorism” (of 19 May 2008) as amended (AML). Under Article 22, the FIU is entitled to issue an order freezing or blocking specific financial actions or transactions in the event it deems it necessary to take action to verify the real nature of those transactions. Its execution is performed through a direct order to the respective financial institution, without notifying the transaction parties, the prosecutor or the court thereof. This measure may be in effect for a maximum of 72 hours and does not require a court order. The transaction parties are not entitled to appeal it with the court.

Enforcement of decisions ordering freezing of terrorists’ assets

As provided by Law No 157/2013 “on Measures against Financing of Terrorism” (2013) as amended by Law (2017), the Ministry of Finance is entitled to order the temporary blocking and seizure of assets belonging to the people who are, pursuant to a Council of Ministers decision, included in the list of people declared terrorists under UN Security Council resolutions.

As provided by Article 16 of the Law (2013), a temporary blocking order is issued by the Ministry of Finance and executed immediately upon issuance, without any warning of the interested parties. The order is communicated for enforcement immediately to the relevant state bodies, such as:

- a) The Albanian National Bank or Financial Supervising Authority for enforcement by financial institutions licenced by them or under their jurisdiction,
- b) The Ministry of Justice for enforcement by the National Immovable Property Registration Agency,
- c) Any ministry for enforcement by state agencies under its jurisdiction that are charged with licencing and/or supervising, maintaining or administering registries of funds and other assets.

As provided by Article 16 of Law (2013), the interested parties are entitled to file a complaint with the Administrative Court within five days from the day they are informed of the order. The complaint is examined by the Court within 10 days. The complaint does not suspend the enforcement of the temporary blocking order.

As provided by Article 22 of the Law (2013), the Ministry of Finance is entitled to issue the seizure order after the Government includes a person in the list of terrorists, pursuant to a UN Security Council resolution. This measure remains in effect until the Council of Ministers strikes him off the list of terrorists, again pursuant to a UN Security Council resolution.

The Ministry of Finance seizure order is immediately forwarded for execution to the Asset Management Agency (AMA), as well as the relevant state or private entities managing or in possession of those assets. At the same time, the seizure order is communicated also to the interested party, who is entitled to lodge a complaint with the Administrative Court, in accordance with the Administrative Procedure Code. The seizure order remains in effect until the court’s decision becomes final.

Execution of seizure in a preventive proceeding

As provided by Article 14 of the AML (2017), the process of enforcing a court seizure decision in a preventive proceeding starts immediately after its adoption.

The court submits the seizure decision to the prosecutor, who is in charge of taking the necessary measures through the JPOs and the administrator of the assets. The prosecutor formally starts the enforcement process by an enactment called “order of execution” directed to the JPOs. The JPOs undertake the requisite enforcement measures specified by the prosecutor in his order of execution.

As provided by Article 14 of the AML (2017) the court’s seizure decision is enforced in the following manner:

- a) Regarding movable and monetary assets, in case of repossession by third parties or the debtors, by implementing procedures provided by Civil Procedure Code;
- b) Regarding other movable or immovable assets, by forwarding the court decision to the relevant state agency in charge of their registration;
- c) Regarding the assets possessed by trade companies, apart from the above procedures, by registration of the decision in the Trade Companies Registry;
- d) Regarding stakes, by the publication of the seizure decision in the Trade Companies Registry and the Accounting Registers of that trade company.

The JPO notifies the interested parties of the seizure decision and takes measures to ensure the surrender of all the seized assets to the designated administrator.

The JPO notifies the court in the event a person refuses to surrender an asset in his possession, the owner of which is unknown or the ownership of which predates the seizure decision, and the court issues an order on the surrender of the asset. That court order is enforced by the JPO.

The JPO inventories the assets handed over to the designated administrator. That report is signed by the people present during the procedure. The seized assets are handed over to the administrator, together with the relevant legal documents.

Execution of confiscation in a preventive proceeding

The procedure for the enforcement of a court confiscation decision starts immediately after its announcement, as provided by Article 28 of the AML (2017). During the enforcement stage, the court’s council chamber delivers the orders to the relevant actors participating in the enforcement process, requiring of them to perform actions or take special measures within the specified deadlines and instructing them how to perform the assigned duties. The confiscation decision and court orders are at the same time delivered to the prosecutor in charge of enforcing court decisions.

Under Article 29 of the AML (2017), after the court confiscation decision becomes final, it shall be forwarded immediately to the Asset Management Agency (AMA). The AMA has 90 days to submit a report on the technical and financial evaluation of all confiscated assets to the Ministry of Finance.

The Ministry of Finance determines the manner and conditions of use of immovable assets and issues instructions thereto within 30 days. The designated AMA administrator is in charge of the use of movable assets according to the criteria set in Article 32 of the AML (2017).

It may be said that the AML does not govern the procedure by which the court notifies the pros-

ecutor or the participants in the enforcement procedure thoroughly, but, rather, in a very simplified way.

In principle, under Article 12 of Law No. 8331 “on the Execution of Criminal Court Decisions” (of 21 April 1998) as amended, as well as Article 463 of the CPC (2017), the prosecutor is in charge of and responsible for the execution of all decisions and orders of the court in a criminal proceeding, including its seizure and confiscation orders.¹³³

In any case, the enforcement obligation rests only with the prosecutor attached to the district court, even when the case is examined by a higher court, as provided by Article 463 of the CPC (2017).

Relating to the execution of seizure in a criminal proceeding

In criminal proceedings, seizure may be ordered both by the prosecutor and the court, as provided by Article 208 of the CPC (2017) (evidentiary seizure), as well as only by the court, as provided by Articles 270 and 274 of the CPC (2017) (conservative seizure and preventive seizure).

When evidentiary seizure is ordered by the prosecutor during the preliminary investigation, that order is directed to the JPO for enforcement. The interested parties may file a complaint with the district court as soon as they are notified of the seizure. The district court rules on the complaint within 10 days, as provided by Article 212 of the CPC (2017). The district court decision may be appealed with the appeal court within five days; the appeal court must rule on it within 10 days. The complaint and the appeal do not stay the enforcement of the seizure order.

When evidentiary seizure is ordered by the court, i.e. during the criminal trial, the court directs the order to the JPO for enforcement. In this case, the interested parties may appeal the court’s seizure order only after the trial is over and only if an appeal is lodged against the court’s decision on the criminal charges.

When preventive seizure or conservative seizure is imposed by the court as a security measure, the enforcement process starts immediately. Appeals of the court’s seizure decisions by the interested parties do not stay their enforcement. The process of enforcement begins with the prosecutor issuing a so-called “order of execution”, which he sends to the State Bailiff Office. The State Bailiff Office, for its part, performs the enforcement in accordance with the Civil Procedure Code, as provided by Article 271 of the CPC (2017).

Execution of confiscation in a criminal proceeding

During a criminal proceeding, the court may order:

- a) Confiscation as punishment, and
- b) Confiscation of assets under a seizure order (evidentiary seizure, preventive seizure or conservative seizure).

133 The prosecutor’s responsibility takes effect immediately, as soon as the court orders seizure. On the other hand, the prosecutor’s responsibility regarding the enforcement of a confiscation decision takes effect only after the court decision becomes final, i.e. after the expiry of the appeal deadline or after a superior court rules on any appeals of the judgment of guilty. The process of enforcement begins with the prosecutor issuing a so-called “order of execution”, of which he notifies the defendant’s lawyer and the court.

Both types of confiscation are ordered by the court at the end of the trial, in its final decision on the criminal charges. Under Article 12 of Law No. 8331 “on the Execution of Criminal Court Decisions” (of 21 April 1998), the responsibility for their enforcement rests with the prosecutor. In any case, the process of enforcement begins with the prosecutor issuing an “order of execution”. This order is issued immediately, as soon as the judgment of guilty becomes final, i.e. after the expiry of the appeal deadline or after a superior court rules on any appeals of the judgment of guilty., as provided by Article 34 of Law No. 8331 (1998). The prosecutor’s order of execution is addressed to the State Reserves Agency, through the State Bailiff Office in the place where the assets are situated, as provided by Articles 17 and 40 of Law No. 8331 (1998). The State Reserves Agency is the authority charged with administering the confiscated assets, as provided by the Law No. 9900 “on State Reserves” (of 10 April 2008). The State Bailiff Office, for its part, performs the enforcement in accordance with the Civil Procedure Code on the compulsory enforcement of civil liabilities.

Proceeds of crime may be confiscated during a criminal proceeding pursuant to the CPC (2017), when the court’s judgment of guilty becomes final. The court may order:

- a) Confiscation as punishment, and
- b) Confiscation of assets under a seizure order (evidentiary or preventive seizure).

Proceeds of crime may be confiscated also during a preventive proceeding, based on the AML (2017), as explained above.

There are no clear procedures in law on the compliance with the court’s confiscation orders or on their compulsory enforcement in case of non-compliance.

3.1.4.2. Protection of the Rights of Third Parties

The enforcement of a court confiscation decision, issued during a criminal or a preventive proceeding, is initiated on the order of the prosecutor and implemented by the State Bailiff Office pursuant to the CPC (2017). On the other hand, Articles 609-614 of the Civil Procedure Code (2017) thoroughly lay down sufficient guarantees to third parties during the enforcement procedure conducted by the bailiffs, such as their right to intervene in the process, complain to the court about the bailiff’s actions, etc.

3.2. BOSNIA AND HERZEGOVINA

Due to the complex constitutional law system of Bosnia and Herzegovina (BiH), comprising four criminal law systems, asset recovery is governed at the state level only by the systemic laws (the Criminal Code [CC] and the Criminal Procedure Code [CPC]) plus regulations on the enforcement procedure. On the other hand, this matter is regulated in the legislations of the BiH entities (the Federation of Bosnia and Herzegovina [FBiH] and the Republic of Srpska [RS]) and the Brčko District (BD) both by their CCs and CPCs and their Laws on the Confiscation of Proceeds of Crime (LCPCs)¹³⁴. From the perspective of *ratio legis*, their hierarchy can (briefly) be summarised as the prevalence of special and newer laws over general and older laws.

134 NB For the sake of economy, the abbreviation LCPC is used in this section of the Report to denote the entity and BD laws on the confiscation of proceeds of crime, the names of which vary in BCS: the FBiH LCPC is called *Zakon o oduzimanju nezakonito stečene imovine krivičnim djelom* (Law on the Confiscation of Proceeds of Crime); the RS LCPC is called *Zakon o oduzimanju imovine koja je proistekla izvršenjem krivičnog djela* (Law on the Confiscation of Proceeds of Crime); and the BD LCPC is called *Zakon o oduzimanju nezakonito stečene imovine* (Law on the Confiscation of Unlawfully Acquired Property).

3.2.1. Financial Investigations

3.2.1.1. Initiation of a Financial Investigation

Financial investigations, as a separate investigative instrument used to reveal, monitor and identify proceeds of crime, are differently regulated at various BiH levels. The BiH CPC does not explicitly govern financial investigations or when and how they are to be implemented. Essentially, the general provisions apply, primarily those of the BiH Criminal Code (2018), under which no-one is allowed to retain the proceeds of crime (Art. 110) and the prosecutor, as the *dominus litis* of the investigation, is entitled and obligated, *inter alia*, to establish facts requisite for a decision on the seizure of proceeds of crime (Art. 35(2(g))).

At the entity level, the FBiH and BD CPCs contain identical provisions spelling out this obligation (Art. 45(2(g)) of the FBiH CPC (2014) and Art. 35(2(g)) of the BD CPC (2014)). The RS CPC (2018) does not explicitly provide for this obligation in Art. 43 on the general rights and obligations of prosecutors.

Articles 8 and 9 of the FBiH LCPC (2014) govern financial investigations in detail. Article 3 of this Law lays down that it applies as a *lex specialis* that prevails over the FBiH CC and CPC and other regulations governing this matter in proceedings for the recovery of proceeds of crimes that are incriminated by the FBiH CC and warrant minimum three years' imprisonment.

Financial investigations are governed in detail by Articles 9-14 of the RS LCPC (2018). Pursuant to Articles 2 and 3(4) of this Law, it applies as a *lex specialis* that prevails over the RS CC and CPC in proceedings regarding the recovery of proceeds of enumerated offences incriminated by the RS CC (2017), i.e. where the value of the proceeds or instrumentalities of crime exceeds 50,000 Convertible Marks (KM), whether or not these proceeds or instrumentalities have been acquired by the commission of offences incriminated by the RS CC (2017), other laws or even laws that are no longer in effect.

In the Brčko District, financial investigations are governed by Articles 8 and 9 of the BD LCPC (2016). Pursuant to Article 4 of that Law, it applies as a *lex specialis* that prevails over the BD CC and CPC and other regulations governing this matter in proceedings for the recovery of proceeds of crimes that are incriminated by the BD CC and warrant minimum three years' imprisonment.

At the BiH level, the prosecutor shall take steps to establish facts requisite for a decision on the confiscation of the proceeds of crime within the actions he takes to identify and prosecute perpetrators of all crimes under the jurisdiction of the Court of BiH (CPC 2018, Article 35). Therefore, the prosecutor establishes the existence of the proceeds of crime *ex officio* and is under the obligation to collect evidence and investigate circumstances relevant to identifying proceeds of crime. Identical provisions can be found in the entity and BD CPCs, specifically in Article 413 of the FBiH CPC (2014), Article 386(2) of the RS CPC (2018) and Article 392(2) of the BD CPC (2014).

The FBiH LCPC (2014) lays down that the prosecutor may (i.e. is not under the obligation to) order a financial investigation if he deems it necessary for the comprehensive determination of the real origin, value and structure of the proceeds of crime. Article 8(1) of the LCPC (2014) prescribes the condition for this action – grounds for suspicion that the proceeds are derived from a crime (incriminated by the FBiH CC and warranting minimum three years' imprisonment).

Grounds for suspicion that a person's property amounts to proceeds of crime is the requirement for conducting a financial investigation under Article 9(1) of the RS LCPC (2018) as well.

Article 8(1) of the BD LCPC (2014) also requires the existence of grounds for suspicion for the initiation of a financial investigation (the legislator uses the term unlawfully acquired property).

Although the four CPCs do not explicitly mention financial investigations, their provisions on ordering investigations provide for the ordering of financial investigations (Art. 216 of the BiH CPC (2018), Art. 231 of the FBiH CPC (2014); Art. 224 of the RS CPC (2018) and Art. 216 of the BD CPC (2014)).

The order to conduct a financial investigation is governed by Art. 8(1) of the FBiH LCPC (2014), Art. 11(1) of the RS LCPC (2018) and Art. 8(1) of the BD LCPC (2016).

3.2.1.2. Goals of Financial Investigations

None of the four CPCs specify the goals of financial investigations.

Article 8(1) of the FBiH LCPC (2014) lays down that financial investigations shall be conducted in order to comprehensively determine the real origin, value and structure of the proceeds of crime.

Article 9(2) of the RS LCPC sets out that financial investigations shall be conducted to collect evidence about the property and legal income acquired by the owner of the property, his way of life and expenses, the property inherited by the legal successor and the property and compensation received in exchange for its transfer to a third party.

Article 8(1) of the BD LCPC lays down that financial investigations shall be conducted to comprehensively determine the actual origin, value and structure of the unlawfully acquired property.

As far as initiation of financial investigations in ordinary and extended confiscation procedures is concerned, it needs to be emphasised that it is not only a matter of the scope of application of the LCPCs vis-à-vis the systemic laws (which, at least at the BiH, FBiH and BD levels, comprise provisions on extended confiscation) but also a matter of *questio facti*, i.e. the prosecutor's assessment of the direction the financial investigation will take (confiscation of proceeds of a specific crime or of the proceeds of the entire criminal activity under the conditions prescribed by law), i.e. the volume and types of evidence he will collect for that purpose.

3.2.1.3. Specificities of Conducting Financial Investigations

The four CPCs (Art. 219 of the BiH CPC (2018), Art. 234 of the FBiH CPC (2014), Art. 227 of the RS CPC (2018) and Art. 219 of the BD CPC (2014)) provide for the implementation of general investigation actions (by police and other public officials) with a view to collecting data and evidence of crimes generating proceeds. Mention should also be made of policing regulations (mostly laws on police officers and internal affairs and those governing the remits of specific law enforcement bodies) that entitle the relevant officials to undertake specific operational measures to that end.

The CPC provisions on evidentiary actions (BiH CPC, 2018, Art. 72(2); FBiH CPC, 2014, Art. 86 (2); RS CPC, 2018, Art. 136(1); BD CPC, 2014, Art. 72(1)) provide for a specific action that may be implemented during financial investigations: banks and other legal persons performing financial operations may be ordered to turn over information concerning the bank accounts and other financial transactions or affairs of persons where there are grounds for suspicion that they committed a crime that generated proceeds, as well as of persons where there are grounds of suspicion of their involvement in the suspects' financial transactions or affairs. Such information is obtained pursuant to a court order issued on the motion of the prosecutor, provided that it can be expected to be used as evidence in criminal proceedings

These Articles provide for the implementation of special investigative measures with a view to identifying and finding proceeds of crime and collecting evidence of such proceeds. Rather than using the term “proceeds”, the legislator here opted for the term “unlawfully acquired property”, thus allowing the collection of evidence also within financial investigations concerning extended confiscation of the proceeds of crime.

The LCPCs contain provisions referring to CPC provisions on the powers and actions for collecting information and evidence within financial investigations. Art. 8(2) of the FBiH LCPC (2014) lays down that, unless otherwise specified in that law, FBiH CPC provisions on conditions and ways of implementing specific measures amounting to financial investigative measures in scope and content shall apply accordingly. The legislator has thus left enough room for the implementation of all ordinary and special investigative measures provided by the FBiH CPC, in order to identify not only the proceeds of a specific crime but also those generated from all criminal activities of the suspects and affiliated parties.

An identical provision exists in the BD LCPC (2016).

Article 3(2) of the RS LCPC (2018) lays down that evidence collected in criminal proceedings (i.e. by applying the RS CPC) may be used in confiscation or extended confiscation procedures. Furthermore, Art. 11(3) of the RS LCPC (2018) expressly authorises the Unit, as a separate organisational unit of the RS Ministry of Internal Affairs (MIA), to collect evidence on the request of the public prosecutor or *ex officio*, albeit under the supervision of the public prosecutor. In the event evidence is collected exclusively within a confiscation procedure, i.e. in the event that evidence had not been collected earlier, during the criminal proceedings, the RS LCPC (2018) provides for the implementation of specific evidentiary actions (search of the homes, other premises and movable property of the owners or other persons [Art. 12]; evidentiary seizure [Art. 13]; collection of information from banks and other financial organisations on the balances on the property owner’s business and personal accounts and his safety deposit boxes and access to the content of his safety deposit boxes [Art. 14]).

Presentation of the modalities of conducting financial investigations by the competent prosecution offices and precise description of the ways in which prosecutors collect data, information and evidence they need to identify proceeds of crime is an extremely thankless task given BiH’s complex constitutional law system and extensive decentralisation.

Therefore, the key question boils down to precisely which data and information the public registries, registers and other records contain, how they can be legally and technically accessed and whether such access is subject to any restrictions, and how they can be directly and/or more easily accessed to facilitate the effectiveness and efficiency of financial investigations.¹³⁵

It first needs to be noted that the prosecutors are entitled to request information from state authorities, companies and legal and natural persons, pursuant to their general powers under the CPC (BiH CPC, 2018, Art. 35(2(d)); FBiH CPC, 2014, Art. 45(2(d)); RS CPC, 2018, Art. 43 (2(g)); BD CPC, 2014, Art. 35(2(d))).

As per bank and financial data, which are obtained during the collection of evidence (e.g. on an order to a bank or another legal person), the CPCs require that the court first issues the order or subsequently convalidates the order issued by the prosecutor in case he needed to act urgently (BiH CPC, 2018, Art. 72(3); FBiH CPC, 2014, Art. 86(3); RS CPC, 2018, Art. 136(3); BD CPC, 2014, Art.

¹³⁵ More on access to individual databases is available in BCS at: <https://kriminalseneisplati.ba/pristup-bazama-podataka-u-finansijskim-istragama/>

72(3)). Provisions on ordinary and special investigative measures prescribed by the procedural laws apply in all other cases.

The LCPCs also contain provisions entitling the prosecutor to issue orders during a financial investigation, including orders to the relevant authorities to forward data and information in their official records.

In FBiH, this issue is governed by Art. 8(3) of the LCPC (2014), which puts major emphasis on the prompt provision of access to data requested within the financial investigation by the police, FBiH Tax Administration, FBiH Securities Register, FBiH Securities Commission et al.

Article 7(2) of the RS LCPC (2018) lays down the obligation to assist and make available all data the MIA Unit and the Assets Management Agency (AMA) require to perform the duties within their remits. A broad range of public institutions, companies, public authorities and organisations are subject to this obligation. Furthermore, Article 13(3) of the RS LCPC (2018) sets out that the RS MIA Unit is entitled to peruse, access and download data in electronic databases and that these entities shall make available the records, documents, data and other items in their possession. The legal prerequisites for directly accessing individual registers and records kept by the entities specified by the RS LCPC are thus in place, which can definitely be of major importance for the implementation of financial investigations.

Article 8(3) of the BD LCPC (2016) lays down the obligation of all BD public authorities and institutions to act, within their respective remits, on the orders of the prosecutors who ordered the financial investigations.

Sub-paragraphs (a) and (d) of Article 6(1) of the Personal Data Protection Law (2011) also warrant mention given that these provisions allow controllers to process personal data without the data subject's consent in order to fulfil their legally prescribed duties and public interest duties.

3.2.1.4. Completion of the Financial Investigation and Use of Its Results

When measures, which have the character of a financial investigation and which are effected for that purpose, are an integral part of a criminal investigation conducted pursuant to the CPCs, the rules laid down in the procedural laws apply to the completion of financial investigations and submission of motions for the confiscation of the proceeds of crime (such motions are usually filed as an integral part of the indictment, but they can be filed separately as well).

Analogously with the procedural law, the FBiH LCPC lays down that the prosecutor shall close the financial investigation when he finds that the state of affairs is sufficiently clarified for him to file a motion for the confiscation of the proceeds of crime under the provisions of that Law (2014, Art. 9(9)). This action is as a rule preceded by a report of the authorised public officials who acted on the prosecutor's order and collected the data and evidence within the financial investigation. Again, analogously with the procedural law, the FBiH LCPC also specifies that a financial investigation shall be discontinued in case of lack of evidence and relaunched in case of discovery of new facts and circumstances. The financial investigation completion deadlines are identical to those by which criminal investigations must be completed (the investigation must be completed within six months, but it may subsequently be extended by a decision of the collegium of the prosecution office).

Article 9(3) of the RS LCPC (2018) sets out that the financial investigation shall be completed when the prosecutor concludes that the state of affairs is sufficiently clarified for him to file a confiscation request and that he shall discontinue it in the event he cannot conclude that the requirements

for submitting such a request have been fulfilled.

The provisions on these issues in Article 9 of BD LCPC (2016) are identical to those in the FBiH LCPC.

In the event the financial investigative measures had been undertaken within a criminal investigation conducted pursuant to criminal procedure law, the prosecutor independently decides which evidence or evidentiary means he will submit together with the indictment and asks the court for leave to present them with a view to substantiating his allegations in his confiscation request. He may definitely ask the court to call to the stand any experts he had engaged during the investigation (BiH CPC, 2018, Art. 227; FBiH CPC, 2014, Art. 242; RS CPC, 2018, Art. 242; BD CPC, 2014, Art. 227).

The FBiH LCPC (2014) governs in detail the content of the confiscation motions, both in ordinary and non-conviction based confiscation procedures. This law lays down that a confiscation motion in an ordinary confiscation procedure shall contain information about the person whose proceeds of crime are subject to confiscation, the description and name of the criminal offence as specified in the law, information about or description of the proceeds of crime to be confiscated, evidence of property subject to confiscation obtained within the financial investigation, evidence of the legal income of the person and circumstances indicating the existence of a manifest disproportion between his property and income. A motion for the confiscation of the proceeds from an affiliated party shall contain evidence that he inherited them, whereas the motion for the confiscation of the proceeds from a third party shall include evidence that they had been transferred to him in order to preclude confiscation either without compensation or for compensation not corresponding to their real value (FBiH LCPC, 2014, Art. 10(3)). The formulation of this provision clearly indicates that such motions may be submitted not only to initiate confiscation of proceeds of specific crimes, but also to initiate extended confiscation of proceeds of the entire criminal activity, given that the legislator expressly mentions, among the grounds for confiscation, the existence of a manifest disproportion between the property and income of the person against whom such a motion is filed. As per the motion for confiscation within a non-conviction based confiscation procedure, the FBiH LCPC lays down that it shall contain information about the person whose proceeds of crime are subject to confiscation, the description and name of the criminal offence as specified in the law, information about or description of the proceeds of crime to be confiscated, evidence of property subject to confiscation obtained within the financial investigation, evidence of the legal income of the person, circumstances indicating the existence of a manifest disproportion between his property and income, and reasons justifying the need to confiscate his property. The motion to confiscate the property of an affiliated party shall include evidence that he had inherited the proceeds of crime, while the motion to confiscate the property of a third party shall contain evidence that the proceeds of crime had been transferred to him in order to preclude confiscation, either without compensation or for compensation not corresponding to their real value (2014, Art. 5(7)).

3.2.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)

3.2.2.1. Legal Framework for Provisional Measures

Provisional measures securing proceeds of crime are governed by a number of CPC provisions, starting with the ones on evidence collection and providing for seizure of proceeds and instrumentalities. Under these provisions in the four CPCs, the court may, on the prosecutor's motion, order the seizure or attachment of property subject to confiscation under the Criminal Code, or another requisite provisional measure with a view to preventing the use, alienation or disposition of such property (BiH CPC, 2018, Art. 73; FBiH CPC, 2014, Art. 87; RS CPC, 2018, Art. 138; BD CPC, 2014, Art. 73). Therefore, this action does, indeed, amount to seizure in substance, but its goals and character

(collection and securing of evidence to be used in criminal proceedings) are totally different from those of measures securing proceeds of crime, because that matter is regulated in other chapters of the CPCs.

Order to a bank or another legal person is another measure within this evidentiary action that warrants mention. Pursuant to the four CPCs (BiH CPC, 2018, Art. 72; FBiH CPC, 2014, Art. 86; RS CPC, 2018, Art. 136; BD CPC, 2014, Art. 72), the court may issue a ruling ordering a legal or natural person to suspend the implementation of a financial transaction where there are grounds to believe that it is used in or intended for use in the commission of a criminal offence, serves to disguise the criminal offence or the proceeds of crime.

3.2.2.2. Motion or Request for Provisional Measures

The CPC provisions on evidence collection lay down that, on the motion of the prosecutor, the court may order the seizure of property subject to confiscation under the Criminal Code, its attachment or another provisional measure to prevent the use, alienation or disposition of that property (BiH CPC, 2018, Art. 73; FBiH CPC, 2014, Art. 87; RS CPC, 2018, Art. 138; BD CPC, 2014, Art. 73).

Under Article 17(3) of the FBiH LCPC (2014), the court shall issue a decision in the form of a ruling on the prosecutor's seizure motion (as opposed to the CPC provisions providing for *ex officio* court actions), in which it must specify the period of validity of the measure. It is under the obligation to review the grounds for its extension, which significantly differs from the corresponding provision in the FBiH CPC and is directly aimed at protecting human rights. The FBiH LCPC also prescribes the functional jurisdiction within the court that is ruling on the prosecutor's motion (depending on the stage of the proceedings), laying down that it must rule on it within the (instructional) deadline of seven days from the day of submission.

The RS LCPC lays down that the prosecutor shall first forward the motion including all the data to the owner, who has 15 days to respond to it and provide evidence of the legal origin of his property (Art. 15(3), LCPC, 2018).

3.2.2.3. Ordering of Provisional Measures

The four CPCs lay down that provisional measures may be ordered when the seizure of the proceeds of crime is possible. In such cases, the court shall *ex officio* order provisional measures in accordance with the provisions on the enforcement procedure (BiH CPC, 2018, Art. 395; FBiH CPC, 2014, Art. 416; RS CPC, 2018, Art. 389; BD CPC, 2014, Art. 395). These provisions are predominantly referable in character, leaving it to the court to review the need for ordering such measures, i.e. to act *ex officio* on a case to case basis. Furthermore, these provisions have not been aligned with the amended regulations on enforcement and civil procedures, because provisional measures (the CPCs refer to) have in the meantime been transferred from the Laws on the Enforcement Procedure to the Civil Procedure Codes, wherefore they are more or less not implementable in practice. Therefore, it may generally be concluded that before the LCPCs had been adopted, there had been legal grounds, albeit insufficiently clear or precise, for ordering provisional measures, but that they lacked a range of important elements that would ensure not only the effectiveness of the actions of the relevant authorities, but also human rights protection standards, especially regarding the peaceful enjoyment of property.

A separate section of the FBiH LCPC (2014) is devoted to provisional measures securing proceeds of crime. The legislator evidently intended to elaborate the relatively meagre provisions in the FBiH CPC in a comprehensive, uniform and precise manner addressing the ongoing practical

requirements and in line with human rights protection standards. In a nutshell, the purpose of the provisional measures is to secure the FBIH's future claim regarding the confiscation of proceeds. The legislator made use of the possibility of laying down that the existence of a statutory presumption of a risk that the enforcement of such a claim will be rendered difficult or impossible unless provisional measures are ordered shall constitute legal grounds for ordering such measures. Provisional measures may be ordered *ex parte*, i.e. before the suspect, defendant or affiliated party has had the chance to respond to the prosecutor's motion (Art. 16, FBIH LCPC, 2014). The provisional measures may be ordered during or upon the completion of criminal proceedings, provided the requirements for conducting a non-conviction based confiscation procedure are fulfilled. The legislator does not distinguish between freezing and seizing measures. Article 17(2) enumerates the measures that may be ordered depending on the type of property (immovable property, movable property, cash and materialised securities, claims and liabilities, funds in bank accounts, dematerialised securities, stakes, fund and business shares, items, titles and other monetary transactions), providing the court with the possibility of independently or simultaneously ordering freezing and/or seizing if possible. The court is under the obligation to order the measures that will achieve the purpose of securing the proceeds of crime the most efficiently.

The greatest difference between the RS LCPC and the FBIH LCPC provisions on provisional measures is that the former separately governs seizure (attachment) and provisional security measures (freezing). Both procedures are thoroughly elaborated, wherefore only the key differences between them and the FBIH provisions will be presented in the ensuing text. The first difference regarding seizure is evident in the decision-making process. The prosecutor's motion with all the data is first to be forwarded to the owner, who has 15 days to respond to it and submit evidence of the legal origin of his property (RS LCPC, 2018, Art. 15(3)). Therefore, seizure (attachment) of property *ex parte* is not possible. The second difference lies in the fact that the court is under the obligation to schedule a hearing after the owner submits his response and to summon all the parties, together with their defence counsel or proxies, to the hearing. The parties present evidence of the (il)legal origin of the property at issue and circumstances indicating the need to seize the property already at this hearing (RS LCPC, 2018, Art. 17). The FBIH LCPC does not include such provisions. Three requirements must be cumulatively met for the court to issue a ruling ordering seizure: existence of reasonable suspicion that a crime has been committed, that the impugned property constitutes proceeds of that crime and that there are reasons or circumstances requiring the ordering of seizure (RS LCPC, 2018, Art. 18(3)). Interestingly, although this provision governs seizure i.e. attachment (physical removal of the property from the owner's possession), it also sets out that the court ruling must include an order to annotate the attachment on the title in the public registry of immovable property and rights in rem or other relevant registers. Therefore, the provision cumulatively orders not only attachment but freezing as well, which gives rise to the question why these two measures are separately regulated when they must be ordered simultaneously in many cases! Article 18(5) of the RS LCPC (2018) regulates the protection of bona fide acquirers and allows the court to allow the owner to use part of the seized property in the event its full seizure would impinge on his livelihood or that of his dependents. Although the RS LCPC is a *lex specialis*, it nevertheless does not allow the seizure of property already exempted from enforcement under the Law on the Enforcement Procedure (Art. 18(8)). Another important provision in the RS LCPC (2018) is the one in Article 20, specifying the periods of validity of the seizure order, court reviews of the need to extend it, its replacement by a milder measure, et al., wherefore this segment of the temporary restriction of the right to peaceful enjoyment of property is, indeed, adequately regulated in terms of human rights protection.¹³⁶

136 Furthermore, as opposed to FBIH regulations, Article 21 of the RS LCPC assigns the Assets Management Agency (AMA) an active role at this stage: the AMA may ask the prosecutor to submit a motion to the court to re-examine its ruling and replace the order that it manage the seized property by another security measure (freezing) in the event administration of such property has caused it grave difficulties or high costs.

The differences in the area of provisional security measures, which, as mentioned above, are separately governed (unlike in the FBiH LCPC), lie in the fact that they may be ordered before the initiation of criminal proceedings. Furthermore, Art. 22(1) of the RS LCPC (2018) lays down that such measures may be ordered up to one year after the decision on the criminal charges becomes final; such a possibility is not provided for in the FBiH LCPC.

The BD LCPC comprises nearly identical provisions on provisional measures as the FBiH LCPC, except for a minor difference on the real jurisdiction of the court ruling on them. Given the specific organisation of the BD judiciary, such measures are always ordered by the BD Basic Court, as the first-instance court, whereas appeals of its rulings on provisional measures are ruled on by the BD Appeals Court.

3.2.2.4. The Appeal Procedure

Appeals of rulings ordering provisional measures do not have suspensive effect; these rulings are enforceable on the day of adoption and they are forwarded for enforcement to the enforcement authorities. The appeals are filed with the immediately higher court, which again partly deviates from the ordinary CPC rules, but which, on the other hand, should facilitate the efficient protection of human rights (FBiH LCPC, 2014, Art. 17(6)). Although, as already emphasised, provisional measures must be ordered for a precisely defined period of time and are subject to regular court reviews, the legislator also laid down the absolute deadline by which they must be lifted. Once a judgment delivered in an ordinary, extended confiscation or non-conviction based confiscation procedure becomes final, the provisional measures may remain in effect for a maximum of 60 days from the day the prosecutor, who had proposed them, is notified that the first-instance judgment is final or that the higher court upheld it on appeal (FBiH LCPC 2014, Art. 21). As far as judicial review and, in general, respect for the principle of proportionality are concerned, the LCPC not only obligates the court to review the grounds for extending provisional measures, but also allows it to replace them by milder measures (e.g. the court may replace the cumulative freezing and seizing order by ordering just the freezing of the property and letting the owner use it), i.e. the court may even allow the person challenging the provisional measure or even a third party to pledge cash (and, in exceptional cases, property or rights) as security (FBiH LCPC, 2014, Art. 20). As per the individuals who have suffered damage due to the imposition of a provisional measure, the LCPC clearly lays down that the FBiH shall be held liable for the damages they sustained. The injured parties have one year to initiate civil proceedings and claim damages from the day the decision dismissing the motion for provisional measures - either as part of the decision acquitting the defendant or dismissing the charges, or within a separate non-conviction based confiscation procedure - becomes final (FBiH LCPC, 2014, Art. 23).

The RS LCPC (2018, Art. 24(1)) retained the provision under which an appeal, which does not have suspensive effect, shall be filed with a judicial panel for review in a non-adversarial hearing within three days from day of service. The other provisions are nearly identical to those in the FBiH LCPC, wherefore they will not be elaborated.

Given the specific organisation of the BD judiciary, the rulings on provisional measures in the BD are always adopted by the BD Basic Court, as the first-instance court. The BD Appeals Court rules on appeals of these rulings.

3.2.3. Confiscation Procedures

3.2.3.1. Types of Procedures and Their Basic Characteristics

Different provisions governing confiscation are in place in Bosnia and Herzegovina, due to its complex territorial-political order and existence of different criminal law systems. All jurisdictions have ordinary confiscation procedures, under which property must be confiscated when facts and circumstances indicate that it had derived from crime. Determination of whether a crime resulted in the acquisition of property is especially important when the acquisition of proceeds of crime is part of the statutory description of the offence (i.e. when it is a decisive fact) and failure to do so amounts to a grave procedural violation of the criminal procedure. However, when acquisition of proceeds of crime is not part of the statutory description of the offence, the principle of criminal law - that no-one may retain property acquired by crime - still applies (BiH CC, 2018, Art. 110; FBiH CC, 2017, Art. 114 i.e. FBiH LCPC, 2014, Art. 2; RS CC, 2017, Art. 8; BD CC, 2018, Art. 114 i.e. BD LCPC 2016, Art. 3).

The non-conviction based confiscation procedure is elaborated in all three LCPCs. Given that an LCPC has not been adopted at the state level, such a procedure may not be conducted before a state authority.¹³⁷ The RS LCPC provides for the implementation of the non-conviction based confiscation procedure in other specific circumstances as well (in the event the perpetrator is unable to participate in the procedure on grounds of mental illness), whereas the BD LCPC allows its implementation also in other circumstances excluding the criminal prosecution of the perpetrator (Ivičević Karas [2011]) specifies that these circumstances may be of substantive or procedural legal character, e.g. the crime is subject to pardon or amnesty, the perpetrator has been granted immunity from criminal prosecution, et al.). Given that these procedures are laid down in the LCPCs, that means that property cannot be confiscated under this regime in the FBiH in the event it had derived from crimes not warranting a special maximum term of imprisonment under three years, crimes not warranting a special minimum term of imprisonment of three years or crimes for which the prescribed range of imprisonment (from minimum to maximum imprisonment) does not include three years' imprisonment. In the BD, property cannot be confiscated under this regime in case of any crime warranting a special minimum term of imprisonment of three years, while, in the RS, it cannot be confiscated under this regime in case of any crimes not specified in Art. 2 of the LCPC (2018) and in the event these crimes had not resulted in the acquisition of property manifestly disproportionate to the legal income of the owner (the perpetrator, his legal successor or a natural or legal person to whom he has transferred it).

Extended confiscation exists in all BiH legislations. In legal theory, extended confiscation denotes confiscation of not only the proceeds of a specific crime for which a person is criminally prosecuted, but also of all proceeds he is merely presumed to have derived from that offence or his other criminal activity preceding or coinciding with that offence (Datzer, 2017). BiH laws, for the most part, do not provide for any special procedural rules for the implementation of this procedure and the courts apply the ones governing ordinary confiscation. RS is the only exception; its LCPC is fully devoted to extended confiscation.

Confiscation of the proceeds of crime is conducted in BiH on the motion/request of the prosecutor, which must be ruled on at the main hearing. Two confiscation situations can be distinguished in principle: 1) the proceeds are confiscated from the perpetrator or his accessories, when the facts and circumstances are determined during the main hearing. Although legal theorists are of the view that this amounts to a so-called ancillary proceeding (i.e. adhesive procedure - that the court is not

¹³⁷ The non-conviction based confiscation procedure, prescribed by all three LCPCs, is launched against an individual not found guilty in criminal proceedings due to difficulties in conducting criminal proceedings against him (due to his death or flight) and results in the confiscation of his proceeds of crime identified by the court.

ruling on the criminal case, i.e. the existence of a criminal offence and the guilt of the perpetrator [Tomašević, 2009], but on whether any proceeds, and in what form, were derived from that crime), the actions within it are undertaken together with the other actions, wherefore no explicit mention is made that these are adhesive procedure actions, but, rather, that they are main hearing actions; 2) in the event the proceeds are confiscated from a third party (to whom they have been transferred), as in the case of confiscation from a legal person, when the third party (or its representative) must be summoned to the main hearing to declare themselves on the confiscation. Third parties are entitled to propose evidence, and, with the approval of the individual or presiding judge, question the defendant, witnesses and experts (BiH CPC, 2018, Art. 393; FBiH CPC, 2014, Art. 414; RS CPC, 2018, Art. 387; BD CPC, 2014, Art. 393).

Evidence serving to determine the form and value of the proceeds is usually the evidence otherwise serving to establish facts in criminal proceedings, such as inquiry (investigation), statement of the defendant, statements of witnesses and experts, technical recordings of facts, documents. Such evidence may be presented by the parties to the proceedings and other persons (those the proceeds have been transferred to), as well as representatives of legal persons.

The proceeds are in principle confiscated from the perpetrator and affiliated parties. Affiliated parties denote the accessories (aiders and abettors), legal successors of the perpetrator or accomplices, as well as all natural or legal persons that the court finds have been transferred the assets or rights amounting to proceeds of crime, where such a transfer was not made in good faith. Proceeds acquired for legal persons can also be confiscated. In such cases, their representatives have the above-mentioned rights.

The possibility to attend the main hearing is primarily granted to the parties to the proceedings, as well as the general public (citizens): the main hearing may be attended by any adult. The possibility of excluding the general public from the main hearing, at which proceeds of a crime are determined, for a specific reason (e.g. national security considerations or to ensure the confidentiality of a state, military, official or important business secret, maintain public law and order, protect morality in a democratic society, etc.) does not apply to the parties to the proceedings, their defence counsel, the injured parties, legal representatives or proxies. Given that persons subject to confiscation of the proceeds of crime may include those to whom the proceeds have been transferred and representatives of legal persons, the CPCs explicitly state that the exclusion of the public does not apply to them (BiH CPC, 2018, Art. 393; FBiH CPC, 2014, Art. 414; RS CPC, 2018, Art. 387; BD CPC, 2014, Art. 393).

3.2.3.2. Procedural Rights of Persons Whose Property is Subject to Confiscation

As described in the previous section, there are no restrictions limiting the right of the perpetrators and accessories, their defence counsel, legal representatives and proxies to attend the main hearing. Persons, to whom the proceeds have been transferred and representatives of legal persons who have benefited from the crime are also entitled to attend the main hearing. The right to attend the main hearing in the non-conviction based confiscation procedure is also granted to the so-called property curator (the person representing the proprietary interests of the person whose property is subject to confiscation), the legal successors of the perpetrator and his accessories. The legal successors' right to attend the main hearing is not clearly specified in the provisions on ordinary confiscation.

All parties to the proceedings exercising the right to defence are entitled to propose evidence indicating the origin of the property and disputing the prosecutor's allegations about its illegal origin; this includes direct, cross and additional examination of the witnesses or experts. As far as confiscation of proceeds from third parties or legal persons is concerned, the CPCs explicitly entitle them

to propose evidence and examine the perpetrator, witnesses and experts (BiH CPC, 2018, Art. 393; FBiH CPC, 2014, Art. 414; RS CPC, 2018, Art. 387; BD CPC, 2014, Art. 393). Full rights to present evidence, including to call and examine witnesses or experts, in a non-conviction based procedure are guaranteed only in the RS LCPC (2018, Art. 30), whereas Article 6(2) of the FBiH LCPC (2014) and Article 6(2) of the BD LCPC (2016) only provide for the examination of affiliated parties about the circumstances in which they had gained the proceeds, but these provisions do not allow them to actively participate in the proceedings.

3.2.3.3. Confiscation Decisions

The prosecutor is charged with the collection of evidence and investigation of circumstances of relevance to identifying the proceeds of crime (BiH CPC, 2018, Art. 392; FBiH CPC, 2014, Art. 413; RS CPC, 2018, Art. 386; BD CPC, 2014, Art. 392). The court may *ex officio* order confiscation in the event the prosecutor fails to request it only under Article 2 of the FBiH LCPC (2014) and Article 3 of the BD LCPC (2016). Given that the LCPCs are not applicable to all criminal offences, the court's possibility of acting *ex officio* is limited.

In an ordinary confiscation procedure, the proceeds of crime are confiscated only in case the court has delivered a condemnatory or declaratory judgment (a judgment in which the court merely ascertains that a crime has been committed but cannot establish the guilt of the perpetrator for various reasons, such as 1) his insanity, and 2) in case of a non-conviction based confiscation procedure), a ruling ordering correctional measures and/or issuing a court admonition.

The content of decisions ordering the confiscation of the proceeds of crime is not uniformly regulated in BiH legislations. The CPCs lay down that they should specify the item to be confiscated that may constitute proceeds of crime acquired in various ways (directly, indirectly-income, property the proceeds have been transformed into or intermingled with), or, in the event confiscation is impossible, an amount of money proportionate to the value of the proceeds (BiH CPC, 2018, Art. 396; FBiH CPC, 2014, Art. 417; RS CPC, 2018, Art. 390; BD CPC, 2014, Art. 396). The FBiH LCPC (2014) and the BD LCPC (2016) include the obligation to specify the items and rights that constitute proceeds of crime, but, as opposed to the CPCs, which provide for ordering the payment of money as an alternative only in exceptional situations, these two LCPCs explicitly require indication of the monetary equivalent of the proceeds to be confiscated. Furthermore, the confiscation decision has to include a statement that the confiscated items and rights shall become the property of the FBiH or BD and a so-called condemnatory request (action or sufferance ordered by the court in its decision: that the defendant or affiliated parties surrender an item, transfer a right or pay an amount of money proportionate to the value of the proceeds of crime, or that FBiH's or BD's ownership rights be entered in the public books or registers kept by the relevant authorities, [FBiH LCPC, 2014, Art. 11 and BD LCPC, 2016, Art. 11]). In addition to these elements, Article 43 of the RS LCPC (2018) explicitly lays down that the confiscation ruling shall include the decision specifying the costs of managing the seized property, the claims of the injured parties and the costs of legal representation (where applicable).

3.2.3.4. The Appeal Procedure

The CPCs lay down that appeals of court decisions ordering confiscation of proceeds of crime shall be filed within a maximum of 15 days from the day of service of the certified copies of the decisions. Timely appeals filed by those entitled to appeal (the prosecutor, an injured party, the defendant or, on his behalf, his legal counsel, spouse or common law partner, parent or adoptive parent, child or adoptive child or a person whose proceeds of crime have been seized) shall be considered admissible and suspend the enforcement of the confiscation decision. Under all laws (save FBiH's), the

appeal shall be filed with the court that delivered the first-instance judgment, while, under the FBiH LCPC (2014), it shall be filed with the second-instance court.

Decisions ordering confiscation of proceeds of crime may be appealed on various grounds. Where proceeds of crime are part of the statutory description of the criminal offence, their form and value must be established and facts substantiating the allegations must be adduced. The failure to elaborate the decisive facts amounts to a gross procedural violation (BiH CPC, 2018, Art. 297; FBiH CPC, 2014, Art. 312; RS CPC, 2018, Art. 311; BD CPC, 2014, Art. 297). The provisions of these Articles, in conjunction with Art. 397 BiH CPC (2018), Art. 418 FBiH CPC (2014), Art. 391 RS CPC (2018), and Art. 397 BD CPC (2014), support the fact that failure to ensure the presence of persons who must attend the main hearing (persons to whom the proceeds have been transferred, and, in case of confiscation from a legal person, its representative) also amounts to a gross procedural violation and strong grounds for appeal. Errors made in the confiscation of proceeds of crime are also grounds for modifying judgments, as they amount to violation of criminal law and errors in the decisions on the extent of confiscation of the proceeds. Criminal law is violated if the court orders confiscation of proceeds although it should have applied another institute or penalty (e.g. it should have ordered seizure as a provisional measure), whereas an error in the decision on the extent of confiscation of the proceeds may entail application of the wrong confiscation regime (e.g. extended confiscation instead of ordinary confiscation).

3.2.3.5. Notification of the Assets Management Agency or Other Entities

The CPCs do not specify the procedure that ensues after the adoption of a judgment or a ruling on confiscation. This means that the general provisions on court post-judgment actions apply (the certified copies of the judgment are served on the parties, defence counsel, the injured parties, the persons whose items had been seized [where applicable] and the owner of the property subject to confiscation in the event that person is not the defendant) (Sijerčić-Čolić, 2008).

The LCPCs have different provisions on confiscation. In the FBiH and BD, the judgments are served on the parties to the proceedings and the FBiH Assets Management Agency and the BD Public Property Management Office respectively. Based on the contents of the confiscation decisions, FBiH or BD are to be registered as the owners of the confiscated immovable property, company shares and securities in the relevant registers, wherefore the copies of the condemnatory judgments need to be forwarded also to the relevant registers. In the event the items and rights had earlier been subject to a provisional measure and entrusted to the Federal AMA or the BD Public Property Management Office for safekeeping and management, or in the event a bank or another legal person had been ordered to withhold the payment of funds in the accounts of the suspect, defendant or affiliated party, the Federal AMA takes the requisite measures to gain ownership of them or other actions related to confiscated asset management. In the event the property had not been subject to a provisional measure, the defendant or affiliated party is ordered to surrender it immediately or pay an amount of money proportionate to the value of the proceeds. The property may be sold, while works of art and other items of cultural or historical significance may be ceded to art galleries, museums and cultural institutions for safekeeping and use. In the event the prosecutor's motion to confiscate proceeds of crime is dismissed, the case files shall be forwarded to the FBiH and BD Tax Administration respectively for further action. In Republic of Srpska, the confiscation order is served on the prosecutor, perpetrator, accessories and their proxies, legal successors, the MIA Unit charged with identifying the proceeds of crime and the Assets Management Agency. Immovable property, company shares and securities are entered in the relevant registers as RS property, the money is credited to the relevant RS budget accounts, while the Government decides on the fate of movable property, precious metals, et al. Items of historical, artistic or scientific value are handed over to institutions charged with safekeeping them.

3.2.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

3.2.4.1. Procedures for the Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

The four CPCs lay down that provisions on the enforcement procedure shall apply to the execution of seizure decisions (BiH CPC, 2018, Art. 395; FBiH CPC, 2014, Art. 416; RS CPC, 2018, Art. 388; BD CPC, 2014, Art. 395). Therefore, in the event the court applies the CPC, i.e. the requirements for applying the LCPC are not fulfilled, it shall *ex officio* order seizure in accordance with the regulations on enforcement, which govern all specific issues regarding the types of security measures and their validity, service of documents, enforcement deadlines, et al.

It needs to be emphasised that the CPC provisions on the provisional measure involving the suspension of financial transactions lay down that this measure shall remain in effect until the completion of the criminal proceedings or until the requirements are met for returning the funds; these provisions, however, do not regulate specific issues related to deadlines, the manner of enforcement of the measure, notification of the court of its execution, et al. (BiH CPC, 2018, Art. 72(5); FBiH CPC, 2014, Art. 86 (5); RS CPC, 2018, Art. 136(5); BD CPC, 2014 Art. 72(5)).

As per the enforcement of provisional measures, the FBiH LCPC (2014) first lays down that rulings ordering provisional measures shall be implemented by the court, the Federal Assets Management Agency or another authority designated by law. The court that issued such a ruling is under the obligation to forward it to these entities to enforce it forthwith or on the first workday following the day of adoption. The FBiH LCPC (2014) imperatively prescribes that the enforcement of these decisions is urgent (Art. 17 (7, 8 and 9)). The rulings become enforceable the moment they are issued, i.e. any appeal of them does not stay enforcement.¹³⁸ The FBiH LCPC (2014) in Article 18(1) also governs the issuance of orders (within court rulings on provisional measures) on annotation of the measures in public books, public registries and registers, which means that the court must specify in each individual case the relevant entity and/or register where the freezing or seizing measure is to be annotated.

The RS LCPC (2018) lays down that seizure rulings shall be served on the parties to the proceedings, as well as the RS MIA Unit and the Assets Management Agency (Art. 18(6)) and that they shall be enforceable the moment they are adopted (Art. 19(1)). The RS LCPC does not specify the deadline by which the ruling is to be served or enforced. It does, however, set out that the enforcement of the ruling on the seizure of property to be surrendered to the Agency shall be implemented by the RS MIA Unit police officers or other relevant authorities designated by law, depending on the type of property to be seized (2018, Art. 19(4)). As per securities, the RS LCPC (2018) lays down that rulings on their seizure shall be conducted by the Central Register of Securities or the court charged with registering company shares (Art. 19(5)). As per provisional measures involving freezing, the RS LCPC (2018) stipulates that they shall be ordered in a court ruling, which shall become enforceable on the day of adoption and be served on the owner, his defence counsel or proxy, the public prosecutor, the RS MIA Unit, the AMA or another authority charged with enforcement. The ruling must be for-

¹³⁸ It needs to be noted that the court may in some cases order only the freezing of the property (entailing the prohibition of specific actions regarding the property but not comprising its physical removal from the owner's possession), whereas in other cases, it may order only its seizure (entailing its physical removal from the owner's possession). Finally, in some cases, the court may issue a ruling ordering a provisional measure involving both freezing (entry of an injunction in the relevant property register) and seizure (e.g. of a motor vehicle and its safekeeping by the Agency). In such cases, the court decision on provisional measures is served on two authorities, which are under the obligation to enforce them by the deadline prescribed by law.

warded to the enforcement authority the day following the day of its adoption. The RS LCPC (2018) lays down that the ruling shall be enforced by the RS MIA Unit or another authority designated by law (Art. 24). As a rule, these kinds of provisional measures are entered in the relevant registers, public registries and records; their entry and deletion are governed by Article 25 of the RS LCPC (2018).

The BD LCPC (2016) includes nearly identical provisions on the enforcement procedure as the FBiH LCPC, except that, in addition to the court, it also mentions “other authorities designated by law” as those in charge of enforcing rulings on provisional measures (See paragraphs 8, 9 and 10 of Art. 17 and Art. 18 of that law).

Enforcement of court decisions ordering confiscation of the proceeds of crime is an extremely important and, at the same time, complex stage of the entire procedure. The assessment of the effectiveness of the entire system in this area often depends on the successful implementation of execution, pursuant to enforcement regulations. These regulations set out that confiscation decisions must fulfil all of the prescribed requirements. Notably, in order to have the character of an enforceable document (i.e. to be enforceable), the confiscation decision must specify:

- a) The authority requesting enforcement,
- b) The person subject to enforcement,
- c) The object of enforcement,
- d) The type of obligation,
- e) The scope of the obligation, and
- f) The deadline by which it must be fulfilled.

At the BiH level, enforcement of confiscation decisions is governed both by the BiH CPC and the BiH Law on the Enforcement of Penal Sanctions, Pre-Trial Detention and Other Measures (LEPS). Article 180(1) of the BiH CPC (2018) provides for the application of enforcement procedure provisions applicable in the place of enforcement. On the other hand, Article 246(1) of the BiH LEPS (2016) sets out that “*Provisions of the BiH Law on the Enforcement Procedure shall apply to the jurisdiction and the procedure for the confiscation of the proceeds of crime, unless otherwise provided for by this Law.*” Paragraph 2 of that Article lays down that the Criminal Division of the Court of BiH shall *ex officio* launch the procedure to execute the decision on the confiscation of proceeds of crime. Specific problems have been identified in practice regarding the relationship between these regulations, notably dilemmas have arisen about the jurisdiction of the BiH Attorney General’s Office to initiate the enforcement procedure. Furthermore, it needs to be emphasised that neither the BiH CC nor the BiH CPC specify in detail the content of court confiscation decisions, in whose favour the proceeds are confiscated (BiH’s), the value (including the monetary equivalent) of the proceeds, or the deadline for voluntary compliance before compulsory enforcement is launched, wherefore such decisions are often unenforceable in view of the above-mentioned elements that proper enforceable documents must include under enforcement law. Regulation of the enforcement of court decisions ordering the confiscation of the proceeds of crime in the FBiH, RS and BD CCs and CPCs is similar, wherefore the ensuing text will present only the provisions of the LCPCs governing these issues.

The FBiH LCPC (2014) lays down the content of judgments ordering confiscation of proceeds in a non-conviction based confiscation procedure (Art. 6(2)) and in ordinary and extended confiscation procedures (Art. 11(1)), the application of the FBiH Law on the Enforcement Procedure and the jurisdiction of the FBiH General Attorney’s Office for initiating the enforcement procedure (Art. 24). It thus ensures the voluntary and compulsory enforcement of court decisions adopted in accordance with the LCPC. Articles 43 and 44 of the FBiH Law on the Enforcement Procedure (2018) also need to be mentioned here, in terms of the need to define more precisely the powers of specific categories

of public officials (court enforcement agents, Federal AMA officers and Judicial Police Officers) in the area of enforcing court decisions ordering confiscation of proceeds of crime.

Article 33(2) of the RS LCPC (2018) lays down the content of rulings issued in non-conviction based confiscation procedures, while Article 43(2) sets out the content of confiscation rulings issued in conviction based confiscation procedures. These provisions differ to an extent, although the matter they govern is quite similar. Rulings issued in non-conviction based confiscation procedures must comprise: information about the items and rights constituting proceeds of crime and their monetary equivalent, a declaration that these items and rights shall become the property of the RS, a 15-day voluntary compliance deadline and an order to enter the RS' property rights in the relevant registers and public registries. These elements of the operational parts of the rulings are not specified in this way in Article 43(2), which is directly relevant also to the enforcement procedure. Furthermore, the RS LCPC (2018) does not include provisions specifying the authority (e.g. the General Attorney's Office) that is entitled to initiate compulsory enforcement of confiscation rulings although this is a mandatory element of a proper enforceable document.

Under Article 24(1) of the BD LCPC (2016), which negligibly differs from the corresponding provision in the FBiH LCPC, the BD General Attorney's Office is entitled to file a motion to initiate the enforcement procedure with the BD Basic Court, which decides on confiscation in non-conviction based, ordinary (and extended) confiscation procedures. Under that Article, the Basic Court is also charged with executing the enforcement ruling. Articles 6 and 10 of the BD LCPC (2016) specify in greater detail the content of the operational parts of judgments ordering the confiscation of the proceeds of crime and in effect enumerate the elements required under the BD Law on the Enforcement Procedure with a view to ensuring that these judgments have the character of enforceable documents.

3.2.4.2. Parties to the Confiscation Enforcement Procedure

Depending on which law is applied (a CPC or an LCPC), in the event the person whose property is subject to confiscation does not comply voluntarily with the court confiscation decision by the voluntary compliance deadline, the enforcement procedures are as a rule initiated on the motion of the relevant Attorney General's Office. These motions are in most jurisdictions ruled on by the municipal courts, while the implementation of the enforcement rulings is entrusted to the courts, Assets Management Agencies and other authorities designated by law, depending on the type and purpose of the confiscated property.

3.2.4.3. Protection of the Rights of Third Parties

The BiH, entity and BD CPCs lay down that the enforcement of judgments ordering confiscation of proceeds of crime shall be conducted in accordance with the laws on the enforcement procedure, which, for their part, include provisions on the rights of third parties in enforcement procedures.

The LCPCs also include such provisions. Article 23 of the FBiH LCPC (2014) entitles third parties to file complaints pending the issuance of an enforcement ruling and to request the termination of provisional measures (if any were imposed during the proceedings). This Article further prescribes how the court is to act on such complaints and regulates other issues concerning the use of public documents to prove the rights of third parties, application of provisions and statutory presumptions, et al.

The RS LCPC (2018) does not regulate the rights of third parties in the enforcement procedure.

Article 23 of the BD LCPC (2016) governs the issue identically as the FBiH LCPC.

3.3. MONTENEGRO

In Montenegro, the recovery of the proceeds of crime is governed by systemic laws, notably the Criminal Code (CC, 2018) and the Criminal Procedure Code (CPC, 2018), as well as the Law on the Confiscation of Proceeds of Crime (LCPC, 2015)¹³⁹, which, as a *lex specialis*, regulates extended confiscation of proceeds of crime.

3.3.1. Financial Investigations

3.3.1.1. Initiation of a Financial Investigation

The CPC (2018) does not recognise financial investigations as a special investigation measure. Article 257b of the CPC (2018), however, deals with access to information about bank accounts and banking transactions. Under sub-paragraph 1 of this Article, if there are grounds for suspicion that a person has committed, is committing or is preparing to commit a criminal offence that is prosecuted *ex officio*, the investigating judge may, on the motion of the state prosecutor, issue a ruling ordering the bank to make available information about the bank accounts and banking transactions of that person within a specific time period, with a view to identifying the perpetrator and collecting evidence, or locating, identifying and searching for a person who has absconded or a person against whom an international arrest warrant has been issued.

Article 11 of the LCPC (2015) lays down that a state prosecutor may issue an order initiating a financial investigation where there are:

- 1) Grounds for suspicion that the property of the holder is manifestly disproportionate to his lawful income;
- 2) Reasonable suspicion that the proceeds derived from crime; and
- 3) Grounds for suspicion that a criminal offence referred to in Article 2(1) of this Law has been committed.

The order referred to in paragraph 1 of this Article shall designate the person subject to the financial investigation (LCPC, 2015).

Sub-paragraph 3) of Article 11(1) links the grounds for suspicion to the criminal offences enumerated in Article 2(1) of the LCPC (2015).

Under Article 14 of the LCPC (2015), the police shall conduct a financial investigation to identify the proceeds of crime either on their own initiative or on the order of the state prosecutor in charge of the financial investigation.

3.3.1.2. Goals of Financial Investigations

A state prosecutor conducts a financial investigation in order to collect information about and evidence of the property, legal income and living expenses of the holder of the property which he needs in order to file a request for the confiscation of proceeds of crime.

The LCPC (2015) specifies that a financial investigation is conducted to collect data on and evidence of:

139 NB The Montenegrin LCPC is called *Zakon o oduzimanju imovinske koristi stečene kriminalnom djelatnošću* (Law on the Confiscation of Proceeds of Criminal Activity)

- The holder's property and lawful income after the deduction of paid taxes and other dues, as well as their proportionality;
- The property transferred to third parties or to legal successors and of the manner in which it had been acquired and transferred.

The LCPC (2015) also sets out that financial investigations may be conducted in order to access other data on and evidence of relevance to the confiscation of proceeds of crime.

Under the LCPC (2015), on the motion of the state prosecutor, the investigating judge may issue a ruling ordering a bank or another financial institution to make available data requisite for identifying and tracing proceeds of crime. This provision is considered to be practically facilitating the monitoring of the movement of financial assets.

There is no explicit legal provision in Montenegrin law providing for covert surveillance of accounts over a specific period of time, wherefore it may be concluded that such a norm does not exist.

The above provisions explicitly governing financial investigations indicate that the LCPC (2015) actually applies to the extended confiscation regime.

3.3.1.3. Specificities of Conducting Financial Investigations

As already noted, the LCPC (2015) lays down that the investigating judge may order banks and other financial institutions to make available data that may be used as evidence for the purpose of conducting financial investigations.

Furthermore, Article 14 of the LCPC (2015) governs the actions and measures the police may take to identify and trace proceeds of crime either on their own initiative or on the order of the state prosecutor.

Pursuant to Article 16 of the LCPC (2015), there are no limitations on use of evidence for the purpose of a financial investigation.

The LCPC (2015) sets out the obligation of the state authorities, state administration and local self-government authorities, legal persons exercising public powers and other entities to make available, without delay, the requested data necessary for identifying and tracing proceeds of crime to the police.¹⁴⁰

140 The question that arises in the event the police are acting on their own initiative concerns the form of enactment they issue to the institutions they are requesting data from, whether there have been cases when institutions quoted e.g. lack of legal grounds for not making the data available. For instance, when the police need to access data in the real estate register, they can request data concerning a number of people, including the history of entries and amendments, in the absence of a clearly defined degree of suspicion. Practice has shown that the police most often access the data indirectly, via the head of the institution or its authorised person. Such a practice has given rise to specific problems, reflected in the fact that at least one individual becomes aware of the police's intention to conduct an investigation. Another problem is that obtaining access in such a manner is more time consuming. Plans to establish a single information system, facilitating efficient access to data to be used in financial investigations, have been pending for a long time now. Such a system, which would guarantee rapid and protected access to the requisite information based on legal regulations, does not exist yet. Practice has shown that the police can access data in registers of e.g. owners of motor vehicles. This gives rise to the following legitimate questions: whether the special prosecution office can access them as well and whether any other police officers, and how many of them, can see that the data had been accessed for the purpose of conducting a financial investigation. If that is the case, it may be concluded that too many people are or may become aware of a financial investigation, which may compromise the entire procedure.

Article 89 of the CPC (2018) lays down that the state prosecutor may require of the state authorities to check the business operations of specific persons and make available the documentation and data that may serve as evidence of a crime or of proceeds of crime, as well as to alert him to any suspicious financial transactions.

Furthermore, the state prosecutor is entitled to require of the relevant authority or organisation to suspend payment or issuance of suspicious funds, securities or items, for a maximum of six months.

In addition, the court may, on the motion of the state prosecutor, issue a ruling ordering the suspension of the implementation of a specific financial transaction in case of reasonable suspicion that it constitutes a criminal offence or is intended to facilitate the commission or concealment of a criminal offence or proceeds of crime.

The court orders that cash or funds in an account be seized and deposited in a designated account for safekeeping pending the completion of the criminal proceeding by a final decision or the fulfilment of the requirements for their release.

Human rights safeguards are in place. The court's decisions (rulings) may be appealed by the parties to the proceedings and their defence counsels, i.e. the owners of the funds or their proxies or the legal persons whose funds have been seized. The appeals are ruled on by a judicial panel of the same court.

Article 257b of the CPC (2018) governs access to data on bank accounts and banking transactions where there are grounds for suspicion that an individual has committed, is committing or is preparing to commit a crime prosecuted *ex officio*; in such cases, the investigating judge may, on the motion of the state prosecutor, issue a ruling ordering the bank to make available information about the person's bank accounts and banking transactions within a specific time period with a view to identifying the perpetrator and collecting evidence, or locating, identifying and searching for a person who has absconded or against whom an international arrest warrant has been issued.

The collection of data concerning electronic communications and retained telecommunication data that may be of relevance to financial investigations is effected on the motion of the state prosecutor and on the order of the investigating judge.

3.3.1.4. Completion of the Financial Investigation and Use of Its Results

Article 17 of the LCPC (2015) lays down that the state prosecutor shall order the extension of the financial investigation to a third party not covered by it in the event data and evidence collected during the financial investigation indicate that there are grounds for suspicion that the proceeds of crime have been transferred to that party.

Under Article 18 of the LCPC (2015):

- The state prosecutor shall finalise the financial investigation when he ascertains that the facts of the case have been sufficiently clarified for him to file a motion for the confiscation of the proceeds of crime or discontinue the financial investigation.
- The state prosecutor shall issue an order discontinuing the financial investigation in the event he ascertains, either during the financial investigation or upon its completion, that the requirements for filing a request for the confiscation of the proceeds of crime have not been fulfilled.

The financial investigation should result in the filing of a confiscation request. Article 16 of the LCPC (2015) lays down that financial investigations shall be conducted in accordance with that Law and the CPC (2018).

Evidence collected in criminal proceedings regarding an offence referred to in Article 2(1) of the LCPC (2015) may also be used in financial investigations. Evidence collected during a financial investigation pursuant to paragraph 1 of Article 16 (LCPC, 2015) may be used in criminal proceedings. The CPC (2018) regulates the obligation to obtain expert opinions. Under Article 480 of the CPC (2018), “[T]he court shall determine the amount of the proceeds of crime at its discretion in the event their determination would give rise to disproportionate difficulties or a significant delay in the proceedings.”

3.3.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)

3.3.2.1. Legal Framework for Provisional Measures

Ordinary confiscation of the proceeds of crime is implemented under Article 481 and other relevant provisions of the CPC (2018), while extended confiscation is implemented under the LCPC (2015). The contents of the CPC (2018) and LCPC (2015) provisions indicate that there are no differences between freezing and seizing.

Article 34 of the LCPC (2015) expressly lays down that its provisions governing the procedure, jurisdiction for and duration of provisional measures shall apply accordingly to the procedure, jurisdiction for and duration of seizure of movable property.

Article 90a of the CPC (2018) sets out that decisions on seizure shall be taken by the investigating judge. During the main hearing stage, such decisions are taken by the judge chairing the judicial panel. The procedure is initiated by the state prosecutor, who specifies the grounds for his suspicion that the items or proceeds have derived from crime and reasons corroborating the likelihood that it will be impossible to confiscate them by the end of the criminal proceeding.

Extended confiscation is conducted in accordance with the LCPC (2015), under which proceeds of crime shall be confiscated in the event the defendant has been convicted of a criminal offence by a final judgment, he has failed to make plausible the legal origin of his property and he, or the person to whom he has transferred the property has failed to prove the legal origin of the property.

3.3.2.2. Motion or Request for Provisional Measures

Under Article 481 in conjunction with Articles 243 and 90 of the CPC (2018), the imposition of provisional measures is sought by a motion. The CPC is not explicit on the application of both kinds of security measures, wherefore it may be concluded that it does not prohibit their cumulative application.

Under Article 21 of the LCPC (2015), the court shall impose a provisional measure on the motion of the state prosecutor. In emergencies, the state prosecutor may issue an order:

- Prohibiting use and disposition of immovable property, and the annotation of the injunction in the real estate register;
- Requiring of the bank to withhold payment of the amount of money subject to the provisional measure;
- Prohibiting disposition of a claim arising from a contractual obligation;
- Prohibiting alienation and encumbrance of company stakes and shares and the annotation of the injunction in the public records;

- Prohibiting exercise and disposition of rights deriving from company stakes and shares and other securities;
- Ordering the seizure (attachment) of movable property.

The state prosecutor shall notify the investigating judge of his order without delay and file a motion for a provisional measure. The prosecutor's order shall remain in effect until the court issues a ruling on his motion. These provisions indicate that prosecutors may issue cumulative orders.

3.3.2.3. Ordering of Provisional Measures

The LCPC (2015) regulates the court's actions on the motions filed by the prosecutor, as explained above.

Under Article 481 of the CPC (2018), when the requirements for confiscating proceeds of crime are fulfilled, the court shall impose provisional measures pursuant to the law governing the enforcement procedure either *ex officio* or on the motion of the state prosecutor. Article 243 of the CPC (2018) applies accordingly in such cases. Article 243 reads as follows:

“(1) On the motion of an authorised person referred to in Article 235 of this Code, provisional measures may be ordered pursuant to the law on the enforcement procedure in order to secure a property claim arising out of the commission of a criminal offence.

(2) In the course of the investigation, the ruling referred to in paragraph 1 of this Article shall be rendered by the investigating judge. After the indictment has been filed, the ruling shall be issued by the chair of the panel outside the main hearing or by the panel at the main hearing.

(3) The ruling on provisional measures issued by the panel may not be appealed. In other cases, the panel referred to in Article 24(7) of this Code shall rule on the appeal. The appeal shall not stay the enforcement of the ruling.”

Under Article 481, in conjunction with Articles 243 and 90b of the CPC (2018), the court issues a ruling ordering a provisional measure. The investigating judge schedules a hearing on the motion for a provisional measure. The hearing must be held within three days from the day of submission of the motion for a provisional measure. The court summons the state prosecutor, whose presence is mandatory. The investigating judge issues a ruling ordering a provisional measure or dismissing the prosecutor's motion after the hearing, within a maximum of three days from the day of its completion.

Rulings imposing provisional measures must be reasoned. The investigating judge is not bound by the prosecutor's motion when deciding on which provisional measure to impose.

Article 22 of the LCPC (2015) lays down that the motion for a provisional measure shall comprise the following information: data on the holder or owner of the property, the name of the criminal offence as specified under the law, information about the property to be subject to the provisional measure, evidence of legal grounds for ownership, circumstances giving rise to reasonable suspicion that the property has derived from crime and reasons substantiating the need to order a provisional measure.

Provisional measures are ordered by the court, in a ruling and on the motion of the state prosecutor. The investigating judge is charged with ordering provisional measures. An appeal of his ruling is reviewed by a three-member judicial panel of the first-instance court.

The provisional measures are laid down in Article 19 of the LCPC (2015). With a view to preserving the proceeds of crime and facilitating their potential subsequent confiscation, the state prosecutor may seek the imposition of the following provisional measures (freezing of assets):

- 1) Prohibition of use and disposition of immovable property and the annotation of the injunction in the real estate register;
- 2) Order to the bank to withhold payment of the amount of money subject to the provisional measure;
- 3) Prohibition of disposition of a claim arising from a contractual obligation;
- 4) Prohibition of alienation and encumbrance of company stakes or shares and the annotation of the injunction in the public records;
- 5) Prohibition of exercise or disposition of rights arising from company stakes or shares or other securities;
- 6) Introduction of receivership of a company.

With a view to preserving the proceeds of crime and facilitating their potential subsequent confiscation, the court may order the seizure of movable property (attachment) on the motion of the state prosecutor.

When deciding on a provisional measure, the court shall limit itself to ascertaining whether the value of the property after the deduction of the paid taxes and other dues is manifestly disproportionate to the holder's legal income.

The LCPC (2015) appears not to expressly enshrine the principle of proportionality but it is presumed that the courts comply with it when deciding on provisional measures in specific cases.

Article 85 of the CPC (2018) lays down that Article 481 in conjunction with Articles 243 and 245 of the CPC shall apply to provisional measures. During the investigation stage, the rulings ordering such measures are issued by the investigating judge. After the indictment has been filed, the ruling shall be issued by the chair of the panel outside the main hearing or the panel at the main hearing.

Under the LCPC (2015), the provisional measures mostly target the holders of property (enumerated in Article 7 of the LCPC).¹⁴¹

3.3.2.4. The Appeal Procedure

Under Article 27 of the LCPC (2015), the state prosecutor may appeal an investigating judge's ruling dismissing his motion for a provisional measure within eight days from the day of service.

An investigating judge's ruling ordering a preliminary measure may be appealed by the holder, his defence counsel or proxy within eight days from the day of service. The appeal does not stay enforcement.

141 A holder denotes a defendant, his legal predecessor or legal successor or family member, or a third party.
A defendant denotes a suspect, a person against whom criminal proceedings have been instituted or a person convicted of a crime.
A third party denotes a natural or legal person to whom the proceeds of crime have been transferred without compensation or for compensation not corresponding to their real value and who knew, could have known or was under the obligation to know that the proceeds had derived from crime.
A legal successor denotes the heir of the defendant, a third party or his heir, or a natural or legal person to whom the property rights had been transferred in a legal transaction.

The holder shall submit evidence of the origin of the property subject to the provisional measure together with his appeal referred to in paragraph 2 of this Article (LCPC, 2015).

The panel reviewing the appeal of the ruling ordering a provisional measure shall schedule a hearing, to which it shall summon the holder, his defence counsel and the state prosecutor.

The panel shall schedule a hearing on the appeal of the ruling dismissing the state prosecutor's motion on a provisional measure, to which it shall summon the state prosecutor.

3.3.3. Confiscation Procedures

3.3.3.1. Types of Procedures and Their Basic Characteristics

Pursuant to Article 112 of the CC (2018), ordinary confiscation shall be conducted under circumstances specified in that Code and in accordance with the CPC (2018, Article 478 *et sequitur*).

Extended confiscation is governed by the LCPC (2015).

Non-conviction based confiscation may be ordered in case of specific procedural difficulties (e.g. the death of the perpetrator, his immunity, pardon, et al.) provided the property is subject to confiscation under the LCPC.¹⁴²

The ordinary confiscation procedure is considered an ancillary proceeding (adhesive procedure) and entails the participation of the interested parties (those whose rights and items are subject to confiscation). On the other hand, the extended confiscation procedure can be considered an independent *post judicem* procedure that has its own structure and specificities, given that it is initiated after the criminal judgment becomes final.

Exclusion of the public from the hearings does not apply to persons to whom the proceeds of crime have been transferred or for whom they have been acquired, or to the representatives of the legal persons whose proceeds are subject to confiscation.

3.3.3.2. Procedural Rights of Persons Whose Property is Subject to Confiscation

Under Article 485 of the CPC (2018), other provisions of the CPC shall apply accordingly to the seizure and confiscation procedures unless otherwise provided for in the provisions in that chapter of the CPC. Article 479 of the CPC (2018) on confiscation of property from third parties lays down that a person or representative of a legal person, whose transferred proceeds of crime are subject to confiscation, will be heard at the main hearing. The representative of the legal person will be heard at the main hearing, after the defendant. This provision applies also to other persons who have not been summoned as witnesses. These persons are entitled to propose evidence regarding the determination of the proceeds of crime and examine the defendant, witnesses and experts.

In addition to the above CPC (2018) provisions on the ordinary confiscation procedure, Article 40 of the LCPC specifies that the state prosecutor shall present evidence of the defendant's property

¹⁴² Under the Law on Pardons, pardon shall also entail release from criminal prosecution. These provisions do not derogate the LCPC provisions on confiscation of the proceeds of crime. Therefore, a person's proceeds of crime shall be confiscated in accordance with the LCPC even if he cannot be further prosecuted due to circumstances permanently barring criminal prosecution. The spirit of the act of grace recognised in theory and practice does not entail exempting him from confiscation of his proceeds of crime.

and his legal income and circumstances indicating the existence of a manifest disproportion between the value of his property after the deduction of the paid taxes and dues and his legal income.

The defendant or his defence counsel shall respond to the state prosecutor's allegations.

In the event the property of a legal successor, a member of the defendant's family or a third party is subject to confiscation, the state prosecutor shall present evidence that the legal successor inherited the proceeds of crime or that the proceeds of crime had been transferred to a member of the defendant's family or a third party without compensation or for compensation not corresponding to their real value with a view to precluding confiscation.

The defendant's legal successor or a member of his family or a third party, or their proxies, shall respond to the state prosecutor's allegations.

3.3.3.3. Confiscation Decisions

The court confiscates proceeds of crime in the ordinary procedure *ex officio* (CPC, 2018, Art. 478). It cannot, however, confiscate them *ex officio* in an extended confiscation procedure.

Under Article 482 of the CPC (2018), "[T]he court shall specify the valuable items, funds or other proceeds that are to be confiscated in the operational part of its judgment or ruling."

Under Article 41 of the LCPC (2015), the court shall issue a ruling upholding or dismissing the confiscation request upon the completion of the main hearing.

The confiscation ruling shall comprise the following information: data of the holder of the proceeds of crime, the name of the criminal offence as specified in the judgment, information about the proceeds of crime subject to confiscation and the value of the proceeds confiscated from the holder in the event he had disposed of the property, the decision on the costs of managing the seized proceeds, the injured parties' property claims and costs of representation.

3.3.3.4. The Appeal Procedure

Under Article 382 of the CPC (2018), appeals may be filed by the parties to the proceedings, the defence counsel, the defendant's legal representative and the injured parties. Furthermore, an appeal may be filed on behalf of the defendant by his spouse or common law partner, lineal consanguineal kin, adoptive parent or child, sibling, or foster parent.

The state prosecutor may file an appeal in favour or to the detriment of the defendant.

First-instance judgments may be appealed within 15 days from the day of service. The second-instance court may uphold the appeal in a ruling overturning the first-instance judgment and remitting the case back to the first-instance court, primarily due to a gross violation of the criminal procedure or insufficient findings of fact. The second-instance court orders the first-instance court to hold a new main hearing.

The second-instance court may uphold the appeal and deliver a judgment modifying the first-instance judgment.

In confiscation proceedings, the court issues a ruling either upholding or dismissing the confiscation request upon the completion of the main hearing. The court's ruling may be appealed by the

holder of the proceeds subject to confiscation, his defence counsel or proxy, the injured parties and their attorneys-in fact, or the state prosecutor, within 15 days from the day of service. The appeal is ruled on by the relevant second-instance court.

The second-instance court may dismiss the appeal as out of time or inadmissible or on the merits as ill-founded, or uphold the appeal and modify the ruling or overturn it and remit the case back to the first-instance court to hear the case again.

In the event the appeal concerns a ruling that has already been overturned and remitted once, the second-instance court shall schedule a hearing and rule on the appeal itself. It is not allowed to overturn the impugned ruling and remit the case back to the first-instance court again.

A proceeding ending with a final decision under the LCPC may be reopened on the motion of the state prosecutor or the holder of the proceeds of crime, in accordance with Articles 424-432 of the CPC (2018).

3.3.3.5. Notification of the Assets Management Agency or Other Entities

The management of seized and confiscated property shall be conducted by the competent authority (the Property Administration) either *ex officio* or pursuant to a court decision, with the diligence of a prudent owner and in a manner ensuring the maximum preservation of the value of the property at minimum cost.

The following information is to be entered in the record of seized or confiscated property:

- 1) The final court decisions ordering provisional measures, seizure and confiscation of property, their case numbers and dates of adoption, the name(s) of the court(s) that rendered them and the days they became final;
- 2) The criminal offence(s) referred to in Article 2(1) of LCPC or the criminal offence(s) from which the proceeds of crime derived – names of the criminal offences as specified under the law and the relevant Criminal Code articles;
- 3) Type and estimated value of the seized and confiscated property, specifically:
 - a) With respect to movable property – list of items, their estimated value and location;
 - b) With respect to immovable property – surface area of the real estate, buildings, real estate rights and the authority keeping the real estate register; period of validity of the seizure order; which property has been entrusted for safekeeping and to whom; sale of confiscated proceeds of crime and the price at which they were sold; property relinquished for without compensation; destroyed property;
- 4) Data on the person whose property is subject to seizure or confiscation – first and last names, personal identification number and address in case of a natural person; or, the company name, headquarters and identification number and the capacity of the person whose proceeds of crime are subject to seizure or confiscation;
- 5) Restitution of seized property – the case number of the final court decision dismissing the confiscation request and the date when it became final; the case number of the final judgment and date when it became final and scope of the seized property subject to restitution;
- 6) Confiscated instrumentalities of crime, items seized in criminal and misdemeanour proceedings and property pledged to the court as security.

Separate records are kept of provisional measures, seized movable property, confiscated proceeds of crime, confiscated instrumentalities of crime, items seized in criminal and misdemeanour proceedings and property pledged as security. The records are kept in the form of a book compris-

ing numbered pages and in electronic form. Regulations on the office operations of state administration authorities apply accordingly to the keeping of records of seized/confiscated property.

3.3.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

3.3.4.1. Procedures for the Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

The court delivers its decision to the Property Administration, which immediately issues an order to enforce one of the following measures:

- 1) Prohibition of use and disposition of immovable property and the annotation of the injunction in the real estate register;
- 2) Order to the bank to withhold payment of the amount of money subject to the provisional measure;
- 3) Prohibition of disposition of a claim arising from a contractual relation;
- 4) Prohibition of alienation and encumbrance of company stakes and shares and the annotation of the injunction in the public records.

The relevant authority shall without delay forward the above order, together with the ruling on the provisional measure, to the administrative authority charged with keeping the real estate register or the legal person keeping a public register or records of property subject to the provisional measure or the one in which the person subject to the provisional measure holds an account.

This authority or legal person is under the obligation to act on the relevant authority's order in accordance with the law governing its remit.

3.3.4.2. Parties to the Confiscation Enforcement Procedure

Article 54 of the LCPC (2015) lays down that the management of seized and confiscated property under Article 53 of that Law shall be conducted by the competent authority, either *ex officio* or pursuant to a court decision, with the diligence of a prudent owner and in a manner ensuring the maximum preservation of the value of the property at minimum cost. Article 53 of the LCPC (2015) reads as follows:

“Management of seized and confiscated property shall comprise:

- 1) Enforcement of provisional measures imposed in accordance with this Law or the Criminal Procedure Code;
- 2) Enforcement of decisions ordering seizure of movable property and confiscation of proceeds of crime;
- 3) Enforcement of decisions ordering the confiscation of proceeds and instrumentalities of crime and items seized in criminal or misdemeanour proceedings and of decisions on property pledged as security;
- 4) Valuation of the seized/confiscated property for the purpose of managing it;
- 5) Lease of the seized/confiscated property or its entrustment for management in accordance with this Law;
- 6) Relinquishment of the seized/confiscated property for use without compensation;
- 7) Safekeeping, storage, sale and restitution of seized or confiscated property;
- 8) Deposition of seized/confiscated funds and funds obtained from selling confiscated property

- in accordance with the law;
- 9) Destruction of confiscated proceeds of crime in accordance with the law;
 - 10) Keeping of records of confiscated proceeds of crime and court proceedings in which they were confiscated, as well as of provisional measures;
 - 11) Other duties in accordance with the law.

The police shall assist the competent authority in enforcing the decisions under paragraph 1, sub-paragraphs 1, 2 and 3 of this Article.”

3.3.4.3. Protection of the Rights of Third Parties

Confiscation of the proceeds of crime does not affect the rights to that property of third parties who have obtained them in good faith. Under Article 49 of the LCPC (2015), a bona fide third party may join in the procedure conducted in accordance with this Law before the decision on the confiscation of the proceeds of crime becomes final.

A bona fide third party may file a motion to terminate or modify the provisional measure, take part in the hearings, file an appeal against a ruling imposing a provisional measure, or ordering the seizure of movable property or confiscation of the proceeds of crime, and take other actions in accordance with this Law.

A bona fide third party shall forfeit his right to seek the settlement of his claims from the confiscated proceeds of crime in the event he fails to join in the procedure conducted in accordance with this Law before the decision to confiscate the proceeds of crime becomes final if he is aware that such a procedure has been initiated.

A bona fide third party, whose claim or another right has been upheld in the final judgment on confiscation of proceeds of crime, may file a request with the relevant authority within two months from the day of receipt of the final judgment, seeking the satisfaction of his claim or realisation of another right arising from the confiscated proceeds of crime.

The decision on the confiscation of the proceeds of crime does not preclude the exercise of social and child protection rights, in accordance with the law governing social and child protection.

Under Article 48 of the LCPC (2015), which deals with the protection of injured parties, in the event a final decision upholding an injured party’s property claim has been rendered in criminal proceedings regarding a crime referred to in Article 2(1) of that Law or in civil proceedings, the court shall, on the motion of the injured party, order the satisfaction of the property claim from the confiscated proceeds of crime in its confiscation ruling unless the property claim is otherwise settled by the time the ruling becomes final.

Where a civil proceeding on the settlement of a property claim arising from a criminal offence referred to in Article 2(1) of the LCPC (2015) is pending, the court shall, on the motion of the injured party, order in its confiscation ruling that funds equalling the value of the property claim are to be set aside and kept separately or deposited onto a designated account.

In the event a judgment upholding the property claim is delivered in proceedings referred to in Article 48(2) of the LCPC (2015), enforcement shall be conducted on the set aside or deposited funds unless the property claim has been settled otherwise.

3.4. KOSOVO*

Confiscation of proceeds of crime is governed in Kosovo* by systemic laws, notably the Criminal Code (CC, 2019) and the Criminal Procedure Code (CPC), as well as the Law on Extended Powers for Confiscation of Proceeds¹⁴³ (LCPC), which has the character of a *lex specialis*.

3.4.1. Financial Investigations

3.4.1.1. Initiation of a Financial Investigation

The legal grounds for confiscating proceeds of crime in Kosovo* are laid down in Article 92 of the CC (2019). Under paragraph 1 of this Article, property or assets deriving from crime shall be confiscated pursuant to the law and in a procedure set out in the Kosovo* CPC. Under paragraph 2 of this Article, in the event confiscation is impossible, the court shall order the perpetrator to pay an amount equivalent (proportionate) to the value of the proceeds or confiscate any of his property of equivalent value, in accordance with the Kosovo* CPC. Financial investigations are regulated within the CPC provisions on criminal investigations (Articles 267-285).

Under Article 1 of the LCPC (2018), this Law governs extended powers for confiscation of property when the procedures laid down in the CPC do not suffice.¹⁴⁴ Extended confiscation under the LCPC shall apply to the property of persons convicted of grave criminal offences incriminated by the Kosovo* CC or other laws or any criminal offence for which a financial threshold of €10,000 has been prescribed as a requirement for initiating a financial investigation (Art. 2).

Investigations of financial crimes are conducted by the state prosecutors *ex officio* and exclusively by the Kosovo* Special Prosecution Office, pursuant to the Law on the Special Prosecution Office (2008) and in accordance with the CPC (Code No. 06/L-74).

Under the CPC, customs officers and Tax Administration of Kosovo* (TAK) officers, known as the “financial police”, are charged with investigating and identifying crimes. Pursuant to the Law Amending the Law on the Prevention of Money Laundering and Financing of Terrorism (2013), these officers are also entitled to investigate these offences under the supervision of the state prosecutor. The Customs Administration and TAK each designate an official charged with liaising with the Special Prosecution Office and other prosecution offices.

Pursuant to the Law Amending the Law on the Prevention of Money Laundering and Financing of Terrorism (2013), the Financial Intelligence Unit of Kosovo* (FIU) is an independent national institution charged with investigating, collecting and analysing information about potential money laundering and financing of terrorism. Article 3 of this Law specifies that crimes under this law and the basic law shall be within the exclusive jurisdiction of the Kosovo* Special Prosecution Office, established under the Law on the Special Prosecution Office of Kosovo* (2008).

The Specialised Anti-Corruption Unit (SUAK) operates as part of the Kosovo* Police Investigation Department and investigates crimes together with the Special Prosecution Office. The SUAK’s main duty is to investigate and combat high-profile corruption in Kosovo*.

143 *This designation is without prejudice to positions on status, and is in line with UNSC 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

The original name of the law is *Ligj për kompetencat e zgjeruara për konfiskimin e pasurisë së përfituar me vepër penale*.

144 The legislator’s intention was to (voluntarily) align this Law with EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

The Anti-Corruption Agency is an independent institution charged with preventing and combating corruption among senior officials and other various important professions. Its duties and remit are based on the Anti-Corruption Law (2005).

Reasonable suspicion that someone has committed a financial crime is the general requirement for initiating an investigation. Based on the evidence and information they collect, the police draw up a criminal report specifying the evidence and information and forward it to the state prosecutor.

Under Article 102(1) of the CPC, the state prosecutor may initiate an investigation on the basis of a criminal report filed by the police or another source where there is reasonable suspicion that a criminal offence prosecuted *ex officio* has been committed, is being committed or will be committed in the near future. The state prosecutor issues a decision on the initiation of the investigation pursuant to Article 104 of the CPC.

Like every criminal investigation, this investigation is initiated by a ruling adopted by the state prosecutor (under Article 104 of the CPC) or the Special Prosecution Office. All special evidentiary actions must be ordered by the pre-trial judge.

Under Article 17 of the LCPC, a state prosecutor may initiate a financial investigation if he has reasonable suspicion that an application can be made for the “verification” of property under Article 4 of this Law. The timeframe for launching such an investigation is extremely broad: from the moment of adoption of the ruling initiating the (criminal) investigation until the expiry of five years from the day the judgment convicting the owner of the property becomes final. Under paragraphs 3 and 4 of Article 17 of the LCPC, state prosecutors conducting financial investigations have all the powers and are entitled to take all the actions under the CPC. The relevant basic court shall assign a judge to the confiscation investigation proceedings if the CPC requires that a decision be issued by the court.

3.4.1.2. Goals of Financial Investigations

Under the systemic laws, the main goal of a financial investigation is to prevent and suppress financial crime, as a factor destabilising the economy and the economic and security system of the state. Actions and measures undertaken within a financial investigation depend on the offence at issue: e.g. money laundering (Art. 302), tax fraud (Art. 307), customs fraud and other grey economy crimes under the CC (2019).

During the investigation, the prosecutor is under the obligation to clearly and precisely determine the amount of money derived from crime and its location (whether it is in the possession of the defendant, a third party or a bank). Items, property, evidence and money found by the police during lawful search or arrest may be seized on the order of the state prosecutor for a maximum of five days and, thereafter, on the order of the pre-trial judge on the motion of the prosecutor.

Under Articles 17, 4 and 3(1.7) of the LCPC, financial investigations shall be conducted with a view to collecting evidence that will facilitate the “verification” of the property, i.e. its real origin.

3.4.1.3. Specificities of Conducting Financial Investigations

Under Article 69 of the CPC, which governs police investigations, the police shall investigate criminal offences in accordance with Article 70, which regulates police investigative actions in detail, and report such crimes to the state prosecutor as soon as possible. Criminal proceedings may be preceded by initial actions undertaken by the police or collection of information in accordance with Article 84 of the CPC that deals with measures taken before the initiation of criminal proceedings.

Under Article 84(1) of the CPC, the state prosecutor may authorise or request of the pre-trial judge to authorise the implementation of covert or technical investigative measures pursuant to Articles 86-100 of the CPC if he has reasonable suspicion of the past, present or future commission of a crime under Article 90 of the CPC.

Pursuant to an order issued by the pre-trial judge, the state prosecutor may access all institutions (e.g. banks, the Tax Administration, the real estate register, et al.) where the property is located in order to establish the facts decisive and relevant to the crime.

These institutions and natural persons must make all data, information and evidence in their possession available on the order of the pre-trial judge.

The record of the seized items specifies the location at which they were found and includes their description. If necessary, their identity will be established in another manner. A seizure receipt is issued for the seized items.

The pre-trial judge may levy a fine amounting to 50% of the value of the items, property, evidence or money subject to his order in the event the person or authority safekeeping them refuses to surrender them to the authorised police officer charged with executing the order. The person or authority may appeal the fine or effect its revocation by complying with the order of the pre-trial judge (as prescribed in detail by the CPC provisions on seizure in Article 112, paragraphs 10 and 11).

The LCPC uses an extremely specific term “verification” of property. The goal of the financial investigation is to collect evidence and information that are to provide an answer to the fundamental question: whether the property is legal under the definition of property in Article 3(1.5) of this Law.¹⁴⁵

3.4.1.4. Completion of the Financial Investigation and Use of Its Results

When the financial investigation and procedure are conducted pursuant to the CPC, the prosecutor includes in the indictment the motion for the seizure of the proceeds of crime and evidence substantiating it. Article 241 (1(9)) of the CPC specifies that the indictment may indicate the type of property to be seized and provide its description and the relevant evidence justifying the seizure.

In the event the financial investigation is conducted pursuant to the LCPC (2018), Article 4 of that Law entitles the prosecutor to file a request for the “verification” of property within five years from the day the judgment finding the defendant guilty of a crime the LCPC applies to becomes final. In his request, the prosecutor specifies all the information about the property, submits evidence of ownership of that property, and notifies the defendant and third parties that may have legal interests in that property.

145 This provision defining property is evidently crucial for properly understanding the concept of the LCPC, including of a financial investigation. Under it, the defendant’s property entails property of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments, as provided for in paragraph 2 and sub-paragraphs 2.1 and 2.2 of Article 8 of this Law, evidencing title to or interest in such assets, which:

1.5.1. the defendant acquired in the ten (10) years preceding the day of initiation of the investigation of the crime referred to in Article 2 of this Law; or

1.5.2. is owned or possessed by a third party on behalf or to the advantage of the defendant; or,

1.5.3 the defendant transferred to a third party, who was not a bona fide purchaser, or subsequently successively transferred to other third parties, who were not bona fide purchasers, in the ten (10) years preceding the day of initiation of the investigation of the crime referred to in Article 2 of this Law.

The prosecutor is entitled to discontinue the investigation at any time, if the evidence shows that there is no reasonable suspicion that a specific person committed the criminal offence at issue, that the offence is not prosecuted *ex officio*, et al. (Art. 158(1) CPC).

The prosecutor may reopen an investigation he had discontinued if new evidence emerges. The prosecutor issues rulings on the discontinuation and reopening of an investigation.

As a rule, financial experts are asked to perform examinations with respect to these crimes. The pre-trial judge issues a ruling ordering an expert examination. The expert acts on the order without delay and files a written report on his examination (e.g. a financial analysis report under Article 148) to the state prosecutor pursuant to Article 138 of the CPC. Article 148 thoroughly governs the financial expert examination and audit procedure; police officers and other professionals may also act in the capacity of experts, with the primary goal of ascertaining how the defendant acquired the property and the value of the property.

3.4.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)

3.4.2.1. Legal Framework for Provisional Measures

Under the CPC provisions on seizure, the seizure of instrumentalities and proceeds of crime may be effected by the prosecutor and subsequently, pursuant to a court decision. Under Article 112(1) of the CPC, items subject to seizure denote items that may be used as evidence in criminal proceedings or that constitute instrumentalities of crime and proceeds of crime under the law. Items, property, evidence and money found by the police during a lawful search or arrest may be seized on the order of the state prosecutor for a maximum of five days and, thereafter, on the order of the pre-trial judge on the motion of the prosecutor.

The CPC also provides for a number of possibilities of freezing the proceeds of crime. Under Article 264(1) of the CPC, the state prosecutor may issue an order preventing the sale, transfer of ownership or withdrawal from an account of any asset referred to in the ensuing two paragraphs.

Under paragraph 2 of this Article, these assets shall comprise any building, immovable or movable property or asset regarding which the state prosecutor has clear articulable evidence supporting a reasonable suspicion that they constitute:

- a) Instrumentalities of the crime under investigation,
- b) Evidence of the crime under investigation, or
- c) Proceeds of the crime under investigation.

Under paragraph 3 of that Article, these assets shall comprise every financial account under investigation in which the defendant may be holding funds that constitute:

- a) Proceeds of the crime under investigation, or
- b) Instrumentalities of the ongoing crime under investigation.

The state prosecutor's order under Article 264 of the CPC shall have the following effect:

- a) Any bank or financial institution, which is issued an order under this Article, shall immediately prevent any further activity from occurring with the bank account specified in the order. The bank shall not be liable to the owner of the bank account for compliance with the order under this paragraph.
- b) Any other party, which is issued an order under this Article, shall take all reasonable measures to comply with the order.

The state prosecutor may issue the above order only once and it will be effective only for 72 hours from the moment of issuance. In it, the state prosecutor describes the building, immovable or movable property, financial account and assets and orders the recipient to prevent their sale, transfer of ownership or withdrawal from the account within the next 72 hours. The prosecutor also specifies the time of issuance and the period of validity of his order. The state prosecutor may issue such an order only if he also submits a request to the pre-trial judge for an attachment order under Article 265 of the CPC.

The state prosecutor issuing an order to freeze the assets referred to in Article 264 of the CPC shall immediately submit a request to the pre-trial judge to issue an order on the attachment of the assets specified in his freezing order.

Article 8 of the LCPC governs in detail the provisional freezing measures, which are called "temporary restraint orders" and comprise a number of measures prohibiting any property-related transactions (sale, transfer, gifting, et al.).

Article 10 of the LCPC lays down the provisional measures for securing property. It needs to be noted that the legislator linked the seizure of property and its management in this provision, providing not only for the preservation and maintenance of the property, but also for its sale, comingling, et al.

3.4.2.2. Motion or Request for Provisional Measures

Under Article 268 of the CPC, the state prosecutor shall file a written request to the pre-trial judge to order provisional measures to secure the seized buildings, immovable and movable property and assets that will be used as evidence or may be subject to confiscation.

Under Article 273 of the CPC, the pre-trial judge may dismiss the prosecutor's request for provisional measures under Article 268 of the CPC, order them or modify them.

Under the LCPC, the prosecutor is first entitled to himself issue a temporary restraint order prohibiting specific persons from engaging in any transactions regarding the property at issue (Article 8(1)). It needs to be noted that in addition to freezing, the temporary restraint order may involve the seizure of the impugned property, pursuant to paragraph 6 of that Article. Such an order shall be effective for a maximum of seven days, within which the prosecutor is to file a confiscation request.

3.4.2.3. Ordering of Provisional Measures

Under the CPC, the court may not impose provisional measures *ex officio*, in the absence of the state prosecutor's request.

The court issues a decision on the request for a provisional measure. Under Article 271 of the CPC, the defendant may file an objection against the request for a provisional measure referred to in

Article 268. All parties with legal interests in the buildings, immovable or movable property or assets enumerated in Article 268(4) of the CPC are entitled to file an objection against a provisional measure requested by the state prosecutor (Article 270, CPC).

The pre-trial judge rules on the provisional measure request submitted by the state prosecutor in accordance with Article 273 CPC within 14 days from the day of submission provided that no objections have been filed against it (Art. 272).

The courts' functional jurisdiction depends on the stages of the criminal proceeding (investigation, indictment and plea, main hearing [trial], and appeal stages) and the instance at which the trial is held.

The pre-trial judge orders the provisional measures requested by the state prosecutor in accordance with Article 268 of the CPC. The decision ordering or modifying the provisional measure requested by the state prosecutor specifies the:

- a) Building, immovable or movable property or asset to be subject to the provisional measure;
- b) Reasonable suspicion that the building, immovable or movable property or asset constitutes:
 - Proceeds of the crime under investigation; or,
 - Instrumentalities of the crime;
- c) Substantial likelihood that the building, immovable or movable property or asset will be unavailable for confiscation at the end of the criminal proceedings or that it will be used during the commission of a criminal offence unless provisional measures are taken;
- d) The proposed measures under Article 269 of the CPC.

The order shall also contain an explanation of the reasons why the objections filed under Articles 270 or 271 of the CPC were dismissed or why the provisional measures were modified due to these objections. The order may set a reasonable period of validity of the provisional measure. The order shall be forwarded to the Agency for the Management of Seized and Confiscated Property (Assets Management Agency, AMA) within 10 days. The AMA shall execute the order within 15 days from the day of issuance, unless an objection referred to in Article 273(4) is filed.

In the event the court dismisses the state prosecutor's request for a provisional measure under Article 268 of the CPC, it shall order the restitution of the property to its owner or possessor and forward the order to the AMA within 10 days. The AMA shall execute the order within 15 days from the day of issuance, unless an objection is filed. The objection shall stay the execution of the order under this Article pending a decision taken by the panel in a non-adversarial hearing.

Seized paper and coin money shall be photographed and kept in a safe location. The authorised police officers and state prosecutor shall keep records of the photographs and the chain of custody of the paper and coin money. Seized money in a bank account shall be kept in the bank account under court authority.

There is no norm on the principle of proportionality either in the Constitution or the CPC, but it is applied in criminal proceedings and within procedural actions. As far as procedural law principles are concerned, the equality of arms is also provided for by law and applied in these proceedings.

At the end of the hearing, the court may order the management of the seized property by the AMA (pursuant to the Law on the Management of Seized and Confiscated Property, 2016) only if it is satisfied that it will be unable to maintain authority over the property under an attachment order.

With the exception of the frozen funds or attached financial account, the defendant or user of the property may continue using the property, but is not allowed to sell it or otherwise transfer ownership of such property.

Under Article 10 of the LCPC, if the application for a final restraint order includes seized property, the state prosecutor specifies in it the temporary measures required to secure the property. Article 12(2) lays down that the court shall issue a decision ordering a provisional measure and, if necessary, order the sale of the seized property if so required by the prosecutor.

3.4.2.4. The Appeal Procedure

Long-term attachment orders may be appealed with the appeals court within 10 days from the day of issuance. An appeal shall not stay the execution of the long-term attachment order.

All persons with legal interest in buildings, movable and immovable property or assets referred to in Article 268(4) of the CPC are entitled to file an objection to the provisional measures requested by the state prosecutor. If no appeals by the defendant or third parties are submitted within 14 days from the day of submission of the request, the pre-trial judge may issue a written order under Article 273 with or without holding a hearing on it. The pre-trial judge may decide to schedule a hearing before he orders the provisional measures under Article 273 in the event the defendant or a third party raises an issue of fact requiring the presentation of evidence or clarification of the facts.

As noted above, under Article 273 of the CPC, the pre-trial judge may dismiss the prosecutor's request for provisional measures under Article 268 of the CPC, order them or modify them.

The objection to the ordered provisional measures under this Article is ruled on by a panel in a non-adversarial hearing. The objection shall stay the enforcement of the order under this Article pending the decision of this panel (Art. 273(3), CPC).

3.4.3. Confiscation Procedures

3.4.3.1. Types of Procedures and Their Basic Characteristics

The Kosovo* CC, CPC and LCPC provide for various confiscation procedures.

First, there is the ordinary confiscation procedure, which is conducted pursuant to the CPC and in which the proceeds of crime or property of equivalent value are confiscated pursuant to Article 92 of the CC.

Second, there is the extended confiscation procedure, which is conducted pursuant to the LCPC and involves the confiscation of the property of people convicted of grave crimes or crimes generating proceeds exceeding €10,000 (Art. 2).

Third, the LCPC provides for non-conviction based confiscation of the proceeds of defendants or third parties in case of their death, flight, disability or mental disorder (Art. 19).

3.4.3.2. Procedural Rights of Persons Whose Property is Subject to Confiscation

The CPC regulates these issues with respect to the ordinary confiscation procedure. Parties to whom proceeds of crime have been transferred, including representatives of business organisations and other legal persons, are summoned for questioning during the investigation and at the main hearing and are cautioned that the proceedings will be conducted notwithstanding their absence.

Representatives of business organisations and other legal persons are examined at the main hearing after the defendant. This provision applies also to other recipients of proceeds of crime who have not been summoned as witnesses.

During the determination of the proceeds of crime, recipients of proceeds of crime and representatives of business organisations or other legal persons are entitled to propose evidence and, with the approval of the individual or presiding judge, examine the defendant, witnesses and experts.

The exclusion of the public from the main hearing does not apply to recipients of the proceeds of crime, including the representatives of business organisations or other legal persons (Art. 279, CPC).

Under Article 12(2) of the LCPC, defendants and all third parties are entitled to prove the legal origin of their property. In the non-conviction based confiscation procedure, the defendants, third parties and legal successors may be represented by a legal counsel either of their own choosing or by one appointed *ex officio* by the court (Art. 19(2)).

3.4.3.3. Confiscation Decisions

In the ordinary confiscation procedure, the court may order confiscation of the proceeds of crime in a judgment finding the defendant guilty, a court admonition or a ruling ordering drug or alcohol abuse treatment.

The CPC also provides for a special regime for confiscating the proceeds of corruption-related crimes referred to in Article 281. This regime has the features of the non-conviction based confiscation procedure because it provides for the confiscation of the proceeds of crime when the criminal proceedings have not ended in a conviction.

In the extended confiscation procedure, the court issues a final restraint order (Articles 12 and 13, LCPC). The LCPC thoroughly governs the procedure, including the requirements that must be met for the issuance of such orders and their content, the deadlines, the relevant institutions and other issues.

The LCPC also provides for non-conviction based confiscation. Article 20 sets out the conditions under which proceeds of crime are subject to confiscation in case of the defendant's death, flight, disability or mental disorder.

3.4.3.4. The Appeal Procedure

The right to appeal a court order is provided in Article 274(7) of the CPC. The defendants and third parties are entitled to appeal confiscation judgments with the appeal court within 15 days. Under Article 284(7) of the CPC, an appeal may also be filed against a court confiscation order.

Under the LCPC, the parties (the defendant, the state prosecutor and third parties claiming legal interest in the property at issue) are entitled to appeal the court decision on the "verification" of the property (Art. 6(6)). The appeal has suspensive effect and is ruled on in accordance with the CPC. No extraordinary legal remedies may be filed against "verification" decisions (Art. 6(8)). The LCPC also provides for appeals of final restraint orders; such appeals, which may be filed within 15 days from the day of issuance, do not have suspensive effect (Art. 16).

Finally, appeals of confiscation decisions rendered in non-conviction based confiscation procedures are filed in accordance with the LCPC (Art. 19(11)).

3.4.3.5. Notification of the Assets Management Agency or Other Entities

Under Article 284(6) of the CPC, the court shall issue an order to the AMA instructing it to sell, liquidate or retain the confiscated building, immovable or movable property or asset.

3.4.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

3.4.4.1. Procedures for the Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

Court decisions ordering seizure or confiscation of proceeds of crime shall be served on the parties to the proceedings, third parties and the AMA as soon as they become enforceable (in case of seizure decisions) or final (in case of confiscation decisions).

Enforcement of judgments regarding confiscation of proceeds of crime and property claims is performed by the relevant court in accordance with enforcement procedure regulations.

In the event confiscation is ordered as additional punishment in the judgment, the proceeds automatically become state property. Certified copies of the judgment are forwarded without delay to the AMA, which may either sell the item or hand it over for use to the Government. The money obtained from selling the item is credited to the state budget.

The LCPC lays down that the police shall enforce seizure decisions and look after and maintain the seized property (Art. 8(6)).

Article 22 of the LCPC lays down that the order on the confiscation of proceeds shall be enforced in accordance with the provisions of that Law and the CPC.

3.4.4.2. Parties to the Confiscation Enforcement Procedure

The AMA, police, banks, the real estate agency and other property registers are parties to the confiscation enforcement procedure.

3.4.4.3. Protection of the Rights of Third Parties

Under Article 270 of the CPC, all parties with legal interest in buildings, immovable or movable property or assets are entitled to file objections against provisional measures requested by the state prosecutor.

In the event the buildings, immovable or movable property or assets are alleged to be instrumentalities of crime, the person who filed the objection must prove that:

- a) He had not known that they constituted instrumentalities of crime,
- b) He could not have known that they constituted instrumentalities of crime,
- c) They will not be used again as instrumentalities of crime,
- d) The requested provisional measure would unreasonably jeopardise his interests.

In the event the buildings, immovable or movable property or assets allegedly constitute proceeds of crime, the person objecting to the provisional measure must prove that:

- a) He had had property interest in the buildings, immovable or movable property or assets for over six months prior to their seizure,
- b) He had paid the market rate for the property interest in the buildings, immovable or movable property or assets,
- c) He had been unaware of the acts in furtherance of the criminal offence,
- d) The suspect or defendant had been unable to use, transfer or otherwise access the buildings, immovable or movable property or assets, and
- e) The requested provisional measure would unreasonably jeopardise his interests.

In his objection, the applicant may propose less restrictive provisional measures or that the court not order a provisional measure at all. He is also entitled to contest the accuracy of the description of the buildings, immovable or movable property or assets at issue.

Third parties are entitled to file appeals challenging confiscation with the appeals court even after the confiscation decision becomes final.

Third parties are also entitled to file objections during the execution of court decisions, pursuant to the law on the enforcement procedure.

The LCPC also provides for the protection of the rights of third parties. Article 4(3) lays down the obligation to serve copies of the property verification applications on the third parties that may have legal interest in the property subject to verification. Under Article 5(3) of the LCPC, third parties are entitled to attend property verification hearings. They are also entitled to present evidence proving their ownership, legal origin and bona fide acquisition of the property (Art. 5(6)).

Third parties are entitled to appeal court final restraint orders within 15 days from the day of service. Such appeals have suspensive effect (Art. 6(6)). Third parties are also entitled to present evidence, before the final restraint order is issued (Art. 11).

Third parties are entitled to appeal final restraint orders within fifteen days from the day of service. These appeals do not have suspensive effect (Art. 16).

The LCPC protects the rights of third parties who may be subject to non-conviction based confiscation proceedings also by laying down that the court shall appoint them a lawyer *ex officio* in the event they do not have one (Art. 19). Under paragraph 13 of that Article, in case an asset is no longer available for restitution, the defendant or the third party shall be entitled to compensation of damages caused by wrongful extended confiscation, in accordance, *mutatis mutandis*, with the relevant provisions of the Criminal Procedure Code.

3.5. NORTH MACEDONIA

In North Macedonia, asset seizure is governed by systemic substantive and procedural laws – the Criminal Code (2018) and the Criminal Procedure Code (2018). The latter governs, inter alia, extended confiscation.

3.5.1. Financial Investigations

3.5.1.1. Initiation of a Financial Investigation

Financial investigations are governed by the Criminal Procedure Code (2018). In the pre-investigation stage, some of the actions are taken not only by the public prosecution office, but also by other authorities, such as the financial police and the State Anti-Corruption Commission. Their remits are regulated by separate laws on these institutions and anti-corruption.¹⁴⁶ When they suspect or the evidence they collect indicates that a financial crime is at issue, they refer the case to the public prosecution office.

Financial investigations are usually triggered by reasonable suspicion that one of the following offences incriminated by the CC (2018) has been committed: money laundering and acquisition of other proceeds of crime (Art. 273), trafficking (Art. 277), smuggling (Art. 278) and tax evasion (Art. 279). Rather than specifying a financial threshold with regard to these offences, the CC uses terms such as “substantial value” or “larger amount of money”.

The financial police perform criminal investigations pursuant to a *lex specialis* (the Financial Police Law, FPL, 2018) and their by-laws. The CPC (2018) applies as a *lex generalis* to issues not regulated by the FPL.

Under Article 283 of the CPC (2018), financial (and other) investigations are initiated on the basis of a criminal report or notification forwarded by the police. The pre-investigation proceedings are conducted by the public prosecutor, pursuant to the CPC (2018). The judicial police are under the obligation to act on the public prosecutor’s orders and guidelines and report back to him. The implementation of the CPC (2018) provision envisaging the establishment of judicial police within the public prosecution offices is still pending. Specialised financial crime investigators have been used by the Special Prosecution Office only for investigating the crimes within the “phone wiretapping” case.¹⁴⁷

Pursuant to the CPC (2018), financial investigations shall be ordered in enactments initiating ordinary criminal investigations. Namely, criminal proceedings are launched by the issuance of an order to initiate a criminal proceeding or by undertaking the first investigative action before an order to open an investigation is issued. Therefore, the CPC (2018) applies as the *lex generalis*, but individual actions undertaken early in the pre-investigative stage are regulated by the FPL (2018).

146 Among others, the Financial Police Law (2014), the Law on the Prevention of Corruption and Conflicts of Interest (2019), et al.

147 Under the proposed amendments to the Law on the Public Prosecution Office, the Special Prosecution Office and its units shall operate as part of the national Public Prosecution Office. This will also apply to the engagement of financial investigators.

3.5.1.2. Goals of Financial Investigations

Under the FPL (2018), financial investigations are conducted in order to:

- Protect the financial interests of North Macedonia by identifying and investigating crimes of money laundering and acquisition of other proceeds of crime, trafficking, smuggling, tax evasion and other criminal offences generating proceeds of crime of substantial value;
- Protect the financial interests of the European Union by identifying and investigating crimes related to the use of EU programme funding North Macedonia receives from the EU budget;
- Financial investigations initiated by the financial police or the Customs Administration are conducted with a view to filing reports of crimes prosecuted *ex officio* with the relevant public prosecutors;
- Submit an initiative with the relevant authority to launch a tax or another procedure to determine and collect taxes and other public dues.

3.5.1.3. Specificities of Conducting Financial Investigations

The Criminal Code (2018) incriminates, inter alia, crimes generating proceeds of substantial value and requiring financial investigations, while the CPC governs the apprehension and reporting of their perpetrators, collection of evidence, and other measures and activities that facilitate the unimpeded implementation of criminal proceedings and are undertaken either *ex officio* or on the order of the public prosecutor.

Under the FPL (2018), financial investigations shall include the following activities:

- Identification and investigation of crimes prosecuted *ex officio* under the CC (2018), such as money laundering and acquisition of other proceeds of crime (Art. 273), trafficking (Art. 277), smuggling (Art. 278), and tax evasion (Art. 279),
- Collection and analysis of data on cash transactions,
- Pre-investigative and other measures where there are grounds for suspicion that these crimes have been committed,
- Tracing of the money to identify the crimes incriminated by law,
- Forensic computer analysis of seized computer systems and other electronic devices;
- Submission of reports of crimes prosecuted *ex officio* to the relevant public prosecutors;
- Submission of initiatives to the competent authorities to launch tax and other procedures to identify and collect outstanding public dues;
- Coordination, launching of initiatives and submission of criminal reports.

Under Article 200 of the CPC (2018), where there is reasonable suspicion that a person has received, held, transferred or otherwise disposed of proceeds of crime in his bank account and the proceeds are relevant to the investigative procedure or are subject to confiscation under the law, the court may, on the reasoned request of the public prosecutor, issue a ruling ordering the bank or another financial institution to make available documents and data on the person's bank account or other financial transactions in the event they may be used as evidence in criminal proceedings.

The public prosecutor's request pertains to the data on all funds received, held, transferred or otherwise disposed of by the said legal or natural person.

In the pre-investigative and investigation stages, a decision on the public prosecutor's request is taken by the preliminary procedure judge, while, once the indictment is filed, it is taken by the court that will hold the main hearing. **The preliminary procedure judge must rule on the request within**

12 hours. In the event the judge dismisses the public prosecutor's request, the latter shall immediately refer his request to the trial chamber to rule on it without delay. The trial chamber shall render its decision on the request within 24 hours.

On the reasoned motion of the public prosecutor, the preliminary procedure judge may issue a ruling in writing, ordering a bank or another financial institution to monitor the financial transactions of the person at issue and regularly report to the public prosecutor, at intervals specified in the ruling.

In emergencies, the public prosecutor may impose special measures requiring of banks and other financial institutions to make available information about a person's financial transactions or property **without a court order**. In such cases, the prosecutor shall **immediately notify the preliminary procedure judge** thereof and the latter **should issue the order within 72 hours**. In the event the judge refuses to issue the order, the public prosecutor returns the data to its sender without opening them beforehand.

Whilst performing the tasks within his remit, the public prosecutor shall cooperate with the financial police, the Ministry of Internal Affairs, the Public Revenue Office, the Customs Administration, the State Anti-Corruption Commission, the State Audit Office, the State Foreign Currency Inspection Office, the State Market Inspectorate and other inspection authorities, state authorities and legal persons charged with preventing and identifying crimes under the law.

State administrative and other authorities, institutions and legal persons collecting data and keeping records in accordance with the law are under the obligation to make the data available to the public prosecutor or the financial police on request. The public prosecutor is entitled to cooperate and exchange information in the field of financial crime with prosecutors of other countries, foreign police forces and state bodies, as well as organisations in foreign countries and international, organisations pursuant to bilateral and ratified international treaties on issues within his remit. The financial police cooperate also with the European Anti-Fraud Office (OLAF).

The public prosecution office may request access to all databases relating to the financial transactions of a legal or natural person, but it will be provided with such access only with a court order.

On the basis of a court order, the prosecution office may gain access to all databases, bank accounts, records and data of the revenue administration, cadastre, securities registry, registry of motor vehicles and other databases.

The law does not restrict the institutions from which the public prosecutor may seek information relevant to a pre-investigation or investigation, as long as his request is based on a valid order issued by the competent judge.

Under Article 287 of the CPC (2018), state and local self-government authorities, organisations, and legal and natural persons shall make available all data to the public prosecutor on his request. All these entities are under the obligation to make available the data, documents and bank account information required during the proceeding to the public prosecutor immediately, within 30 days at the latest. The prosecutor may also request the seizure of money, securities, items and documents that may be used as evidence. The public prosecutor may ask the court to issue a fine ranging between €2,500 and €3,500 payable in Macedonian Denars against entities that failed to comply with his request. In practice, the public prosecutors are granted access to various databases comprising information relevant to their financial investigations as soon as the court issues the order.

3.5.1.4. Completion of the Financial Investigation and Use of Its Results

The CPC (2018) lays down the legal grounds for determining the circumstances in which the proceeds of crime were acquired and other facts regarding the detection, monitoring and identification of the proceeds of crime. Namely, the same deadlines prescribed for other procedures apply to financial investigations, with the exception of investigations of organised crime offences, where different deadlines apply.

Evidence and data the prosecutor needs in order to decide whether to file an indictment or abandon prosecution are collected during the investigation procedure. During the investigation procedure, the public prosecutor is under the obligation to collect both inculpatory and exculpatory evidence. To that end, the public prosecutor issues an order on the implementation of the investigation procedure, in which he specifies the suspect's personal data, the description and statutory qualification of the crime, the circumstances to be examined, the investigation activities to be undertaken and the persons to be interviewed. If there is reasonable suspicion that the suspect acquired his property or funds through the commission of a crime, the public prosecutor may request of the court to place the property and funds under court supervision and order one of the provisional measures to temporarily secure them.

The public prosecutor ends the investigation procedure when he assesses that the facts of the case have been sufficiently clarified for him to file an indictment or discontinue the procedure.

The public prosecutor is under the obligation to notify the superior public prosecutor in the event he fails to complete the investigation procedure within six months from the day the order to conduct it was issued; if the case is complex, the latter is entitled to extend the deadline by six months. Exceptionally, the Chief Public Prosecutor may extend the deadline by another three months. The Chief Public Prosecutor may extend the deadline by another six months in case the investigation concerns organised crime (such offences are usually financial in character and generate proceeds of crime). The public prosecutor is under the obligation to notify the suspect and his defence counsel before the deadline that he will request an extension of the investigation.

The public prosecutor is under the obligation to file an indictment or discontinue the investigation procedure within 15 days from the day of its completion and the expiry of the deadlines. The CPC (2018) sets a 30-day deadline for organised crime cases.

Financial police officers may seize items, computer data, letters, telegrams and other mail, files, documents, technical recordings and other items that are subject to seizure under the Criminal Code or may serve as evidence in criminal proceedings. They shall turn them over for safekeeping to the prosecution office, a body designated under a separate law or ensure their safekeeping in another manner. This procedure is linked to and regards the seizure of *instrumenta et producta sceleris* (objects with which the crime was committed or the products created by its commission). Seizure orders are issued by the court, on the motion of the financial police. The seizure procedure usually begins where the items are found; they shall be inventoried, described and, if necessary, their identity shall be established in another manner. The person whose property is seized shall be issued a receipt. The seizure, safekeeping and handling of seized items are implemented in accordance with the CPC (2018).

Based on the collected evidence giving rise to suspicion that the suspect committed a crime within the remit of the financial police and of his criminal liability, the financial police file a criminal report with the public prosecutor, to which they attach the evidence. Documents, items, sketches, photographs, reports on undertaken actions, minutes, official memos, statements and other evidence are submitted together with the criminal report.

The financial police are an authority specialising in financial investigations and they operate independently from the Ministry of Internal Affairs. However, the CPC also allows other entities, not just the financial police, to file reports of financial (and any other) crimes to the relevant public prosecutor.

Financial police officers are entitled to inspect items, business premises, offices of state authorities and institutions vested with public powers and other legal persons and specific documents with a view to collecting data requisite for the successful implementation of criminal proceedings. They shall turn them over for safekeeping to the prosecution office, a body designated under a separate law or ensure their safekeeping in another manner.

The order to seize an item is issued by the court, on the motion of the financial police.

The seizure, safekeeping and handling of seized items are implemented in accordance with the CPC (2018).

3.5.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)

3.5.2.1. Legal Framework for Provisional Measures

These provisional measures are governed by Articles 194-204 of the CPC (2018). Throughout the criminal proceedings, the court may, on the request of the public prosecutor, order the freezing or seizing of property or items subject to confiscation under the CC (2018), order their attachment or another requisite provisional measure to prevent the use, alienation or disposition of that property or items.

Pursuant to a reasoned request of the public prosecutor, the court may order a financial institution or another legal person to temporarily suspend a specific financial transaction or seize specific assets.

When the requirements for the confiscation and extended confiscation of proceeds of crime and property are fulfilled, the court shall, on the motion of the public prosecutor, order provisional measures, that may also apply to third parties in case of suspicion that the proceeds of crime had been transferred to them or that they had not provided adequate compensation when they acquired them.

3.5.2.2. Motion or Request for Provisional Measures

The public prosecutor must specify the following in his motion on the seizure of property or objects subject to seizure under the Criminal Code (2018):

- A brief description and statutory name of the criminal offence;
- Description of the property or objects derived from the commission of a criminal offence;
- Information about the person who owns the property or the objects;
- Evidence substantiating the suspicion that the property or objects constitute proceeds of crime; and,
- Reasons corroborating the likelihood that the seizure of the property or objects will be impeded or obstructed by the end of the criminal proceedings.

3.5.2.3. Ordering of Provisional Measures

The court may order provisional measures itself (*ex officio*).

The provisional measures are ordered by the preliminary procedure judge before and during the preliminary procedure and by the court hearing the case once the indictment is filed. The preliminary procedure judge shall rule on the request immediately, within 12 hours from the moment he receives it. In the event the preliminary procedure judge dismisses the public prosecutor's request, the latter shall immediately refer his request to the trial chamber. The trial chamber shall rule on the request within 24 hours from the moment of its receipt. In its ruling ordering the measure, the court shall specify the kind and value of the property or objects subject to seizure under the CC (2018) to be seized and the validity of the order.

The preliminary procedure judge's decision ordering provisional measures may be appealed within 24 hours but it shall not stay the enforcement of the decision.

The appeal is ruled on by the trial chamber referred to in Article 25(5) of the CPC (2018).

If there is a risk of delay, the judicial police may attach or seize the property and objects subject to seizure under the CC (2018) and take other necessary provisional measures to prevent their use, alienation or disposition.

The public prosecutor must be notified of these measures immediately and they must be approved by the preliminary procedure judge within 72 hours. The measures shall be revoked in the event the preliminary procedure judge does not approve them and the seized property and objects shall immediately be returned to the person they have been taken from. The provisional measures may remain in effect until the completion of the first-instance criminal proceedings.

If an item of an unknown owner or origin is found in the possession of the defendant, the authority conducting the procedure shall post a description of it on the bulletin board of the relevant authority of the municipality in which the defendant resides and of the municipality in which the crime had been committed.

3.5.2.4. The Appeal Procedure

Provisional measures ordered in the preliminary procedure shall be revoked *ex officio* in the event the investigation procedure is not initiated within three months from the day the decision ordering them was adopted. Before the expiry of that deadline, the provisional measures may be revoked *ex officio* by the court or on the request of the public prosecutor or any interested party in the event they prove that the measures are unnecessary or unwarranted given the gravity of the crime or the financial circumstances of the person subject to them or his dependants, or that circumstances indicate that the seizure of the property or objects subject to seizure under the CC (2018) will not be impeded or precluded by the end of the criminal proceedings.

All actions taken with respect to the property and objects subject to provisional measures after the submission of the request for their revocation shall be void.

Property seized as *instrumenta et producta sceleris* during the criminal proceedings shall be returned to its owner or holder in the event the proceedings are discontinued and there are no grounds for seizing/confiscating it.

3.5.3. Confiscation Procedures

3.5.3.1. Types of Procedures and Their Basic Characteristics

Article 97 of the CC (2018) lays down the grounds for the confiscation of the proceeds of crime. Under that Article, no-one may retain direct or indirect proceeds of crime. Proceeds of crime are confiscated under a court decision determining the commission of a crime under the terms laid down in the CC (2018). The court issues a confiscation ruling in a procedure specified by law also when criminal proceedings cannot be conducted against the perpetrator of the crime for factual or legal reasons (e.g. he is unavailable, has absconded, has died in the meantime or the state he is in is refusing to comply with the extradition request). The confiscated property will be returned to other countries pursuant to the conditions set in ratified international treaties.

The confiscation of property and proceeds of crime of legal persons is governed by Article 98 of the CC (2018). In the event their proceeds of crime or property cannot be confiscated because they had ceased to exist before the enforcement of the confiscation ruling, the founder(s) of the legal person or undertakings, stockholders or stock companies shall be obligated to pay an amount of money corresponding to the value of the acquired proceeds of crime. Article 100-a of the CC (2018) applies accordingly to the confiscation of objects from legal persons.

The procedures for confiscating proceeds of crime and objects et al. are governed by Chapter XXXIV of the CPC (2018).

Court decisions ordering the confiscation of property and proceeds of crime may be appealed by all persons entitled to appeal them under the law. The appeals must be filed within eight days from the day of service of the decision.

The court shall apply the extended confiscation procedure in accordance with the requirements laid down in the CC (2018) in the event the defendant fails to prove he had acquired the property legally within one year from the day the main hearing commenced. In the event the court delivers a first instance judgment in less than one year from the day the main hearing commenced – when the legal requirements for ordering extended confiscation are fulfilled – the court shall deliver a supplementary judgment ordering extended confiscation. The latter judgment may be appealed.

The court shall adopt a decision ordering extended confiscation of the property or proceeds of crime under the terms prescribed in the CC (2018) also against third parties who fail to prove, within two years from the day the extended confiscation procedure commenced, that they had given compensation corresponding in value to that of the property or proceeds of crime. This procedure is conducted on the motion of the public prosecutor. Third parties are entitled to appeal the court's decision with the immediately superior court within eight days from the day of service.

Under Article 530 of the CPC (2018), property and proceeds of crime shall be determined during the criminal proceedings. During the proceedings, the public prosecutor is under the obligation to collect evidence and examine circumstances of relevance to the determination of the property and proceeds of crime and propose measures under Article 202 of the CPC (2018).

During his determination of the value of the property or proceeds of crime, the public prosecutor may request any information from other state authorities, financial institutions or legal and natural persons, which are under the obligation to make such information available to the prosecutor without delay. Where there is reasonable suspicion that the property has been moved abroad, the court is under the obligation to issue an international notice.

3.5.3.2. Procedural Rights of Persons Whose Property is Subject to Confiscation

Third parties (their representatives in case they are legal persons), to which proceeds of crime or property subject to confiscation have been transferred, shall be summoned for questioning during the preliminary procedure and the main hearing. They shall also be notified that the proceedings will be concluded notwithstanding their absence. Representatives of legal persons shall be examined at the main hearing after the defendant. The same shall apply to third parties to whom proceeds of crime have been transferred and who have not been summoned as witnesses. Third parties and representatives of legal persons, to which proceeds of crime have been transferred, are entitled to propose evidence during the determination of the origin of the property and, with the approval of the presiding judge, examine the defendant, witnesses and experts. In the event that the court finds during the main hearing that requirements have been fulfilled to confiscate the property and proceeds of crime from the third parties, the public prosecutor shall propose the adjournment of the main hearing and the summoning of the third parties or representatives of the legal persons, to which the property or proceeds of crime have been transferred. An injured party instructed during the criminal proceedings to institute civil proceedings for the settlement of his property claim may seek the satisfaction of his claim from the confiscated proceeds by initiating a dispute within six months from the day the decision referring him to civil court becomes final and provided he seeks the satisfaction of his claim within three months from the day the decision upholding his claim becomes final.

An injured party, who did not file a compensation request in criminal proceedings, may seek compensation for the confiscated property in the event he had initiated a dispute before the civil court within three months from the day the judgment ordering the confiscation of the proceeds of crime becomes final, but not later than two years from the day the confiscation decision becomes final, and provided he seeks compensation for the confiscated property within three months from the day the decision upholding his claim became final.

3.5.3.3. Confiscation Decisions

Under the CPC (2018), the court may confiscate proceeds of crime *ex officio*.

The court may order the confiscation of property and proceeds of crime in a judgment declaring the defendant guilty, a caution or a decision imposing a correctional or security measure. The court shall specify the property, objects i.e. monetary value subject to confiscation. A certified copy of the judgment or decision shall be served on the parties to whom the property or proceeds of crime have been transferred and representatives of legal persons (in the event their property is subject to confiscation).

The extended confiscation procedure is conducted when criminal proceedings cannot be conducted against the perpetrator of the crime for factual or legal reasons. In such cases, the court shall, on the motion of the public prosecutor, conduct an extended confiscation procedure if the requirements under the CC (2018) are fulfilled. The requisite evidence is presented in such proceedings on the motion of the public prosecutor. The court issues a ruling ordering the confiscation of property if it is proven that it constitutes proceeds and instrumentalities of crime or objects subject to seizure under the CC (2018). The individual whose property, proceeds of crime or objects are subject to seizure is entitled to appeal the ruling with the immediately superior court within eight days.

Under Article 529 of the CPC (2018), objects subject to seizure under the CC (2018) will be seized even if the criminal proceedings do not end with a judgment finding the defendant guilty. A decision to that effect shall be taken by the authority before which the proceeding was being conducted at the moment it was discontinued or ended. Such a decision is also taken by the court if the judgment

finding the defendant guilty does not include a confiscation order. A certified copy of the decision is served also on the owner of the objects, if his identity is known. The owner of the objects is entitled to appeal the decision. The appeal is ruled on by the trial chamber (referred to in Article 25, CPC, 2018).

In the event a convicted offender fails to return the proceeds of crime, compensate damages or fulfil other obligations specified in his probationary judgment by the specified deadline, the court that had tried him in the first instance shall conduct a proceeding to revoke the probation on the motion of an authorised plaintiff or *ex officio*. The judge shall hear the convicted offender if he is available and conduct the requisite inquiries to establish the facts and collect evidence of relevance to its decision, whereupon the presiding judge shall schedule a chamber session and notify the plaintiff, convicted offender and injured parties thereof. The session will be held notwithstanding the absence of the duly summoned parties to the proceeding and the injured parties. In the event the court finds that the convict had not fulfilled the obligation ordered in the judgment, it may deliver a judgment extending the deadline for the fulfilment of the obligation, relieve the person from such an obligation or replace it with another appropriate obligation prescribed by the law, or recall the probation and order the enforcement of the sentence. In the event the court finds that there are no grounds for adopting any of these decisions, it shall issue a ruling discontinuing the proceeding for revoking the probation.

3.5.3.4. The Appeal Procedure

Article 412 (paragraphs 2 and 3) and Articles 420 and 424 of the CPC (2018) apply to appeals of confiscation decisions. Under Article 449 of the CPC (2018), a motion for the repetition of the criminal proceedings contesting the confiscation decision may be submitted by the person whose property is subject to extended confiscation.

3.5.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

3.5.4.1. Procedures for the Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

Confiscation shall be enforced within 30 days from the day the judgment ordering it becomes final.

The enforcement order is issued by the court that rendered the first-instance judgment. Enforcement is implemented against the property and proceeds of crime specified in the court decision. In the event such enforcement is partly or entirely impossible, enforcement shall be implemented against the remaining property of the person at issue.

The law does not provide for filing objections against enforcement orders. Compulsory enforcement is discontinued only in the event the person voluntarily returns the property or pays the value of the proceeds of crime into the court's account. Legal enactments concluded upon the commission of the crime, with a view to reducing the value of the property to be confiscated, are null and void. Objections may be filed only against decisions ordering enforcement against the remaining property. They may be filed within eight days with the immediately superior court, which shall rule on them within eight days.

The manner of enforcement of confiscation decisions is governed by the Criminal Code (2018) and the Criminal Procedure Code (2018). Provisions of the Law on the Enforcement Procedure also apply.

Under Article 98 of the CC (2018), direct and indirect proceeds of crime comprising money and/or movable or immovable property of value and any other assets and material or non-material rights, shall be confiscated from the perpetrator. If that is impossible, the perpetrator's other property, the value of which corresponds to that of the proceeds of crime, shall be confiscated.

Under Article 100-a of the CC (2018), no-one may retain or acquire property derived from crime. Instrumentalities of crime shall be confiscated from the perpetrator regardless of whether they belong to him or a third party, if so required in the interest of general safety or human health.

Actual or intended instrumentalities of crime may be confiscated if there is a risk that they may be used to commit another crime.

Items owned by a third party shall not be confiscated, unless that party knew, or could have or should have known that they were actual or intended instrumentalities of crime.

The court shall rule on the confiscation of these items in a procedure prescribed by law also if there are factual or legal impediments to conducting criminal proceedings against the perpetrator.

The application of this measure does not prejudice the right of third parties to seek compensation of damages from the perpetrator of the crime.

The items may be returned to another state, under the conditions stipulated in ratified international treaties.

3.5.4.2. Parties to the Confiscation Enforcement Procedure

Banks and other financial institutions where the perpetrator has an account subject to the measure, the real estate registry and other institutions charged with keeping land books, are under the obligation to enforce the court ruling without delay and preclude any fund transfers and financial transactions.

3.5.4.3. Protection of the Rights of Third Parties

Proceeds of crime shall be confiscated also from third parties, who had not given adequate compensation in exchange for them and who could have or should have known that they had derived from crime. Items declared cultural heritage or a natural rarity, as well as those injured parties have a personal attachment to, shall be confiscated from third parties, whether or not they knew, or should have or could have known that they had derived from crime and whether or not they had given adequate compensation in exchange for them. The seized items shall be returned to the injured parties and, in the absence of injured parties, they shall become the property of the state. In the event the injured party's property claim has been upheld during the criminal proceedings, the court shall order the confiscation of the proceeds of crime in the event the value of the latter exceeds the value of the claim.

3.6. SERBIA

The legal framework governing the confiscation of the proceeds of crime in Serbia comprises the so-called systemic laws, notably the Criminal Code (CC, 2016) and the Criminal Procedure Code (CPC, 2014), as well as the Law on the Confiscation of Proceeds of Crime¹⁴⁸ (LCPC, 2016), which is a *lex specialis* and the only law governing extended confiscation of all property presumed to constitute proceeds of crime under this Law.

3.6.1. Financial Investigations

3.6.1.1. Initiation of a Financial Investigation

The financial investigation, as a special form of investigation, is provided for by the Law on the Confiscation of Proceeds of Crime (LCPC, 2016) and is conducted within the scope defined by that Law as a *lex specialis*. It governs extended confiscation of the proceeds of the crimes enumerated in Article 2 of the Law.

Individual forms of financial investigations are governed by and defined within the CPC (2014) provisions on evidentiary actions, which specify the requirements and scope of their implementation. They include, for instance, ordering of examinations by financial experts, checking of accounts and suspicious transactions, computer search of data, collection of data from banks, the customs and tax authorities, et al.

Under the Law on the Organisation and Jurisdiction of Government Authorities in the Suppression of Organised Crime, Terrorism and Corruption (2016), which has been in force since 1 March 2018, the Organised Crime Prosecution Office and special departments of higher public prosecution offices (the four regional prosecution offices under this Law) may form financial forensic units staffed by financial forensic experts.

Pursuant to this Law, financial forensic experts shall denote individuals assisting the prosecutors in analysing the movement of money and financial transactions for the purpose of criminal prosecution.

Under the LCPC (2016), financial investigations shall be launched where there are grounds for suspicion that the owner or another individual possesses substantial property deriving from crime. The LCPC defines the concepts of the owner and proceeds of crime. It does not set a financial threshold as a requirement for initiating a financial investigation; the amount of “substantial property” is determined in practice.

Under the CPC (2014), evidentiary actions related to financial investigations may be conducted where there are grounds for suspicion that a criminal offence has been committed. Special evidentiary actions may be implemented if the requirement under Article 162 of the CPC (2014) is also fulfilled; this Article enumerates the crimes regarding which special evidentiary actions (e.g. computer search of data) may be undertaken.

Under the LCPC, financial investigations are initiated on the order of the prosecutor. The CPC does not specify by which enactment a financial investigation is launched. It lays down that evidentiary actions in criminal investigations shall be taken on the order of the prosecutor, but requires that special evidentiary actions be ordered by the judge for preliminary proceedings (2016).

148 The original name of the Serbian LCPC is *Zakon o oduzimanju imovine proistekle iz krivičnog dela*.

3.6.1.2. Goals of Financial Investigations

In ordinary criminal proceedings, evidentiary actions, including those regarding the defendant's financial transactions and property, are performed with a view to identifying the elements of the acts of crime and determining the proceeds of crime and any transfer of such proceeds to third parties. Under Article 538(2) of the CPC (2014), the authority conducting the proceedings is under the obligation to collect evidence and examine all circumstances of relevance to determining the proceeds of crime throughout the proceedings.

Articles 17-22 of the LCPC (2016) are devoted to financial investigations conducted within the extended confiscation procedure. Under Article 17(2) of the LCPC (2016), financial investigations shall be carried out to collect evidence of the property, legal income, way of life and living expenses of the defendant, cooperating defendant or bequeather, of the property inherited by the legal successor, and evidence of property and compensation paid for its transfer to a third party.

3.6.1.3. Specificities of Conducting Financial Investigations

All ordinary evidentiary actions envisaged by the CPC (2014) are permitted and applied. Under Article 286 of the CPC (2014), during the pre-investigation proceedings, the police may independently undertake operational measures, collect evidence and information and, inter alia, inspect documents of state authorities, companies, shops and other legal persons, as well as seize items and documents. The police are under the obligation to notify the public prosecutor of their actions immediately, no later than 24 hours after performing them.

There are no special restrictions regarding the implementation of ordinary evidentiary actions, except those concerning the conditions in which they may be undertaken, i.e. their lawfulness.

Ordinary evidentiary actions under the CPC (2014) include checking of accounts and suspicious transactions (Article 143). This action may be undertaken only if there are grounds for suspicion that a crime warranting at least four years' imprisonment or another crime referred to in paragraph 1 of this Article, including money laundering and corruption crimes, has been committed.

Under this Article, checking shall entail collection of data, and monitoring and suspension of suspicious transactions.

This action is implemented by a bank or another financial organisation on the order of the prosecutor.

The collected data must be destroyed in the event the prosecutor does not initiate a criminal proceeding (instituted by an order to conduct an investigation) within six months from the day he examined the material (Art. 144, CPC (2014)).

Under Article 145 of the CPC (2014), a public prosecutor may ask the court, i.e. the judge for preliminary proceedings to order monitoring of suspicious transactions. The validity of such orders is three months and may be extended for another three months.

The deadline for destroying the material is the same as the one prescribed in Article 144 except that the ruling ordering the destruction is issued by a judge for preliminary proceedings.

Under Article 146 of the CPC (2014), the judge for preliminary proceedings may, on the reasoned request of the prosecutor, order a bank or another financial organisation to suspend a suspicious transaction.

The validity of the suspension measure may not exceed 72 hours; in the event it includes non-work days, the measure may be extended by a maximum of 48 hours, on the order of the court.

The CPC (2014) provides for the following special evidentiary actions that may be taken within financial investigations: simulated sale, purchase and business service provision and bribery (Arts. 174-177); computer search of data (Arts. 178-180) and controlled delivery (Arts. 181-182).

The implementation of these special evidentiary actions, like all other special evidentiary actions, is subject to a special restricted regime. They are ordered by the judge for preliminary proceedings on the reasoned request of the prosecutor where there are grounds for suspicion that a crime referred to in Article 162 of the CPC (2014), including, inter alia, organised crime, money laundering and corruption crimes, has been committed. Their duration is limited and they have to be reviewed by the statutory deadlines. For instance, the duration of a simulated business deal may not exceed six months; actions concerning crimes under the jurisdiction of the special prosecution office may last up to one year. Computer search of data may last up to nine months. All special evidentiary actions are reviewed every three months, when new reasoned orders on their extension have to be issued.

As noted above, Articles 17-22 of the LCPC (2016) govern financial investigations. The LCPC does not enumerate the evidentiary actions that may be undertaken by the Financial Investigation Unit (FIU). It lays down that search of the premises of owners or other persons and searches of persons shall be conducted on the order of the court. It defines the obligation of state and other authorities, public services and organisations to provide the FIU with access to and forward them the records, documents, data and other items that may serve as evidence in financial investigations.

All evidentiary actions provided for by the CPC (2014), including special evidentiary actions, may be undertaken during a financial investigation given that Article 4(4) of the LCPC (2016) lays down that the CPC shall apply accordingly, all the more since paragraph 2 of this Article sets out that evidence collected in criminal proceedings may be used in the (extended) confiscation procedure.

The FIU, which was established under the LCPC and started operating in 2008, is entitled to independently collect data from various databases under the general provisions of the CPC (2014, Art. 286); in the vast majority of cases (95%), it collects such data on the order of the prosecutor.

The FIU has direct access to the databases of the Republican Geodetic Authority, the Business Registers Agency, some public companies and bank accounts of legal and natural persons.

Data from the Administration for the Prevention of Money Laundering and Tax Administration are obtained on request.

The FIU has a contact list of staff in business banks charged with cooperating with it directly.

Under Article 20(1) of the Law on the Organisation and Jurisdiction of Government Authorities in the Suppression of Organised Crime, Terrorism and Corruption (2016), the Tax Administration – Tax Police, Customs Administration, National Bank of Serbia, Administration for the Prevention of Money Laundering, Business Registers Agency, Central Securities Depository and Clearing House, the State Audit Institution, the Republican Geodetic Authority, the Anti-Corruption Agency, the Republican Pension and Disability Insurance Fund, the Republican Health Insurance Fund, the Republican Directorate for Property of the Republic of Serbia and the Public Procurement Administration must each designate at least one liaison officer, who is charged with cooperation and forwarding of the

data of these authorities and organisations to the Organised Crime Prosecution Office and special anti-corruption departments of the higher public prosecution offices in order to facilitate the prosecution of crimes referred to in that Law.

Paragraph 2 of this Article also provides for the designation of liaison officers in other authorities and organisations, at the request of the relevant public prosecutor.

If necessary, the liaison officers, who have the status of civil servants, may be temporarily reassigned to the Organised Crime Prosecution Office or a special anti-corruption department of a higher public prosecution office.

Rather than enumerating the entities, the CPC lays down the general legal obligation of state and other authorities to provide the requested data on the order of the police, prosecution offices or courts.

During the pre-investigation stage, the police in most cases collect specific data on the request of the prosecutor. According to Article 286 of the CPC (2014) mentioned above, the police may independently collect specific data but they must notify the prosecutor thereof.

Under Article 48 of the Law on Banks (2015), the banks are not under the obligation to keep bank secrets in the event they are disclosing data on the request of, inter alia, the relevant court, the police and the authorities charged with combatting organised crime and preventing money laundering, in accordance with the regulations.

Under the Article 6 of the LCPC (2016), the FIU, formed within the Ministry of Internal Affairs, shall perform financial duties *ex officio* and pursuant to a decision of the public prosecutor, while, under Article 7 of that Law, state and other authorities, organisations and public authorities shall forward the requested data to the FIU without delay. The provisions concern financial investigations conducted under the LCPC, the goal of which is described above.

The public prosecutor may order a bank or another financial organisation to forward to the FIU data on the balances on the business and personal accounts and his safety deposit boxes (Art. 22, LCPC, 2016).

3.6.1.4. Completion of the Financial Investigation and Use of Its Results

The CPC does not lay down deadlines for the completion of financial investigations, which are formally not conducted under that name, but through evidentiary actions. The duration of a financial investigation depends on the provisions governing individual evidentiary actions. In ordinary criminal proceedings, evidence may be collected until the decision taken in them becomes final.

Under Article 16a of the LCPC (2016), together with a report on a crime referred to in Article 2 of that Law, the police shall forward to the public prosecutor data on the property of the suspect and third parties collected during the pre-investigation proceedings.

Under the LCPC (2016), a financial investigation may be conducted until the completion of the confiscation procedure.

The LCPC (2016) does not lay down the requirements for discontinuing a financial investigation, but it may be inferred from the text of the Law that a financial investigation shall be discontinued when a judgment acquitting the defendant of a crime referred to in Article 2 of the LCPC becomes final.

The LCPC (2016) does not envisage the obligation to order an expert examination. Where necessary, expert examinations are sought by the prosecutor or the court, depending on the stage of the proceeding, pursuant to the general provisions on expert examinations in the CPC (2014), which do not include any special provisions on examinations by financial experts.

Financial investigation results are used in ordinary criminal proceedings and may serve as evidence of elements of a criminal offence and to substantiate the confiscation of proceeds of crime. The information on the property of the defendant and members of his family household are specified in the indictment.

Articles 23 and 38 of the LCPC (2016) specify the contents of the prosecutor's seizure and confiscation requests. In addition to the property subject to seizure/confiscation, the prosecutor practically lists the financial investigation results in his reasoning, presenting evidence of the property and the circumstances indicating reasonable suspicion that the property derives from crime or indicating a manifest disproportion between the defendant's property and his legal income.

3.6.2. Provisional Measures (Freezing and Seizing Proceeds of Crime)

3.6.2.1. Legal Framework for Provisional Measures

Under Article 540 of the CPC (2014), the court is entitled to order provisional measures to secure the proceeds of crime *ex officio*. These measures are ordered in accordance with the law governing enforcement and security of claims, specifically, the Enforcement and Security Law (2017). Such measures may be ordered if there is a risk that the subsequent seizure/confiscation of the proceeds will be impeded or obstructed by the defendant.

Under Article 24 of the LCPC (2016), before the court rules on a seizure request, the public prosecutor may issue an injunction to prevent disposal of assets or an order on the seizure of movable property if there is a risk that the owner shall dispose of proceeds of crime.

Under the LCPC (2016), the prosecutor's injunction/order shall remain in the effect until the court rules on his seizure request, but not more than three months.

The court must rule on the prosecutor's seizure request within three months from the day of submission. It shall uphold the request provided that the following requirements set out in Article 25 of the LCPC (2016) are met: there is a risk that the subsequent seizure of the property would be impeded or obstructed and there are grounds for suspicion that the natural or legal person committed a crime referred to in Article 2 of the LCPC; there are grounds for suspicion that the property derived from crime; and, the value of the impugned property exceeds 1.5 million dinars (RSD).

The court shall issue a ruling dismissing the public prosecutor's request if the above requirements are not met.

3.6.2.2. Motion or Request for Provisional Measures

In ordinary proceedings, the court issues a ruling ordering a provisional measure *ex officio*. The prosecutor does not have to file a motion for it, wherefore he can express it orally or in writing, without following a prescribed form.

The LCPC (2016) lays down that the prosecutor's seizure request will contain the following information: the owner's data, the statutory name of the criminal offence, the property to be seized,

evidence of the property, circumstances indicating reasonable suspicion that the property derives from crime and reasons justifying seizure, i.e. the risk that the owner will dispose of the property.

During its subsequent review of the measure, the court may replace it by a measure temporarily prohibiting the owner from disposing of the seized property.

3.6.2.3. Ordering of Provisional Measures

As already noted, provisional measures may be ordered in ordinary proceedings and pursuant to the LCPC (2016).

Under the LCPC (2016), the court may not order provisional measures *ex officio*. It can replace a seizure measure by a measure prohibiting the owner from disposing of the seized property during its review of the measure or on the motion of the Assets Management Directorate, as well as on the motion of the owner. The court must review the provisional measure at least once a year, until the confiscation ruling is issued.

In ordinary criminal proceedings, the court adopts a decision imposing a provisional measure. Depending on the stage of the proceeding, such a decision is adopted by a judge for preliminary proceedings, an individual judge or judicial panel. The CPC (2014) does not lay down a specific procedure, except with respect to proceeds of crime transferred to third parties. Third parties shall be examined during the preliminary proceedings or at the main hearing. The decision ordering a provisional measure may be adopted in their absence provided they had been duly summoned (Art. 539).

In the ordinary proceedings, these measures are ordered by the judge for preliminary proceedings, and, once the indictment has been issued, by an individual judge or a judicial panel, depending on the crime, i.e. whether or not the defendant is tried in summary proceedings (in which individual judges rule on crimes warranting less than eight years' imprisonment).

In the proceeding under the LCPC, the provisional measure is ordered by a judge for preliminary proceedings or the presiding judge at the main hearing, again depending on the stage of the proceeding. The same rules apply to the issuance of rulings prohibiting owners from disposing of their property, which are issued in this proceeding.

Practically all the measures provided for by the Enforcement and Security Law (2017) may be ordered. Any measure securing a pecuniary or non-pecuniary claim may be imposed, notably: seizure of or prohibition of alienation of immovable or movable property, seizure of funds i.e. freezing of bank accounts, prohibition of encumbrance of immovable property.

The principle of proportionality is primarily ensured by the Enforcement and Security Law (2017), under which provisional measures are imposed in ordinary criminal proceedings. For instance, when selecting the means and objects of enforcement, the court must strive to ensure that the means and objects of enforcement or security are proportionate to the amount of the obligation. This practically means that, when a court is ordering a provisional measure of seizure in criminal proceedings, it must bear in mind the value of the property suspected of being proceeds of crime and order a proportionate provisional measure.

Pursuant to the Enforcement and Security Law (2017), instead of imposing a provisional measure, the court may order the defendant to deposit a guarantee; or it may allow the defendant to deposit a guarantee in lieu of the imposed provisional measure.

Seizure is not ordered in the extended confiscation procedure under the LCPC (2016) to secure a future claim related to the outcome of the criminal proceeding, determination of guilt and the amount of the proceeds of crime, but to ensure that the confiscation of suspected proceeds of crime or criminal activity is not impeded or obstructed.

This is why the LCPC (2016) refers to the Enforcement and Security Law (2017), notably in the part regarding management of seized/confiscated property. There are provisions which protect specific rights in the spirit of this Law. For instance, under paragraphs 2 and 3 of Article 26 of the LCPC (2016), in its ruling ordering seizure, the court may specify that it does not apply to property that should be exempted from seizure under the rule on the protection of bona fide acquirers and it may allow the owner to use part of the seized property if its seizure would bring into question his sustenance or that of his dependents under the law. Furthermore, the court may not seize property exempted from enforcement under the law governing enforcement and security.

In ordinary criminal proceedings, provisional measures may be ordered against a defendant and a suspect and against any other person to whom the proceeds of crime have been transferred without compensation or for compensation manifestly not corresponding to their real value.

The LCPC (2016) provides for seizure of property of a broader scope of persons that own it, notably, the defendants or suspects, cooperating defendants, including protected witnesses and cooperating criminals, bequeathers, legal successors and third parties.

Under Article 3(1(7)) of the LCPC, a “bequeather” shall denote a person against whom criminal proceedings have not been instituted or have been discontinued due to his death, but it has been ascertained during criminal proceedings against other persons that he had committed a criminal offence under Article 2 of this Law in complicity with them.

It needs to be noted that, under the LCPC (2016), the prosecutor’s seizure request is forwarded without delay to the owner of the property, who is instructed that he may respond to the request within 15 days and submit evidence of the way in which he acquired the property. The court renders a decision on the prosecutor’s request when it receives the owner’s response, within a maximum of eight days from the day of expiry of the deadline by which the owner was to have responded.

3.6.2.4. The Appeal Procedure

In ordinary criminal proceedings, a ruling ordering a provisional measure may be appealed within three days by the prosecutor and/or the suspect/defendant. The appeal does not stay the enforcement of the ruling. An appeal of a decision adopted by the judge for preliminary proceedings is ruled on by the judicial panel of the same court in a non-adversarial hearing, while an appeal of a decision adopted by an individual judge or panel is ruled on by the second-instance court.

Under the LCPC (2016), the public prosecutor and the owner of the property may appeal a ruling ordering seizure with the second instance court within eight days from the day of service. The appeal does not stay the enforcement of the ruling. The owner may submit, together with the appeal, evidence of the legal origin of the property to be seized.

The second-instance court rules on the appeal of the ruling at a hearing, to which it summons the owner, his defence counsel or proxy and the public prosecutor.

The summons to the hearing and the appeal are served to the known address or headquarters of the opposing party, along with the caution that it will be held notwithstanding their absence.

The hearing shall be held within a maximum of 15 days from the day the appeal was submitted. The absence of duly summoned parties shall not prevent the holding of the hearing.

As a rule, initiated hearings shall be conducted without adjournment or postponement.

3.6.3. Confiscation Procedures

3.6.3.1. Types of Procedures and Their Basic Characteristics

Under Article 91 of the CC (2016), no-one may retain proceeds of crime. Pursuant to the CC (2016) and the CPC (2014), in its decision finding a person guilty of committing a criminal and unlawful act, the court shall *ex officio* order the confiscation of his proceeds of crime. The CC (2016) and the relevant CPC (2014) provisions apply only to the confiscation of direct proceeds of the crime that is the subject of the proceedings.

Money, valuable items and all other proceeds of crime shall be confiscated. In the event confiscation is impossible, the perpetrator shall be obligated to surrender other property or pay an amount of money corresponding to the value of the proceeds of crime. This amendment of the legislation, adopted in 2009, provides for value-based (equivalent) confiscation in ordinary criminal proceedings.

Proceeds of crime shall be confiscated also from a legal or natural person to whom they had been transferred without compensation or for compensation manifestly not corresponding to their real value.

Proceeds of crime acquired for another shall also be confiscated.

The proceeds of crime of a person who has died cannot be confiscated in ordinary criminal proceedings. Proceeds of crime of a fugitive can be confiscated in case he is tried *in absentia*.

The LCPC (2016) provides for an extended confiscation procedure and governs the remits of authorities charged with identifying, seizing/confiscating and managing seized/confiscated property.

As already noted, in the meaning of this Law, proceeds of crime denote property manifestly disproportionate to the legal income of its owner, i.e. any property in the owner's possession which he had acquired before committing the crime he is tried for (LCPC, 2016). Given that confiscation of property under the LCPC (2016) is possible only in the event the defendant has been found guilty of a crime this Law applies to by a final judgment, his seized property is restituted to him in the event he is acquitted.

Under the general provisions of the CPC (2014), proceeds of crime are determined *ex officio*, during the criminal proceedings, at the main hearing. Depending on the stage of the proceeding, the acting authority is under the obligation to collect evidence and examine circumstances relevant to determining the proceeds of crime.

Third parties (their representatives if they are legal persons), to whom proceeds of crime may have been transferred without compensation or for compensation manifestly not corresponding to their real value and which thus may be subject to confiscation, shall be summoned for questioning during the preliminary proceedings and the main hearing. They shall be cautioned in the summons that the proceedings will be notwithstanding their absence. Third parties shall be examined before the defendant at the main hearing. They are entitled to propose evidence and, with the approval of the presiding judge, question the defendant, witnesses, experts and expert advisers.

In the event the court finds that confiscation of proceeds of crime from these third parties is possible only during the main hearing, it will adjourn the main hearing and summon those third parties (or their representatives if they are legal persons).

Exclusion of the public from the main hearing does not apply to third parties.

Under the LCPC (2016), the confiscation procedure is initiated on the request of the prosecutor, within six months from the day of service of the final judgment finding the individual guilty of a crime referred to in Article 2 of that Law.

This procedure is conducted at the main hearing before a panel of the competent court. The LCPC (2016) provides for a preparatory hearing, at which the parties propose evidence and present facts regarding the prosecutor's request. There are no provisions on the exclusion of the public.

The LCPC (2016) provides for confiscation of proceeds of crime from their owner, whom Article 3 of that Law defines as a suspect or defendant, a cooperating defendant, including protected witnesses and cooperating criminals, a bequeather, a legal successor and a third party.

Under the LCPC (2016), a "bequeather" shall denote a person against whom criminal proceedings have not been instituted or have been discontinued due to his death, but it has been ascertained during criminal proceedings against other persons that he had committed a criminal offence under Article 2 of this Law in complicity with them. This practically means that property of the heir(s) of the bequeather, i.e. a defendant who has not been tried or against whom criminal proceedings have been discontinued on account of his death, may also be subject to confiscation.

3.6.3.2. Procedural Rights of Persons Whose Property is Subject to Confiscation

Persons whose property is subject to confiscation enjoy all the procedural rights enshrined in the CPC (2014), such as the right to attend the main hearing in ordinary proceedings, the right to a defence, to right to propose evidence and the right to take part in adversarial proceedings. Where proceeds of crime are to be confiscated from third parties, both legal and natural persons, they must be duly summoned to the main hearing and cautioned that the hearing will be held notwithstanding their absence.

The main hearing within the extended confiscation procedure under the LCPC (2016) is preceded by a preparatory hearing, to which the public prosecutor, the owner and his proxy are summoned. The summons are served at the parties' known addresses, along with a caution that the hearing will be held notwithstanding their absence. The summons shall be considered served in the event they are served directly on the owner or his attorney in fact. In the event the summons cannot be served in this manner, the court shall assign an *ex officio* attorney in fact to represent the owner during the confiscation procedure.

The summons shall be served on the owner at least eight days before the preparatory hearing.

In the summons, the court shall invite all the summoned persons to present facts and propose evidence substantiating or disputing the public prosecutor's request at the preparatory hearing.

The main hearing shall be scheduled within three months from the day of the preparatory hearing. The parties, both the defendant and the prosecutor, have that period at their disposal to collect evidence. In the event they have difficulty collecting evidence, the main hearing may be postponed for another three months.

The main hearing opens with the public prosecutor presenting his request. As a rule, an initiated hearing shall be conducted without adjournment or postponement.

In the event the request concerns the property of the defendant or cooperating defendant, the public prosecutor shall present evidence of property in their possession, their legal income and circumstances indicating the manifest disproportion between their property and their legal income. The defendant and cooperating defendant, or their proxies, shall respond to the public prosecutor's claims.

In the event the request concerns the property of a legal successor or a third party, the public prosecutor shall present evidence that the property the legal successor had inherited constitutes proceeds of crime i.e. that the property had been transferred to the third party without compensation or for compensation manifestly disproportionate to its real value, with a view to precluding confiscation. The legal successor and third party, or their attorneys-in fact, shall respond to the public prosecutor's claims.

At the main hearing, the court shall question all summoned witnesses and hear all admissible evidence.

3.6.3.3. Confiscation Decisions

As already mentioned, the court shall order the confiscation of the proceeds of crime in ordinary criminal proceedings *ex officio*. It shall do so also in case it finds the defendant guilty of a crime for which the law mandates confiscation of the proceeds of crime. These crimes include, e.g., money laundering, bribery, trading in influence, and other corruption crimes.

The court may not confiscate property *ex officio* in the extended confiscation procedure.

Under the CPC (2014), the court's confiscation decision shall be specified in the operational part of the judgment and the facts it took into account in the reasoning of the judgement.

The operational part of the judgment, which subsequently serves as an enforceable document during the enforcement procedure, must precisely specify the kind and quantity of the confiscated proceeds of crime.

Under the LCPC (2016), the court shall specify the following information in its confiscation ruling: the owner's data, the statutory name of the crime he has been found guilty of in the judgment, information about his property to be confiscated or the value to be confiscated from him in the event he had disposed of the proceeds of crime to preclude their seizure/confiscation, and the decision on the costs of managing the seized property, the property claims of any injured parties and their costs of representation.

3.6.3.4. The Appeal Procedure

Under the CPC (2014), the defendant or third party may appeal the judgment, including the part on the confiscation of the proceeds of crime, either in person or via their defence counsel, within the 15-day deadline prescribed for lodging appeals against judgments. The deadline may exceptionally be extended to 30 days. A timely and admissible appeal shall stay the enforcement of the judgment, including the part on the confiscation of the proceeds of crime. The appeal of the judgment is ruled on by a second-instance court: by a higher court in case of crimes warranting up to five years' imprisonment and by an appeals court in case of all other graver crimes.

Under the LCPC, appeals of confiscation rulings may be filed within 15 days from the day of service. These appeals are ruled on by a second-instance court, the appeals court in most cases. Appeals may be filed by the public prosecutor, the owner of the confiscated property and his defence counsel or proxy.

The appeal shall not prevent the Assets Management Directorate from managing the seized property until the decision rendered in the procedure becomes final.

The second-instance court may overturn a ruling only once. In the event the first-instance court's ruling is appealed again, the second-instance court must schedule a hearing and rule on the appeal itself.

A request for the protection of legality, an extraordinary legal remedy filed with the Supreme Court of Cassation, may also be filed against decisions on the confiscation of the proceeds of crime adopted under the CPC (2014) and the LCPC (2016). It may also be filed to contest seizure decisions i.e. provisional measures.

3.6.3.5. Notification of the Assets Management Agency or Other Entities

Once the judgment ordering confiscation of proceeds of crime becomes final, the court notifies the Assets Management Directorate thereof. The Directorate is an authority within the Justice Ministry that is charged with managing seized and confiscated proceeds of crime under the LCPC and the CPC. The remit and powers of the Directorate are governed by the LCPC.

The court shall serve its confiscation ruling issued under the LCPC to the owner, his proxy, the public prosecutor, the Assets Management Directorate and the Financial Investigation Unit.

Once the confiscation decision becomes final, the Republic of Serbia becomes the owner of the property and of the money from the sale of the property.

Confiscated foreign currency and foreign cash holdings are paid into and kept in a designated account with the National Bank of Serbia, while confiscated dinars are paid into the public revenue accounts.

The Directorate shall hand over free of charge confiscated items of historic, artistic and scientific value to institutions charged with safekeeping such goods, pursuant to a decision of the ministry in charge of science or culture.

Provisions of the law governing public property shall apply to confiscated immovable property. The Government may decide that the confiscated property is to be used for community purposes. The confiscated property is managed by the Directorate, pending the Government's decision on its disposition.

3.6.4. Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

3.6.4.1. Procedures for the Execution of Court Decisions on Seizure and Confiscation of the Proceeds of Crime

A court decision shall become enforceable when it becomes final and when the deadline for voluntary compliance with the obligation expires.

In ordinary court proceedings, the court forwards the decision on a provisional measure to the relevant institutions, e.g. the banks, the cadastres, the state agencies, et al.

Rulings on provisional measures have the effect of enforcement rulings. Therefore, a ruling ordering a special enforcement action is forwarded to the enforcement department of the relevant court.

Property seized under the LCPC (2016) is managed by the Assets Management Directorate. The court forwards the ruling ordering seizure to the owner, his defence counsel or proxy, the public prosecutor, the FIU, the Directorate, the bank or another organisation charged with payment operations. The ruling is enforced directly by the Directorate staff, who apply the Enforcement and Security Law accordingly.

Compliance with the injunction to prevent disposal of the seized assets is monitored by the FIU.

Enforcement is implemented via the Assets Management Directorate, which applies the Enforcement and Security Law accordingly.

Voluntary enforcement entails the voluntary surrender of the items to the Directorate.

Compulsory enforcement is implemented in accordance with the Enforcement and Security Law (2017). The Directorate requests of the court that had rendered the decision to initiate the compulsory enforcement procedure, which the court does via the Attorney General. The compulsory enforcement procedure is implemented before the competent court.

3.6.4.2. Parties to the Confiscation Enforcement Procedure

The enforcement procedures are governed by the Enforcement and Security Law (2017). Compulsory enforcement is implemented via the court when the state is the creditor. The state is represented by the Attorney General.

The court enforcement decision is forwarded to the relevant banks, property registries and cadastres.

The banks implement the enforcement procedure on the order of the court and in line with their procedures.

The Assets Management Directorate has various powers. It is, inter alia, entitled to lease real estate, sell movable property or hand over specific items to the relevant institutions for safekeeping. For instance:

- The Directorate hands over seized items of historic, artistic or scientific value for safekeeping to institutions charged with safekeeping such items pending a decision on the request for their confiscation.
- Seized foreign currency and foreign cash holdings are paid or transferred into a designated Directorate account with the National Bank of Serbia on the basis of a contract. The seized dinars are deposited in a designated account the Directorate holds with the ministry charged with finance and economy – the Treasury Department.
- The Directorate hands over for safekeeping items made of precious metals, precious and semi-precious stones and pearls to the National Bank of Serbia, pending a decision on their confiscation.

- Seized weapons are handed over for safekeeping to the ministry charged with internal affairs, with the exception of collectable and trophy weapons, which are handed over for safekeeping to museums.

The Directorate concludes contracts on the safekeeping of the items with the relevant institutions or the National Bank of Serbia.

In the event a legal person is subject to seizure, the Directorate may transfer the right to manage it to a natural or legal person, on the basis of a contract.

The person to whom the right to manage the legal person is transferred has the powers, obligations and liabilities of a representative of social capital, in accordance with the law governing privatisation.

3.6.4.3. Protection of the Rights of Third Parties

The rights of third parties, whose property is subject to seizure or confiscation, are elaborated above. They include their rights before the court, in appeals proceedings, et al. Under the LCPC (2016), third parties have all the rights property owners have in enforcement proceedings.

Third parties may protect their rights in civil proceedings as well.

IV EXTENDED CONFISCATION IN THE COMPARATIVE PERSPECTIVE

4.1. ALBANIA

4.1.1 Extended Confiscation Legal Framework

In terms of substantive law, extended confiscation, as a measure based on a flexible connection between the criminal acts and the proceeds of crime, is governed by the AML (2017), which applies as a *lex specialis*. The procedures to follow during financial investigations, court hearings and enforcement of court decisions and orders on extended confiscation are laid down in the AML (2017), complemented by provisions of the CPC (2017).

4.1.2. Scope of Application

4.1.2.1. Legal Criteria for Applying Extended Confiscation

The scope of the law applicable to extended confiscation is explicitly laid down in Article 2 of the AML (2017) and comprises prevention and fight against organised crime and trafficking through the confiscation of property of persons who have an unjustified economic status resulting from suspected criminal activity. Therefore, the two main criteria for applying extended confiscation under the AML (2017) include:

- a) Unjustified economic status, and
- b) Participation in criminal activity.

4.1.2.2. Property Subject to Extended Confiscation

Under the AML (2017), extended confiscation entails:

- Confiscation of specific assets the value of which is manifestly disproportionate to the person's income from legal sources;
- Confiscation of any other assets (monetary, movable and immovable) other than those subject to confiscation, because the latter have been alienated, dissolved, transferred, concealed or displaced.

4.1.3. Evidentiary Criteria (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)

4.1.3.1. Determination of the Proceeds of Crime

Extended confiscation is implemented with a view to confiscating the property of persons who have an unjustified economic status and are suspected of criminal activity. In order to achieve this goal and pursuant to Article 24 of the AML (2017), the Court is entitled to order extended confiscation when it finds that the following requirements have been met:

- a) The prosecutor proved that there are reasonable doubts, based on evidence, that a person (suspect) has participated in one of the criminal activities enumerated in Article 3 of the AML (2017);

- b) The prosecutor proved that there are reasonable grounds, based on evidence, to believe that the property is directly or indirectly in full or partial possession of the suspect, his relatives, or any natural or legal person under his control;
- c) The suspect, his relatives or natural or legal persons under his control, have failed to prove beyond reasonable doubt that their property is of legal origin (burden of proof);
- d) There are reasonable grounds, based on evidence, to conclude that the value of the property legally owned by these people is manifestly disproportionate to their legal income.

Article 3 of the AML (2017) provides for two statutory presumptions. First, it is presumed that assets legally owned by the suspect's relatives actually belong to the suspect, where there is sufficient evidence of their illegal origin.

Second, it is presumed that the assets in the possession of natural or legal persons belong to the suspect, where there is sufficient evidence of their mutual relationship or the illegal origin of the assets.

Analysis of Article 21 of the AML (2017) on the burden of proof indicates that the burden of proof shifts after the prosecutor brings evidence about the existence of property meeting the above terms. After the prosecutor successfully fulfils these terms, then:

- The suspect has the burden to prove that he had acquired the assets, fully or partly in his possession, from legal sources of income;
- The relatives have the burden to prove that the assets legally owned by them:
 - a) have been only in their possession;
 - b) are legally in their possession and had been acquired from legal sources of income; and,
 - c) are not indirectly in the legal ownership of the suspect.
- The natural and legal persons have the burden to prove that the evidence brought by the prosecutor is not sufficient to prove that the assets legally owned by them:
 - a) are possessed, fully or in part, directly or indirectly, by the suspect; and,
 - b) are used, have enabled or otherwise facilitated the suspect's criminal activity.

4.1.3.2. Procedural Guarantees and Human Rights Protection

There are no provisions in the AML (2017) expressly guaranteeing human rights. However, it may be inferred that such guarantees exist even during preventive proceedings, given that Article 5 of the AML (2017) lays down that verification, investigation and decision-making pursuant to the AML with a view to imposing and enforcing preventive measures (seizure and confiscation) shall be based on the procedural rules of the AML, complemented by the provisions of the CPC. Article 4 of the CPC (2017) enshrines the principle of the presumption of innocence, Article 6 guarantees the right to defence, and Article 7 prohibits double jeopardy (the *non bis in idem* principle).

4.2. BOSNIA AND HERZEGOVINA

4.2.1. Extended Confiscation Legal Framework

Extended confiscation of proceeds of crime has been envisaged by BiH criminal law for some time now. It was introduced during the 2010 reform of the BiH, FBiH and BD Criminal Codes; it was introduced in the RS also in 2010, albeit by a separate law (the Law on the Confiscation of Proceeds of Crime, *Official Gazette of the Republic of Srpska No. 12/10*). The 2010 amendments to the BiH, FBiH and BD Criminal Codes put in place the substantive law grounds for extended confiscation, but the procedure itself relied on their (meagre) regulations on seizure. The 2010 RS LCPC, on the

other hand was fully devoted to extended confiscation. This law was subsequently replaced by a new LCPC (*In BiH, FBiH and BD, the relevant provisions of substantive law (Article 110a of the 2018 BiH CC)*). The BiH Federation and the Brčko District also enacted their own laws on the confiscation of proceeds of crime (in 2014 and 2016 respectively), but, apart from some minor interventions, extended confiscation has remained mostly unaddressed in these jurisdictions.

BiH legislators do not fully clarify from where proceeds of crime subject to extended confiscation derived: a specific crime that is the subject of the proceedings or other, unspecified crimes. The main intention of this institute in comparative law is to confiscate proceeds of prior crimes which need not be ascertained in detail (Boucht, 2017).¹⁴⁹ They mostly specify that this regime of confiscation is to apply to proceeds of crime identified during proceedings for grave criminal offences for which the prosecutor is unable to collect sufficient evidence clearly proving that they derived from those crimes.

It may, therefore, be concluded that extended confiscation of proceeds of crime is partly regulated by systemic laws (mostly the concept of extended confiscation, in substantive criminal law), whereas procedural issues are separately governed only with respect to offences to which the LCPCs apply. As in other areas, the provisions of systemic laws apply accordingly to issues not governed by the LCPCs.

4.2.2. Scope of Application

4.2.2.1. Legal Criteria for Applying Extended Confiscation

As already noted, extended confiscation is governed by the LCPCs, where they exist (the criminal offences these regulations do not apply to are enumerated above). The FBiH and BD LCPC apply the criterion of minimum warranted penalty (offences warranting minimum three years' imprisonment in FBiH and offences warranting a special minimum term of imprisonment of three years in BD), whereas the RS LCPC lays down two criteria. The first is the criterion of the offences the RS LCPC (2018) applies to and enumerates (terrorism, specific crimes against life and limb, human rights and freedoms, sexual integrity, sexual abuse and exploitation of children, human health, economy and business transactions, official duties, legal traffic, public law and order, computer data safety and crimes against humanity and values protected under international law) and the second is the value of the proceeds: all proceeds and instrumentalities of crime the value of which exceeds 50,000 KM are subject to confiscation.

In BiH, FBiH and BD, the relevant provisions of substantive law (Article 110a of the 2018 BiH CC, Article 114a of the 2017 FBiH CC and Article 114a of the 2018 BD CC) shall apply in the absence of grounds for applying their LCPCs. These Articles enumerate the Criminal Code chapters incriminating crimes regarding which extended confiscation may be ordered.

It may be concluded that positive law provides for complex circumstances and multiple criteria for applying extended confiscation: the criterion of enumerated criminal offences (mostly by referral to Criminal Code chapters or individual offences incriminated in these chapters) applies to some offences and the criterion of minimum penalty applies to others. In addition, in the RS, extended confiscation may be ordered on account of the value of the proceeds. In any case, the offences at issue substantially jeopardise or undermine social order and its values.

149 The provisions in Article 110a of the BiH CC (2018), Article 114a of the FBiH CC, i.e. Article 10(4) of the FBiH LCPC (2014), Article 3 of the RS LCPC (2018), Article 114a of the BD CC (2018) i.e. Article 10(5) of the BD LCPC (2016) – which define extended confiscation – do not appear to fulfil that purpose.

4.2.2.2. Property Subject to Extended Confiscation

BiH legislations provide for quite extensive confiscation of property presumed to be deriving from crimes where the causal link with such crimes cannot be ascertained with certainty. Given that proceeds denote direct proceeds (derived originally from the predicate offence), indirect proceeds (those that are the result of manipulation with direct proceeds), surrogate proceeds (where proceeds that can be linked to a crime are intermingled with lawfully acquired property, transformed property, et al.) and the monetary equivalent of the proceeds (in the event the proceeds in any of the above forms have been concealed, spent, destroyed or are otherwise unavailable), extended confiscation applies also to property that is linked to the perpetrators' criminal activity in any of the enumerated ways. Article 110a of the BiH CC (2018) and Article 4(1(1)) of the RS LCPC (2018) are quite clear on this issue, whereas the other regulations suggest such an interpretation given their definitions of the concept of the proceeds of crime. It may be concluded that extended confiscation of proceeds of crime will most likely be applied to specific assets in the possession of the perpetrator, where circumstances indicate that they had derived from his criminal activity, the details of which cannot be ascertained. The laws also provide an alternative: confiscation also of other property only presumed to exist or to have existed (the presumption being based on the logical conclusion about what the perpetrator had or could have had at one point).

4.2.3. Evidentiary Standards (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)

4.2.3.1. Determination of the Proceeds of Crime

In addition to a conviction for a grave criminal offence (organised crime et al.) and the failure of the defendant or the possessor of a property or right to prove its legal origin, the circumstances indicating the possibility of the existence of other proceeds deriving from other (unidentified) crimes are another prerequisite for the extended confiscation of proceeds of crime (Datzer, 2017).

BiH criminal law for the most part does not specify the circumstances indicating the existence of the proceeds of crime. As regards the link between the proceeds of crime subject to extended confiscation, BiH, FBiH and BD criminal law requires "sufficient evidence of reasonable grounds to believe that such proceeds derived from crime and the perpetrator has not presented evidence that he had acquired it legally" (Art. 110a BiH CC (2018), Art. 114a FBiH CC (2017), Art. 10(4) FBiH LCPC (2014); Art. 114a, BD CC (2018); Art. 10(5), BD LCPC (2016)). Reasonable grounds to believe can be interpreted as a possibility, a likelihood that is qualified, more credible than a mere presumption, indicating that the presumption about the criminal origin of the property must be quite well-founded. Apart from this certainty (the degree of which obviously must be high) of the existence of specific facts on the part of the authority conducting the proceedings, the laws do not elaborate what specifically these authorities must be certain of. Namely, these laws do not mention some specific circumstances, such as the ones listed in the 2014 Directive of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union or some other national legislations explicitly stating that such circumstances may amount to the value of the offender's property disproportionate to his legal income. Only the RS LCPC (2018) states, in Article 4(1)2), that the property must be "manifestly disproportionate to the owner's legal income."

In view of the above considerations, it may be concluded that BiH legislators are not fully clear on which specific circumstances must be proven when establishing a link between the property subject to extended confiscation and the crimes it allegedly derived from. The provisions in RS law and indirect interpretation of the BiH, FBiH and BD criminal law provisions, however, suggest that the perpetrator's property, the size and value of which cannot be reasonably explained by comparing it with his legal income, is subject to extended confiscation.

4.2.3.2. Procedural Guarantees and Human Rights Protection

BiH laws provide for a balanced burden of proving the origin of the impugned property. First, the prosecutor is under the obligation to show that there are reasonable grounds to believe that the property derives from the defendant's criminal activity, which implies the possibility of the defendant to challenge the prosecutor's allegations and prove the lawfulness of his property. The defendant is expected to present arguments substantiating that his property is legal at the same level as the prosecutor (reasonable grounds to believe). Only the definition of the concept of proceeds of crime (subject to extended confiscation) in the RS fails to specify the requisite evidentiary standard for establishing a link with the perpetrator's criminal activity, wherefore it may be said that an evidentiary standard requisite for validating a conviction (beyond reasonable doubt) applies there.

Balanced burden of proof, as well as relatively high evidentiary standards indicating the possible criminal origin of the property, suggest that a defendant subject to an extended confiscation procedure is not in a substantially different situation from a defendant subject to a proceeding in which any circumstances *contra favorem* his legal status are presented, that is, when he is held liable for an action or consequence. Like in any other evidentiary proceeding, he is entitled, but not obligated, to respond to the prosecutor's allegations. His failure to dispute the charges, present evidence, etc., however, implies negative effects on the property in his ownership or possession or under his control that is subject to extended confiscation: given that he is in the best position to explain its origin, the defendant is not doing himself a favour by failing to react in situations in which he is clearly provided with the opportunity of justifying the origin of the incriminated property. It may therefore be concluded that fairness and protection in proceedings, including the right to the presumption of innocence and the right to remain silent (that is, the privilege against self-incrimination) are guaranteed to defendants in BiH to a large extent.

Given that extended confiscation is an ancillary proceeding, albeit conducted under criminal law rules, all rights related to the function of the defence in ordinary proceedings also apply in extended confiscation procedures, including, e.g. the right to attend the trial, equality of arms, so-called minimal defence rights (to be informed of the nature and cause of the accusation, to a reasoned court judgment, to compensation of damages for a wrongful conviction, to be given time to prepare one's defence), the right of appeal, the right to protection from use of illegal evidence, etc.

4.3. MONTENEGRO

4.3.1. Extended Confiscation Legal Framework

The extended confiscation procedure is governed by the LCPC (2015). Property acquired before and/or after the commission of a crime referred to in Article 2 LCPC (2015) may be subject to extended confiscation, provided that there is a "temporal correlation between the time the criminal proceeds were acquired and other circumstances [...] justifying their confiscation." This provision in Article 8 of the LCPC (2015) is not, however, sufficiently elaborated by this Law.

4.3.2. Scope of Application

4.3.2.1. Legal Criteria for Applying Extended Confiscation

The criterion of enumerated criminal offences is laid down in Article 2 of the LCPC (2015), under which: "proceeds of crime may be confiscated from a perpetrator where there is reasonable suspicion that such proceeds have derived from crime and the perpetrator failed to make plausible the

legal origin of such proceeds (extended confiscation) and in the event the perpetrator was convicted by a final judgment for one of the following offences incriminated by the Criminal Code of Montenegro:

- 1) Abduction under Article 164;
- 2) Criminal offences against sexual freedom under Articles 206, 208, 209, 210, 211, 211a and 211b;
- 3) Criminal offences against property under Articles 240, 241, 242, 243, 244, 244a; 249, 250, 251 and 252;
- 4) Criminal offences against payment transactions and business operations under Articles 258, 259, 260, 261, 262, 263, 264, 265, 268, 270, 272, 273, 274, 276, 276a, 276b, 281 and 281a;
- 5) Unauthorised production, possession and sale of narcotic drugs under Article 300;
- 6) Criminal offences against the environment and spatial planning under Articles 303, 305 and 307;
- 7) Criminal offences against security of computer data under Articles 350, 352, 353 and 354;
- 8) Criminal offences against public law and order under Articles 401, 401a, 402, 404 and 405;
- 9) Criminal offences against legal traffic under Articles 412, 413 and 414;
- 10) Criminal offences against official duties under Articles 416, 419, 420, 422, 422a, 423 and 424;
- 11) Criminal offences against humanity and other values protected under international law under Art. 444, 445, 446, 447, 447a, 447b, 447c, 447d, 449, 449a and 449b.”

4.3.2.2. Property Subject to Extended Confiscation

Under Article 3 of the LCPC (2015), proceeds of crime shall denote any increase in or prevention of decrease of property deriving from crime, all income and other benefits directly or indirectly deriving from criminal activity, as well as property they have been transformed into or intermingled with.

All property that is in any way related to the crimes referred to in Article 2(1) of the LCPC (directly or indirectly, or transformed) shall be subject to extended confiscation. If that is impossible, the provision on the payment of a monetary equivalent under paragraph 4 of Article 2 shall apply, provided, of course, that the property is manifestly disproportionate to the perpetrator’s legal income (LCPC, 2015).

Property entails rights to property of every kind, whether tangible or intangible, movable or immovable, securities and other instruments evidencing title to property.

4.3.3. Evidentiary Standards (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)

4.3.3.1. Determination of the Proceeds of Crime

The state prosecutor presents evidence of the defendant’s property, his legal income and circumstances indicating the existence of a manifest disproportion between the value of the defendant’s property after the deduction of paid taxes and other dues and his legal income.

In the event the property of a legal successor, a member of the defendant’s family or a third party is subject to confiscation, the state prosecutor shall present evidence that the legal successor inherited the proceeds of crime or that the proceeds of crime had been transferred to a member of the defendant’s family or a third party without compensation or for compensation not corresponding to their real value with a view to precluding confiscation.

4.3.3.2. Procedural Guarantees and Human Rights Protection

Under Articles 2 and 8 of the LCPC (2015), the property of a person convicted of a criminal offence referred to in Article 2 may be subject to confiscation where there is reasonable suspicion that it constitutes proceeds of crime and that person failed to prove plausible its legal origin (extended confiscation).

The burden of proof in the extended confiscation procedure rests on both parties. In the event the defendant fails to prove that he had gained his property legally, or the possessor of the items or rights fails to prove the legal origin of the property, such property shall be confiscated. The defendant's privilege against self-incrimination should be viewed in the following manner: the reversed burden of proof and the right to remain silent are not in his favour because he also bears the burden of proof. To conclude, such a legal solution is contradictory to the fundamental aspects of the principles of fairness: the presumption of innocence and the privilege against self-incrimination; however, in the light of the aim pursued (confiscation of the proceeds of crime), it is not in contravention of the right to a fair trial standards.

The public character of the proceedings and the right to defence, elements of the right to a fair trial are also guaranteed by law.

Pursuant to Article 41(7) of the LCPC, after the completion of the main hearing, the court shall issue a ruling upholding or dismissing the motion for the confiscation of proceeds of crime.

This ruling may be appealed by the holder, his defence counsel or proxy, the injured parties and their proxies, or the state prosecutor, within 15 days from the day of service of the ruling.

The appeal is ruled on by the second-instance court, which may declare it inadmissible or dismiss it as out of time, dismiss it on the merits as ill-founded or uphold the appeal and modify the ruling or overturn it and remit the case back to the first-instance court to hear the case again.

In the event the appeal concerns a ruling that has already been overturned and remitted once, the second-instance court shall schedule a hearing and rule on the appeal itself. It is not allowed to overturn the impugned ruling and remit the case back to the first-instance court again.

4.4. KOSOVO*

4.4.1. Extended Confiscation Legal Framework

Extended confiscation is governed in Kosovo* by a *lex specialis*, Law (No. 06/L-87) Law on Extended Powers for Confiscation of Proceeds (LCPC, 2018). This Law governs extended powers for confiscation of property when the procedures laid down in the CPC do not suffice (Art. 1(1)).

Another formal requirement for applying extended confiscation under the LCPC is that it may be ordered only after the judgment convicting a person of a crime referred to in Article 2(1) of this Law becomes final.

The LCPC governs confiscation of proceeds of crime upon the completion of criminal proceedings. Such confiscation is requested by the state prosecutor in the event he ascertains that additional property not covered by the indictment had derived from the crime the defendant has been found guilty of.

4.4.2. Scope of Application

4.4.2.1. Legal Criteria for Applying Extended Confiscation

Article 2 of the LCPC enumerates the crimes the perpetrators of which may be subject to extended confiscation. The first group comprises grave organised crime, corruption, human health and trafficking, cybercrime, money laundering and financing of terrorism offences, crimes regarding abuse of narcotic drugs, use of firearms, property and environmental crimes, et al. The second criterion applied by the legislator is the financial threshold, i.e. the value of the proceeds of crime has to exceed €10,000.

Extended confiscation may be applied not only against the accused or convicted individual (given that the procedure under the LCPC may be conducted after the condemnatory judgment becomes final), but also against third parties, who had not acquired the property in good faith.

Under Article 3(1(1-1.5)) of the LCPC, proceeds of crime shall denote all property the defendant acquired in the ten (10) years preceding the day the investigation of the crime was initiated.

4.4.2.2. Property Subject to Extended Confiscation

A precise definition of the key concepts, especially the concept of property, is one of the crucial requirements for the efficient regulation and application of the extended confiscation institute. The Kosovo* LCPC defines property subject to confiscation as property of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments, evidencing title to or interest in such assets, which derived from crime directly or indirectly or were acquired from proceeds of crime.¹⁵⁰

Other property, the value of which corresponds to the value of the proceeds of crime, may also be subject to confiscation. In the event specific property cannot be confiscated for various reasons, e.g. the defendant destroyed it, hid it, et al, or a third party acquired it in good faith, the court orders the defendant to pay an amount of money corresponding to the value of the property to the state.

It is important to note that the LCPC also provides for temporary and final restraint orders that may be ordered with respect to property inside or outside Kosovo* (Art. 21(1)).

4.4.3. Evidentiary Criteria (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)

4.4.3.1. Determination of the Proceeds of Crime

As per evidentiary rules in the extended confiscation procedure, the legislator opted for a balanced approach to the division of the burden of proof between the state prosecutor on the one hand, and the defendant and/or third parties (those whose property is subject to confiscation), on

150 One of the following three criteria on the relationship between the defendant and the property that are prescribed by the LCPC also need to be met for the latter to be subject to extended confiscation: (1) that the defendant had acquired it in the ten (10) years preceding the day the investigation against him was initiated for a crime the LCPC applies to; (2) that the property is in the ownership or possession of a third party on behalf of or to the advantage of the defendant; or (3) that the defendant transferred the property to a third party, who was not a bona fide purchaser, or subsequently successively transferred it to other third parties, who were not bona fide purchasers, in the ten (10) years preceding the day the investigation of the crime was initiated.

the other. The state prosecutor must prove that the property regarding which he sought verification (of its legal origin) is owned by the defendant, while the defendant must present evidence proving he had acquired it from legal sources, otherwise the court will order its confiscation.

Therefore, property verification is the first step towards the implementation of the extended confiscation procedure. In the initial stages of the procedure, the state prosecutor submits evidence to the court within five years from the day the condemnatory criminal judgment became final, to be used to identify the impugned property and indicate the existence of the circumstances listed above in the text on the concept of property (fulfilment of one of the three criteria). Under the LCPC, for the burden of proof to shift to the defendant, the state prosecutor has to prove, on the balance of probabilities, the existence of the property (as defined in this Law). Even in its initial provisions, the LCPC sets out that the balance of probabilities denotes a “standard of proof that something is probable, or more likely than not” (Art. 3(1(1.8))). The state prosecutor is under the obligation to be guided by this standard during the property verification hearing (Art. 5).

4.4.3.2. Procedural Guarantees and Human Rights Protection

Although the LCPC in principle distributes the burden of proof between the parties, the burden is initially on the state prosecutor, who must prove that the property at hand is owned by the defendant in accordance with Article 3(1(1.5)) of the LCPC. The LCPC does lay down any restrictions regarding the types of evidence and evidentiary tools the state prosecutor may use in the procedure. During the verification stage, the court may even order an expert examination or examine witnesses to verify the origin of the impugned property. The defendant and third parties are granted all the rights to participate in the procedure, to propose evidence and challenge the evidence of the state prosecutor and, essentially, prove the legal origin of the impugned property or that they had acquired it in good faith. If they succeed, the court is under the obligation to issue a reasoned decision dismissing the prosecutor’s application for the verification of the entire or part of the impugned property (Art. 6(3)). Human rights and freedoms enshrined in international agreements and instruments are guaranteed by the Kosovo* Constitution; they apply directly in its territory and prevail over all legal provisions and other enactments of public institutions in case of conflict (Article 22 of the Kosovo* Constitution).

A court seizure/confiscation decision rendered at the main hearing or by a panel in a non-adversarial hearing may be appealed with the appeals court by the defendant and third parties it regards. The appeals court must rule on an appeal of a judgment within 15 days and on an appeal of a ruling within three days. These appeals have suspensive effect.

Under Article 16(2) of the LCPC, the state prosecutor, defendant and all other third parties referred to in the final restraint order may appeal a decision dismissing or issuing the final restraint order within 15 days from the day of issuance. Such an appeal does not stay the enforcement of the order. The CPC provisions on legal remedies apply *mutatis mutandis*.

4.5. NORTH MACEDONIA

4.5.1. Extended Confiscation Legal Framework

As opposed to the other jurisdictions in the region, extended confiscation in North Macedonia is governed exclusively by its systemic laws: substantive law laid down in the Criminal Code (2018) and procedural law laid down in the Criminal Procedure Code (2018).

4.5.2. Scope of Application

4.5.2.1. Legal Criteria for Applying Extended Confiscation

Paragraph 1 of Article 98-a of the Criminal Code (2018), which deals with extended confiscation, stipulates several criteria for applying this institute. First, extended confiscation applies to proceeds of crime of persons found guilty of crimes committed within a criminal conspiracy warranting at least four years' imprisonment. Second, extended confiscation applies to proceeds of crime of persons found guilty of terrorist offences under Articles 313, 394-a, 394-b, 394-c and 319 of the CC (2018) warranting minimum five years' imprisonment. And, third, extended confiscation applies to proceeds of crime derived from money laundering crimes warranting minimum four years' imprisonment.

Under paragraph 2 of this Article, extended confiscation shall also apply to proceeds deriving from the crimes referred to in paragraph 1 of this Article that are in the possession of third parties for whom they have been acquired.

And, finally, paragraph 3 of this Article explicitly extends the possibility of applying extended confiscation to the family members of the perpetrator to whom he had transferred the property if it is obvious that they had not given him compensation corresponding to the real value of their items or property in exchange, as well as to third parties who failed to prove that they had given him such compensation.

Article 359-a of the CC (2018), incriminating unlawful acquisition and concealment of property by public officials, also warrants mention with respect to the scope of application of extended confiscation. Paragraph 2 of this Article lays down that property shall be confiscated from (a precisely specified category of) public officials in the event they are found guilty of unlawful acquisition and concealment of property, found to be substantially disproportionate to their legal income or that of their relatives. Therefore, this amounts to a *sui generis* form of extended confiscation of property exclusively applicable to the crime of unlawful enrichment by public officials. Paragraph 5 of this Article provides for value-based (equivalent) confiscation of the perpetrator's property if the court finds that the value of his property exceeds his legal income and that he had provided false or incomplete data or no data at all that would prove the legal origin of his property and that it is impossible to confiscate the property at issue.

Article 273 of the CC (2018) incriminating money laundering and acquisition of other proceeds of crime, also warrants mention. Paragraph 10 of that Article allows for the confiscation of proceeds of crime even in the event the crime from which the laundered proceeds had derived cannot be proven. The requirement that must be fulfilled under this paragraph is the existence of legal or factual impediments precluding prosecution for this crime. In that case, the existence of the crime shall be proven on the basis of the facts of the case and existence of a reasonable suspicion that the impugned property derived from that crime.

4.5.2.2. Property Subject to Extended Confiscation

Under Article 98-a(1) of the CC(2018), extended confiscation shall apply to property acquired by a perpetrator of the enumerated criminal offences (criminal association warranting minimum four years' imprisonment, terrorism warranting minimum five years' imprisonment or money laundering warranting minimum four years' imprisonment) in a period preceding the commission of the crime. This period may not exceed five years and is determined by the court on a case to case basis. In addition to this temporal criterion, this paragraph lays down that the court shall determine, on the basis of all the circumstances of the case, whether the value of the property at issue exceeds the defendant's legal income.

As noted above, the court may also order extended confiscation of the property of public officials found guilty of unlawful enrichment and of money launderers.

The court shall order extended confiscation under the terms prescribed in the CPC (2018).

The extended confiscation procedure is conducted on the motion of the public prosecutor.

4.5.3. Evidentiary Criteria (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)

4.5.3.1. Determination of the Proceeds of Crime

The main provision dealing with the determination of circumstances indicating the criminal origin of the property is paragraph 1 of Article 98-a of the CC (2018), which lays down that the court is entitled to establish, on the balance of probabilities and on the basis of all the circumstances of the case, that the value of the defendant's property exceeds his legal income and that it derives from a crime extended confiscation applies to. The specificity of North Macedonia's law is that it lays down a deadline, more precisely a period preceding the commission of the crime from which the proceeds derived, which the court establishes on a case to case basis, but which may not exceed five years. Only property acquired in that period may be subject to extended confiscation.

In case of extended confiscation of the proceeds of the crime incriminated by Article 359-a of the CC (2018), notably unlawful enrichment of public officials, the following criterion is applied to determine the criminal origin of the property: "the property the value of which substantially exceeds [...] the legal income of the defendant or his family members".

Extended confiscation of property or proceeds of crime may be ordered by the court in its judgment declaring the defendant guilty, its decision or its ruling ordering a security measure. In the operational part of its judgment or ruling, the court shall specify the property or object that is subject to confiscation or its monetary equivalent the perpetrator is to pay.

There are no provisions explicitly governing the determination of the illegal origin of property. The CPC (2018) provisions on determining the facts of the case in criminal proceedings apply.

The provisions on confiscation from third parties are the exception, given that third parties are under the obligation to present evidence that they had acquired the property in good faith, i.e. that they had paid a realistic, full and specific amount of money for it.

Under Article 449 of the CPC (2018), a motion for the repetition of the criminal proceedings contesting the confiscation decision may be filed by the person whose property is subject to extended confiscation.

Property and proceeds of crime shall be confiscated within 30 days from the day the judgment becomes final. The enforcement ruling is issued by the court that delivered the first-instance judgment.

Enforcement shall be conducted against the property and proceeds of crime specified in the court decision. In the event such enforcement is partly or entirely impossible, enforcement shall be implemented against the remaining property of the person at issue

4.6. SERBIA

4.6.1. Extended Confiscation Legal Framework

The Law on the Confiscation of Proceeds of Crime (LCPC, 2016) is a *lex specialis* and the only law governing extended confiscation of all property presumed to have derived from criminal activity under this Law.

The CPC (2014) applies accordingly.

Under Article 314(3) of the CPC (2014) governing plea agreements, a plea agreement may include an agreement on proceeds of crime to be confiscated from the defendant.

4.6.2. Scope of Application

4.6.2.1. Legal Criteria for Applying Extended Confiscation

The LCPC (2016) lays down the following criteria: (a) the criminal offences enumerated in paragraph 1 of Article 2, and, for quite a few of them an additional criterion (b) the value of the proceeds of crime, applicable only to a (large) group of the criminal offences enumerated in paragraph 1 of that Article, mostly corruption crimes and those committed out of greed. Under the latter criterion, the value of the proceeds of crime must exceed 1.5 million RSD.

4.6.2.2. Property Subject to Extended Confiscation

Property of any kind - whether movable or immovable, corporeal or incorporeal, in the form of company stakes, and any legal documents or instruments, evidencing title to or interest in such property - and deriving from the perpetrator's entire criminal activity, may be subject to confiscation. In other words, any property presumed to be deriving from crime, not just the particular crime that is the subject of the criminal proceedings, may be confiscated. Property also entails income or other gains derived from crime, either directly or indirectly, and property it has been transformed into or intermingled with.

The law also provides for value-based (equivalent) confiscation of property.

4.6.3. Evidentiary Criteria (Statutory Presumptions, Disproportion, Reversed Burden of Proof, etc.)

4.6.3.1. Determination of the Proceeds of Crime

Property manifestly disproportionate to the legal income of its owner is deemed proceeds of crime. The circumstances indicating the existence of a manifest disproportion between the owner's

property and legal income need to be ascertained, and they give rise to the reasonable suspicion that the property derived from criminal activity. The law does not specify the circumstances that may indicate existence of such a manifest disproportion; rather, it is ascertained on a case to case basis. Such a manifest disproportion is the important element, enabling the courts to use the statutory presumption of the criminal origin of the property and refer to it in reasoning of their decisions, whilst directly applying ratified conventions.

4.6.3.2. Procedural Guarantees and Human Rights Protection

The presumption of innocence exists only in the proceeding in which the defendant's guilt for the crime he is charged with is determined. The burden of proof of the criminal origin of the property is divided between the prosecutor and the defendant, i.e. the owner of the property. The prosecutor presents evidence of the defendant's legal income and the property he owns or has owned, and the circumstances indicating the existence of a manifest disproportion between the property in his possession and his legal income.

The defendant disputes the prosecutor's allegations and presents evidence proving he had legally acquired his property.

Nevertheless, a greater burden of proof rests on the defendant.

The right to a fair trial is reflected in respect for the principle of adversary proceedings, the right to propose and present evidence and the right to a defence.

V. CONCLUSIONS

5.1. OVERVIEW OF UN, COUNCIL OF EUROPE AND EU GUIDELINES

Section Two of the Handbook on Asset Recovery Measures outlines the International and European standards pertaining to seizure and confiscation measures. This section covers United Nations Conventions, European Union instruments, as well as the latest Recommendations of the Financial Action Task Force on Money Laundering. More specifically to the region, this section of the Handbook also makes a thorough examination of the work of the Council of Europe. It outlines the Council's legal instruments; sets out the work of its monitoring bodies, GRECO and MONEYVAL; and investigates in detail the requirements of the European Convention on Human Rights under Articles 6, 7, 8 and Article 1 of Protocol No. 1, and key accompanying case law before the European Court of Human Rights.

It is relatively clear that the focus of the international instruments considered in Section II is greater cooperation between States and the harmonisation of national anti-corruption and confiscation measures. Harmonisation is also a key challenge in the case law of the European Court of Human Rights, for while each State's authorities operate within a margin of appreciation, the Court has worked to ensure that every State's actions are proportionate to their legitimate aim. The need to strike a balance between actions and rights remains an evolving area of law and the standards applied in this regard require careful interpretation and application.

5.2. COMPARATIVE ANALYSIS OF THE LEGISLATIONS

5.2.1. Financial Investigations

Financial investigations were the first issue analysed in the comparative analysis of the legislations on asset recovery. Financial investigations are conducted by the authorities in charge of criminal prosecution and, as a rule, under the guidance of the prosecutors. They aim to detect, monitor and identify the property at issue, with a view to implementing the subsequent stages of the proceedings, when the courts order provisional seizure measures.

The concluding observations on the normative regulation of financial investigations in the six analysed jurisdictions essentially cover the following key issues: (a) how financial investigations are regulated within the jurisdictions' systemic laws (CPC) and/or their *leges speciales*, if they exist; (b) the goals/purpose of financial investigations specified in these laws; (c) how these laws regulate the implementation of financial investigations; and, (d) which property registries and databases the prosecutors have access to (and what kind of access) with a view to facilitating the implementation of financial investigations.

There are essentially no major differences in the six jurisdictions' CPCs inasmuch as none of them explicitly provide for financial investigations as separate investigative measures aimed at identifying proceeds of crime. Instead, these laws envisage the implementation of specific actions and investigative measures, the goals and purposes of which have the character of financial investigations, within the criminal investigations (conducted pursuant to order, rulings or other enactments issued by the prosecutors). Furthermore, the CPCs do not mandate financial investigations; the prosecutor leading on the criminal investigation decides whether or not to undertake actions that amount to a financial investigation. In addition, the CPCs of some jurisdictions (Bosnia and Herzegovina, Monte-

negro, et al.) provide for particular measures (e.g. orders to banks and other legal persons) that are *de facto* typical financial investigation actions both in content and *verba legis*, but are regulated as part of ordinary evidentiary actions (specifically, in the chapters on seizure of instrumentalities and proceeds of crime). Therefore, in most jurisdictions (with the exception of North Macedonia, which does not have a *lex specialis* on the confiscation of the proceeds of crime), financial investigations are subsumed under criminal investigations and implemented within the latter at the discretion and on the order of the prosecutors. One should also bear in mind the powers of national anti-money laundering bodies (Financial Intelligence Units), operating in accordance with regulations on the prevention of money laundering and financing of terrorism, which obtain important data and information on these crimes during their work; these data and information often serve as grounds for the implementation of financial investigations on the orders of the prosecutors.

Another important question the analyses aimed to find an answer to was whether the legislative provisions in the region facilitated the efficient detection, monitoring and identification of the proceeds of crime. As per the purpose and goals of financial investigations, the analyses show that there are no major differences among them in the CPCs of the analysed jurisdictions. As mentioned, in jurisdictions in which financial investigations are part of criminal investigations under the CPCs, their goals correspond to those of criminal investigations. As a rule, these goals include collection of evidence of criminal offences and the liability of the perpetrators; actions that have the character of financial investigations also aim at collecting evidence that the perpetrators had derived proceeds from their crimes. On the other hand, in jurisdictions that have *leges speciales*, which mostly govern extended confiscation (Serbia, and especially Montenegro), or both extended and ordinary confiscation (FBiH and BD in Bosnia and Herzegovina), the goals of financial investigations are mostly linked to the collection of data and evidence, including those on the legal incomes, expenses, obligations and property of the suspects and affiliated parties, or a specific form of property “verification” within separate preventive seizure procedures (Albania) or extended confiscation powers, where this term is also used (Kosovo*). It may, therefore, be concluded that the legislations adequately define the goals and purposes of financial investigations, both those conducted under the systemic and those conducted pursuant to *lex specialis* regulations.

In all the jurisdictions, the CPCs and LCPCs (where they exist) entitle the prosecutors to initiate and conduct financial investigations. This can definitely be ascribed to the reforms of the criminal legislations in the region, which abandoned the concept of court investigations conducted by investigative judges and mostly adopted the adversarial concept of criminal proceedings, in which the prosecutor is in charge of these actions.

The organisation of financial investigations varies from one legislation to another, mostly with respect to the degree of specialisation of prosecution offices with real jurisdiction for suppressing grave forms of organised crime, corruption and financial crime. Some jurisdictions (such as Serbia) adopted separate laws on the organisation of state authorities charged with these issues and governing the powers, rights and obligations of a number of entities in the context of actions related to financial investigations. In some cases, only specific authorities (e.g. the financial police in North Macedonia) are explicitly designated and entitled to take specific actions within investigations of specific categories of crime (e.g. money laundering). Some jurisdictions (Bosnia and Herzegovina, notably its entity the Republic of Srpska) have established specialised police units (Serbia has a similar solution) charged with taking actions within financial investigations. In other cases (Bosnia and Herzegovina, notably its entity the Federation of Bosnia and Herzegovina), only some institutions are designated as the prosecution offices’ key partners in implementing financial investigations (FBiH Tax Administration, FBiH Securities Register, FBiH Securities Commission). Essentially, these approaches largely depend on the organisation of the state administrations and especially the judicial systems, and the achieved level of specialisation of the police and prosecutorial authorities for handling the above

crimes. Specialisation of financial investigation duties is obviously a general trend that will continue in the forthcoming period.

Finally, the issue of legal presumptions for direct and/or facilitated access to property registries and registers in general (mostly in the form of databases), an extremely important tool for prosecutors conducting financial investigations, remains an outstanding problem in the region. When they become aware that a crime generating proceeds has been committed or that a person is in possession of property presumed to constitute proceeds of crime, the prosecutors must have direct or at least easier access to the relevant property registries and databases if they are to be able to promptly conduct financial investigations and pursue them when their initial suspicions are confirmed. Only some of the analysed jurisdictions have such presumptions in place at the moment (Serbia, Albania, and BiH to an extent, specifically its entity, the Republic of Srpska). The prosecutors do not have such possibilities in other jurisdictions; some jurisdictions (Bosnia and Herzegovina) do not even have nationwide registries of bank accounts of natural persons and the collection of these data is performed in an obsolete manner, by sending inquiries to the business banks, which may compromise the integrity of the investigation. Therefore, this extremely important technical issue must be addressed as soon as possible because the success of the entire financial investigation, as well as of the asset seizure procedure, very likely depends on it. This issue should be distinguished from the prosecutor's legal powers to request of banks, public authorities and natural persons to make available to him all the data and information he needs during the financial investigation, albeit only on the prior (and, exceptionally, subsequently convalidated) order of the court. The future reforms of the regulations on banks will hopefully liberalise the concept of bank secrets (like Croatia has done), thus providing the prosecutors conducting financial investigations with direct access also to the content of the bank accounts, pursuant to court orders.

To conclude, the comparative analysis of the legislations of the jurisdictions in the region indicates that some headway has been made in the regulation of financial investigations, which can, for the most part, be attributed to the fact that most of the jurisdictions have *leges speciales* governing (mostly extended) confiscation of the proceeds of crime. However, this does not suffice, because steps also have to be made at both the normative and technical or organisational levels to comprehensively create the necessary infrastructure for conducting more efficient financial investigations with a view to detecting, monitoring and identifying property that will be subject to seizure/confiscation. Only then can major headway in implementing the laws on asset recovery be expected in the region.

OVERVIEW OF FINANCIAL INVESTIGATION ELEMENTS IN THE ANALYSED LEGISLATIONS

Elements of Financial Investigations	Legal Regulation of Financial Investigations		Form and Purpose of Financial Investigations		Organisation of Financial Investigations		Access to Property Registries	
	GPC	LCPC	Order or similar prosecutorial enactment	Identification, tracing and determination of proceeds of crime	Prosecutor as the <i>dominus litis</i>	Police, tax and other authorities	Direct access	Facilitated access
Jurisdiction								
ALBANIA	NO (part of the criminal investigation)	YES	NO (only registration of the proceeding)	YES (asset and property verification)	YES	YES (judicial police)	YES (CAMS)	YES
BOSNIA AND HERZEGOVINA	NO (part of the criminal investigation)	YES (FBiH, RS and BD) NO (BiH)	YES (financial investigation order) NO	YES (only within <i>leges speciales</i>)	YES	YES (<i>leges speciales</i>) Police (RS-Unit) tax authorities financial police	NO YES (RS MIA Unit)	NO YES (RS MIA Unit)
MONTENEGRO	NO (part of the criminal investigation)	YES	YES (financial investigation order)	YES	YES	YES	NO	NO
KOSOVO*	NO (part of the criminal investigation)	YES	YES (confiscation investigation)	YES (property verification)	YES	YES	NO	NO
NORTH MACEDONIA	NO (part of the criminal investigation)	NO	NO	YES (for specific crimes)	YES	YES Judicial police (especially financial police)	NO	NO
SERBIA	NO (part of the criminal investigation)	YES	YES (financial investigation order)	YES	YES	YES Unit - MIA Financial forensics	YES (MIA Unit)	DA

5.2.2. Provisional Measures

The first moment at which the courts are involved in proceedings involving seizure of the proceeds of crime from persons (and affiliated parties) is when they render decisions temporarily restricting their use or disposition of the property at stake. Such measures are usually called provisional measures (measures for securing proceeds of crime) and the legislative frameworks governing them are thoroughly analysed within the comparative analysis of the relevant legislations in the region.

The analyses essentially aimed at answering several questions. The first was whether the provisional measures were governed exclusively by the CPCs or by both the CPCs and LCPCs (where they exist) and their mutual relationship.

The analyses show that all the CPCs govern provisional measures on very similar, one might say conventional bases, and that they often have dual or even multiple meanings. Firstly, they involve seizure of proceeds and instrumentalities of crime for evidentiary purposes, within the CPC provisions on collection of evidence in criminal proceedings. This is fully understandable given that proceeds of crime can sometimes also serve as evidence in criminal proceedings, wherefore the legislators recognise them as such and legally regulate their seizure for the purpose of implementing criminal proceedings. Secondly, in their separate chapters on seizure/confiscation, the CPCs also include provisions on the seizure of proceeds of crime for preventive purposes, to serve as guarantee. In some jurisdictions, these provisions refer to other laws (on the enforcement procedure). In some cases (e.g. Bosnia and Herzegovina), the inconsistencies of the criminal and enforcement regulations are evident.

Provisional measures are also governed in detail by the LCPCs, where they exist. In most of the jurisdictions with LCPCs, the LCPC provisions on seizure prevail over the CPCs or their relationship is conditioned by their purpose i.e. the goals of the different procedures (e.g. Albania in case of preventive seizure). In some jurisdictions, provisional measures may also be ordered after the completion of the criminal proceedings, in the event an extended confiscation procedure is launched under the LCPC (Serbia, BiH – the Republic of Srpska entity, and Kosovo*).

Another issue tackled by the analyses concerned the requirements that have to be fulfilled for ordering provisional measures and how they are ordered. Distinction has to be drawn again between the legal regimes ordering such measures, i.e. the types of procedures (specifying the purpose, goal) within which property is temporarily secured. Where such measures are ordered under the CPCs, depending on whether evidentiary or preventive seizure is at issue, the legal grounds for the seizure usually comprise the likelihood that the property constitutes proceeds or instrumentalities of crime, wherefore there is a need to seize or freeze it, i.e. preclude its alienation if preventive seizure is at issue. Interestingly, under this legal regime (the CPC), the courts may order preventive seizure *ex officio*, while, in emergencies, relevant police officers and even prosecutors (e.g. in Kosovo*) are entitled to conduct evidentiary seizure. In some jurisdictions (e.g. BiH), only specific evidentiary actions in criminal proceedings, such as freezing of accounts and suspension of financial and business transactions, may be ordered by the prosecutor, provided they are subsequently convalidated by the court. On the other hand, such a possibility is not provided by the regimes under the *leges speciales* (both on preventive seizure and extended confiscation). However, in some jurisdictions (e.g. in Montenegro, Kosovo*), the LCPCs also allow the prosecutors to order such measures in emergencies, provided they are subsequently convalidated by the court. As per the legal regimes within criminal proceedings (i.e. under the CPCs), some legislations prescribe detailed procedures, such as hearings, deadlines and other elements of the procedure in which provisional measures are ordered, while, as noted, other legislations have only provisions referring to the implementation of the enforcement procedure law.

As per the legal presumptions for ordering provisional measures, the LCPCs as a rule lay down that such measures shall be ordered in the event of a risk that the property shall be alienated, while some legislations also provide for *ex parte* court decisions (e.g. the LCPCs in Bosnia and Herzegovina – the FBiH entity and the Brčko District, and, to an extent, the LCPC of the RS).

Another crucial question dealt with in the analyses regarded whether freezing and seizing were adequately and equally governed in the legislations in the region. The analyses showed that adequate attention has been devoted to these issues, especially in the LCPCs, where they exist; these LCPCs include comprehensive, clear and precise provisions on the types of property that may be subject to seizure and/or freezing (specifying the property by type and actual features).

Finally, most legislations essentially lay down limited periods of validity of the provisional measures, which are mostly related to the status (final or first-instance) of the confiscation decisions; they also provide for court reviews of these measures, either periodically, depending on the assessment of the court, or at legally prescribed intervals. The legislators in the region commendably recognised this extremely important human rights protection standard and incorporated it in the regulations, mostly in the laws governing (extended) confiscation of the proceeds of crime. In the context of human rights protection and proportionality, which must be borne in mind when discussing provisional measures, note should also be taken of the possibility provided by the LCPCs in the region: imposition of milder or replacement measures (guarantees, other property in lieu of proceeds, et al.), and prohibition of seizure/confiscation of the property of bona fide acquirers (in Serbia) and property requisite for the sustenance of the families of the individuals against whom they are ordered.

OVERVIEW OF THE ELEMENTS OF PROVISIONAL MEASURES IN THE ANALYSED LEGISLATIONS

Elements of Provisional Measures	Law Governing Provisional Measures		Conditions and Procedure for Ordering Provisional Measures		Types of Measures		Procedural Status	
	CPC	LCPC	Legal Presumptions (risk et al)	Court Decision	Freezing	Seizure	Period of Validity	Possibility of Ordering Milder/ Replacement Measures
Jurisdiction								
ALBANIA	YES Evidentiary and Preventive	YES (Preventive)	YES (LCPC)	YES (ex officio possibility under the CPC) + Judicial police (evidentiary)	YES	YES	6 months, plus court review	YES
BOSNIA AND HERZEGOVINA	YES Evidentiary + Preventive	YES (FBIH; RS and BD) NO (BiH)	YES (LCPCs of FBIH, RS and BD)	YES (exceptionally by authorised public officials in case of evidentiary seizure under the CPC)	YES	YES	LCPCs (FBIH; RS; BD) 60 days from the day the decision becomes final	YES
MONTENEGRO	YES	YES	YES (LCPC)	YES (exceptionally by the prosecutor, under the LCPC)	YES	YES	LCPC (until the decision on confiscation becomes final)	YES
KOSOVO*	YES Evidentiary + Preventive	YES (extended seizure/ confiscation powers)	YES (LCPC)	YES (when the confiscation motion is filed)	YES	YES	Reasonable time period	YES
NORTH MACEDONIA	YES Evidentiary + Preventive	NO	YES	YES	YES	YES	Pending the completion of the criminal proceedings	NO
SERBIA	YES Evidentiary + Preventive	YES	YES (LCPC)	YES	YES	YES	Pending a decision on the confiscation request	YES

5.2.3. Extended Confiscation

Extended confiscation of proceeds of crime is a special criminal law regime for confiscating proceeds of crime. The determination of a link between property and a specific criminal offence may be difficult in ordinary confiscation proceedings, especially in case of frauds involving manipulation of large amounts of money and taking place over an extended period of time, organised crime offences in the fields of drug trafficking or smuggling, as well as all offences involving large numbers of people, which are organisationally complex or have the features of transnational crimes. Hence, extended confiscation is considered a good way to overcome the above-mentioned problems, especially where circumstances indicate that there is suspicious property, the origin of which cannot be reasonably explained.

The following three issues were analysed to take stock of the legislations on extended confiscation of proceeds of crime: a) which crimes warrant extended confiscation, b) which property is subject to extended confiscation and how is it linked to the perpetrator's criminal activity, and c) what are the rights of the perpetrators and third parties during the extended confiscation procedure.

Given the sensitivity of the matter – confiscation of property that may be linked to a perpetrator's criminal conduct only indirectly – the legislators' caution in selecting the crimes warranting extended confiscation does not come as a surprise. Three approaches can be distinguished. The first approach, applied the most often, involves the enumeration of the criminal offences, either the individual crimes or the Criminal Code chapters incriminating them. That is the case in Albania, most BiH jurisdictions, Montenegro, Kosovo*, North Macedonia and Serbia. Furthermore, North Macedonia and Serbia set additional criteria for the application of this institute (the gravity of the penalty the crime carries or the value of the proceeds of crime). Some of the analysed legislations provide for multiple opportunities for applying this confiscation regime. In Republic of Srpska (BiH) and Kosovo*, apart from the enumeration of crimes subject to the application of this regime, extended confiscation may be ordered also in case of other crimes generating proceeds of substantial value. Therefore, the value of the proceeds of crime is a criterion for the application of this regime. Finally, the third approach relates to the penalty of imprisonment the crime carries. This approach is applied in FBiH and the Brčko District (BiH), but only when confiscation is carried out in accordance with their LCPCs. What all these approaches have in common is that the crimes warranting extended confiscation are for the most part grave offences, such as organised, economic, corruption crimes, as well as terrorism, money laundering, crimes against property, life and limb, human health, et al.

Property subject to confiscation under the extended confiscation regime is usually the one in the possession of the perpetrator or persons affiliated to him (his relatives, accomplices, legal successors, or third parties it has been transferred to). Most of the analysed legislations require a disproportion between the value of the property and the perpetrator's legal income – this requirement exists in Albania, Republic of Srpska (BiH), Montenegro, Kosovo*, North Macedonia and Serbia. In most of their laws, extended confiscation may apply not only to the property of the perpetrator and other parties, but also to other property of equivalent value or its monetary equivalent, in case the property subject to extended confiscation is unavailable. In most BiH jurisdictions (all but Republic of Srpska) and, to a certain extent, in Montenegro, property may be subject to extended confiscation if some other criteria are fulfilled, albeit the legislators are not precise: they usually use formulations such as “reasonable suspicion that the proceeds derived from crime”, without specifying which circumstances actually need to be proven and which specific property is at stake. The possibility should not be ruled out that the extensive interpretations of such legal provisions may lead to the conclusion that property that is suspiciously handled (e.g. money hidden in secret “bunkers”) is at issue or that some other circumstances indicate its criminal origin (e.g. the perpetrator's strong links with the criminal milieu, as, for example, in German case-law). The case-law on this issue is yet to be developed.

In all the analysed jurisdictions, the perpetrator and persons affiliated to him (his relatives, accomplices, legal successors, or third parties the property has been transferred to) have the rights to defence usually guaranteed defendants in ordinary confiscation proceedings. They entail the right to attend the proceedings, the right to take all procedural actions as the opposing party (equality of arms), the so-called minimum defence rights (right to a reasoned court judgment, right to compensation in case of a wrongful conviction, sufficient time to prepare one's defence), right of appeal, protection from use of unlawful evidence, etc. The fact that the defendant and affiliated parties are expected to respond to the charges is characteristic of the extended confiscation procedure and their failure to do so may impinge on their property legal status. In other words, a defendant is not expected to be totally passive, but to actively contribute to the clarification of the origin of the property at issue. Failure to do so will be to his detriment. This, however, does not mean that the defendant bears the entire burden of proving the legal origin of his property. In some jurisdictions (e.g. in Bosnia and Herzegovina), the burden of proof is explicitly divided; even in those jurisdictions in which it is reversed and requires the defendant's more active engagement, the accusatorial principle, requiring the implementation of proceedings only on the request of the prosecutor, applies at all times; so does, notably the presumption of innocence, which, inter alia, requires of the prosecutor to collect evidence and ask the other party to respond to it. In Albania, Montenegro, Kosovo* and North Macedonia, the prosecutor is expected to prove the disproportion between the property in the possession of the perpetrator or a third party and their legal income (without going into the details of the origin of that property), whereby the defendant and affiliated parties are placed in the position to provide responses about the legal origin of their property. The situation is similar in Serbia and Republic of Srpska (BiH), while prosecutors in the Federation of Bosnia and Herzegovina, the Brčko District and at the BiH state level are expected to engage in proving the criminal origin of the property to a somewhat greater extent. However, whatever provisions are in place, property subject to extended confiscation is not considered a penalty or a new charge, but an additional circumstance requiring of the holder of the property or a right to respond to claims about its criminal origin; it is in his interest to do so, *if he acquired the property legally*, and it should not pose him any particular problems. Such a possibility is envisaged also in Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

It may, in principle, be concluded that: a) the analysed legislations restrict the application of the extended confiscation regime just to some crimes (mostly grave ones) b) that property in the possession of the perpetrator or persons affiliated to him (relatives, accomplices, legal successors or third parties to whom the property has been transferred) is subject to extended confiscation and that the disproportion between the perpetrator's property and legal income is typically the crucial circumstance leading to the conclusion that it had derived from crime; and, c) that this disproportion implies the possibility of the defendant and affiliated parties to respond to allegations about the illegal origin of the property, and that their failure to respond or their unsuccessful response negatively reflect on the property at issue and result in its confiscation.

OVERVIEW OF ELEMENTS OF EXTENDED CONFISCATION IN THE ANALYSED LEGISLATIONS

Elements of Extended Confiscation	Crimes Warranting Extended Confiscation			Property Subject to Extended Confiscation and Circumstances Indicating its Criminal Origin				Procedural Guarantees and Human Rights Protection	
	Enumerated crimes	Value of proceeds	Gravity of penalty	In the possession of the perpetrator or affiliated party	Replacement property or monetary equivalent	Disproportion between the property at issue and the perpetrator's legal income	Other circumstances indicating the criminal origin of the property	Burden of proof	Minimal defence rights
Jurisdiction									
ALBANIA	YES	-	-	YES	-	YES	-	Reversed (on the defendant)	YES
BOSNIA AND HERZEGOVINA	YES	YES	YES	YES	YES	YES	YES	Divided	YES
MONTENEGRO	YES	-	-	YES	YES	YES	YES	Reversed (on the defendant)	YES
KOSOVO*	YES	YES	-	YES	YES	YES	-	Reversed (on the defendant)	YES
NORTH MACEDONIA	YES (plus the additional gravity of penalty criterion)	-	-	YES	-	YES	-	Reversed (on the defendant)	YES
SERBIA	YES (plus the additional value of proceeds criterion for some crimes.)	-	-	YES	YES	YES	-	Divided	YES

5.3. COMPARATIVE ANALYSIS OF PRACTICAL EXPERIENCES IN APPLYING ASSET RECOVERY LEGISLATIONS

5.3.1. Financial Investigations

The practical problems arising in the first stage of the procedure for seizing and confiscating the proceeds of crime concern several important issues directly or indirectly influencing the efficiency of financial investigations and the success of detecting, monitoring and identifying specific property subject to seizure/confiscation.

Normative impediments, arising from the inconsistencies between the CPCs and *leges speciales* (mostly) governing extended confiscation, often preclude the implementation of special evidentiary (investigative) actions in these procedures (e.g. most of the special evidentiary actions provided for in Article 162 of Serbia's CPC may be ordered only with respect to organised crime offences and some other enumerated crimes, wherefore the problem of presenting sufficient evidence arises in the LCPC procedures). This problem is especially salient when it comes to proving the living standards of the perpetrator in the context of determining disproportion, as a legal category. Practitioners have come across major problems in situations when financial investigations are conducted for the purpose of extended confiscation of the property of persons (the defendants and/or affiliated parties) who have been earning legal income for longer periods of time. Despite the manifest disproportion between the property they possess and their legal income, these persons as a rule endeavour to rebut the presumption of the illegal origin of their property by adducing their and their relatives' legal incomes, statements on the sustenance of their extended family members, bank credits, et al. These problems are not as great in cases where the defendants, involved in conventional crime, do not have legal income but dispose of property that is manifestly disproportionate.

The comparative analysis of the legislations indicates that the legal grounds are in place for conducting financial investigations, either within the criminal investigations conducted under the CPC or under the LCPCs. Regardless of which of these two legal regimes is applied, the experiences of specific countries, such as Montenegro, show that it is best to conduct the criminal and financial investigations simultaneously i.e. in parallel and that they complement each other. The result of the entire confiscation procedure depends on the outcome of the financial investigations, wherefore they are a "critical point"; their implementation is also impeded in cases where the authorities are investigating the business dealings of persons registered in "tax havens" i.e. off-shore areas. Use of various new financial instruments and modes of transactions via computer systems and the Internet to conceal illegally acquired property and money laundering is very likely to increase in the forthcoming future. The problem of the legal collection of evidence, especially the one located in computer systems and digital media, should definitely be borne in mind in the context of new technologies and the implementation of financial investigations.

As per problems regarding the removal of property abroad, i.e. to other countries or areas, a financial investigation often has to be strategically designed to ensure that, already in its earliest stages, the investigators acquire the initial information about such removal from all available sources (witnesses, suspects, documents, public officials) by undertaking operational and evidentiary actions (interviews, questioning, searches, special investigative actions, et al.). In one case in Bosnia and Herzegovina, the authorities obtained initial information on the suspect's ownership of real estate abroad when it searched his house and found a public utility bill he had paid for the apartment; the apartment was later subject to the confiscation procedure. Only once the initial information is checked should international legal assistance and seizure proceedings before the court be pursued.

Practitioners in most jurisdictions in the region, especially prosecutors and law enforcement bodies acting on their orders within financial investigations, continue facing problems in promptly accessing the relevant public registries, registers and other records of property, income, obligations and costs, which has considerably slowed down and impeded their determination of the legal income of persons subject to the financial investigations and their property, which is prima facie disproportionate to their legal income. Some jurisdictions, e.g. Bosnia and Herzegovina, still have not established nationwide registries of bank accounts of natural persons, which extremely impedes financial investigations from the very start. Furthermore, practice has shown that some categories of property (especially real estate) are not registered in the books, which indicates the need to establish comprehensive and updated property registries that will be accessible to criminal prosecution authorities.

The countries in the region that recently joined the European Union, such as Croatia, tried to alleviate the problem by providing prosecutors with direct and/or simpler access to the databases relevant to their rapid implementation of financial investigations. On the other hand, those jurisdictions provide for simpler opening of bank accounts in EU Member States, as well as easier transfers of cash to them, which considerably impedes the detection of the proceeds of crime. Online bank transfers are a particular problem, given that the prosecutors as a rule find out about them after the funds have already been transferred. In such cases, prevention is the only way to achieve results. In this chain, the key role is played by the national Financial Intelligence Units (FIUs) and the private sector legally obligated to monitor suspicious and disputable transactions (primarily the anti-money laundering departments of business banks), which must be trained in recognising suspicious transactions, adequately reacting to them and promptly alerting the state institutions to them. Therefore, inter-institutional liaison and concerted efforts by the representatives of the involved institutions are extremely important for overcoming these problems, particularly when the cases are complex. The prosecutors' cooperation with the tax authorities and their specialised units focusing on tax fraud and evasion is particularly relevant and definitely constitutes a good practice example in several jurisdictions in the region.

Financial investigations very frequently require the implementation of one or more expert examinations in order to identify the disproportion between a person's legal income and his property. The legislations regulate this area similarly, but the analysis of the jurisdictions' practices indicates that the costs of expert examinations considerably impinge on the efficiency of the prosecution offices conducting the financial investigations. This can primarily be ascribed to the relatively well-established case-law indicating that courts are of the view that the disproportion between the property and the legal income can be proven only by an expert examination. Sometimes, in addition to financial expert examinations, some other expert examinations – e.g. of art, real estate, vehicles, et al. - must be performed as well. All these examinations cost a lot of money and are therefore a limiting factor in the implementation of financial investigations. As per the above-mentioned case-law, mention needs to be made of cases where specific facts present in public documents (e.g. a notarised real estate contract, based on which the tax authorities set and collected tax, et al.) have not been accepted by the courts, which insisted on their expert examinations, although it was clear that, e.g. the prices of the real estate specified in the contracts reflected the market rates.

Another problem related to expert examinations concerns the (formal) engagement of tax and other public officials participating in financial investigations in the capacity of experts and presenting their findings to the court. This (again) gives rise to the problems of dual (repetitive) work on the same issues and of the additional costs of engaging experts to appear in court where they, as a rule, merely present the findings of the financial investigation. Better regulation of this issue would also contribute to the efficiency and cost-effectiveness of the confiscation procedure. Such a tendency is evident e.g. in Article 148 of the Kosovo* CPC, in which the legislator provides for the engagement of public officials in the implementation of financial analyses; their reports subsequently have the character of expert findings and opinions.

And, last but not the least, note needs to be made of the importance of the professional training, primarily of prosecutors leading on financial investigations, as well as other judicial and public officials. The application of the legislations in all the jurisdictions in the region appears to be still in its early stages and the results of their enforcement appear modest. Motivating prosecutors to conduct financial investigations and propose provisional measures and subsequently confiscation is definitely another challenge.

5.3.2. Provisional Measures

Ordering of provisional measures against third parties was one of the identified problems in practice. Practitioners are often in a dilemma whether the prosecutors should, already in this stage of the proceedings, present (strong) evidence that the property at issue has been transferred to third parties with a view to impeding or precluding its future seizure/confiscation, which is the standard required for confiscation. Such a problem has appeared in practice, e.g. in Serbia, in terms of Articles 25 and 27 of the LCPC, because the confiscation standards set out in Article 38(3) and 43(3) apply. One way to address the problem might be to improve the regulations by introducing an obligation to present such evidence, but, perhaps, require (and precisely specify) a lower degree of suspicion in the seizure procedure. With a view to facilitating the efficient application of the provisions on seizure (and, thus, confiscation), the *leges speciales* (on extended confiscation) need to regulate the concept and role of bona fide property acquirers.

Excessively long criminal proceedings are generally a major problem. Consequently, the seizure of property lasts a long time as well. In case of an acquittal, the property is returned to its owner, often generating substantial costs, due to the changed status or any (urgent) sale of the property. It needs to be noted that the periods of validity of provisional measures are in line with the standards on the protection of human rights, especially the right to peaceful enjoyment of possessions.

This is why some states have amended their legislation with a view to reducing the absolute periods of validity of provisional measures. For instance, the Croatian legislator laid down that provisional measures ordered under Article 557.e of the Croatian CPC until the confirmation of the indictment may be in place two years at most. Provisional measures are ordered at the time the investigation is opened. In complex cases handled by the Croatian Office for the Suppression of Corruption and Organised Crime, such investigations can last up to 18 months; however, only a small number of indictments are confirmed in the remaining months, until the two-year period expires and the provisional measures have to be terminated. In most cases, the courts dismiss requests for the reintroduction of the provisional measures against the same property, thus rendering senseless the implementation of so-called “financial inquiries” and provisional measures. The deadline per se is not so problematic in ordinary cases, but it is too short in complex cases, as practice has demonstrated.

5.3.3. (Extended) Confiscation

Most of the dilemmas arising in practice with respect to the enforcement of the legislations in the region concern extended confiscation, primarily because it is a relatively recent and quite complex legal institute introduced by law in a short period of time.

Practice has shown that it might already be time to review the LCPC provisions on extended confiscation, especially those defining the scope of application of those laws to proceeds derived from specific categories of crime. This scope is perhaps excessively broadly defined in most of the legislations, although there are clear criminal policy reasons for this legislative move. On the other hand, there are objective concerns that the burden thus placed on the defendants (and affiliated parties) is excessive vis-à-vis the right to peaceful enjoyment of property enshrined in the ECHR and the

Constitutions of the analysed jurisdictions. Any revision of legislation should definitely be preceded by comprehensive and reliable research and analysis of its implementation in practice to ensure that the actual situation is examined from all perspectives and that the decisions are based on objective indicators.

Another issue on which full consensus has not been reached in practice yet is the quality of the provisions specifying the time periods subject to (retroactive) scrutiny to establish the legal origin of property in the extended confiscation procedure, i.e. whether they constrain the prosecutors' efficiency. In jurisdictions in which the law strictly prescribes such time periods (e.g. in North Macedonia), the practitioners have voiced some reservations about these provisions, perceiving them as relativising the principle prohibiting everyone from retaining proceeds of crime, regardless of when they acquired them. On the other hand, in jurisdictions in which the LCPCs do not prescribe such a time period (Serbia, Bosnia and Herzegovina, et al.), practitioners have opined that the periods subject to scrutiny should be limited. This issue is partly addressed in case-law, where sometimes all the legal income ever earned by the defendant is subject to scrutiny (that is the case in Croatia, for example). In some cases, this entails checking the financial situation and living standards of a family 30 or more years back, which considerably extends the duration of the investigation and raises the costs of expert examinations. Some jurisdictions also lay down in their LCPCs deadlines for initiating the extended confiscation procedures after the judgment finding the defendant guilty of crime becomes final. Practitioners have various opinions on this issue, because the possibility of initiating a procedure to confiscate the convicted defendant's property presumed to constitute proceeds of crime, the existence of which comes to light after the completion of the criminal proceedings, is definitely commendable. On the other hand, a clear legally defined time period (e.g. five years since the judgment became final in Kosovo*) may provide the defendant with the possibility of successfully hiding the impugned property during that period and freely disposing of it thereafter. Furthermore, it is unclear how an extended confiscation procedure can be initiated by a prosecutor, and by which prosecutor at that, after a longer period of time, and how he can identify the property because the more time passes since the criminal judgment became final, the greater the risk that the expediency of the entire extended confiscation procedure and the detection of the defendant's "additional wealth" will be undermined.

The evidentiary standards in extended confiscation procedures differ in the practices of the courts in the region as well. In some jurisdictions (e.g. Montenegro), the duration of the evidentiary procedure appears to be the key problem, both in first-instance and appeals proceedings, which brings into question the very purpose of the institute. In addition to overly long proceedings, other jurisdictions also have problems regarding the admission of evidence of the legal origin of the impugned property in the form of loan agreements concluded between the defendants and their relatives, appearing for the first time at the main hearing, et al. As a rule, the courts often give faith and admit as evidence documents or witness testimonies merely making it likely that specific property had been acquired legally. On the other hand, there is scant case-law providing guidance on which evidence the court finds admissible or inadmissible, i.e. which standard of proof suffices for the court to consider specific property legal. Problems have appeared in practice in some jurisdictions (e.g. in Serbia) – the owners present loan agreements that have not been notarised as evidence proving the origin of their property or they do not even present any loan agreements and instead propose that the court hear numerous witnesses; or they claim that the huge amounts of money were their wedding presents (similar examples can also be found in Montenegro), which again requires proving, albeit clear standards for proving such allegations have not been established in the case-law. This problem is even more pronounced in cases where affiliated parties are proving the legal origin of their property which they claim they had bought with their salaries and money from additional sources, with their family's help, etc. Given that these persons are not defendants, practice has shown that the courts as a rule give faith to their claims about the legal origin of the impugned property.



All these issues need to be regulated more clearly and more simply in the relevant laws and case-law.

As per evidentiary standards, regular monitoring of the relevant case-law (of domestic courts and the ECtHR) needs to be ensured, especially by the prosecution offices. It would definitely be worth considering designating staff in the relevant judicial institutions to monitor decisions in the relevant areas and report on the good practices they identify as useful at staff meetings.

VI. LITERATURE

- Bačić, F. (1998). *Kazneno pravo: opći dio*. Zagreb: Informator.
- Bavcon, L. Š. (1996). *Kazensko pravo (splošni del)*. Ljubljana: Časopisni zavod Uradni list Republike Slovenije.
- Boucht, J. (2017). *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds*. Oxford; Portland: Hart Publishing.
- Datzer, D. (2016). Uvod u materiju oduzimanja imovinske koristi pribavljene kaznenim djelom. In E. Mujanović, & D. Datzer, *Oduzimanje imovinske koristi pribavljene krivičnim djelima: Priručnik za praktičare* (str. 19-39). Sarajevo: Criminal Policy Research Center.
- Datzer, D. (2017). Teorijski aspekti normiranja posebnih oblika oduzimanja imovinske koristi. U E. Mujanović, & D. Datzer, *Prošireno oduzimanje imovinske koristi pribavljene krivičnim djelima* (pp. 15-36). Sarajevo: Criminal Policy Research Center.
- Derenčinović, D. (1999). Pravna priroda instituta oduzimanja imovinske koristi i njegovo značenje u prevenciji organiziranog kriminala. *Policija i sigurnost*, 8 (3-4), pp. 161-170.
- European Police Office (Europol). (2016). *Does crime still pay? Criminal Asset Recovery in the EU*. The Hague: Author.
- Kilchling, M. (2014). Finance-Oriented Strategies of Organized Crime Control. U L. Paoli, *The Oxford Handbook of Organized Crime* (pp. 655-674). Oxford: Oxford University Press.
- Martinson, R. (1974). What works? – questions and answers about prison reform. *The Public Interest*, 35, pp. 22-54.
- Mujanović, E. (2017). Algoritmi za prikaz postupaka za oduzimanje imovinske koristi pribavljene krivičnim djelom. In E. Mujanović, *Smjernice za postupanje nadležnih institucija u postupku za oduzimanje imovinske koristi pribavljene krivičnim djelom* (pp. 112-130). Sarajevo: Criminal Policy Research Center.
- Mujanović, E., & Sarajlija, S. (2014). Oduzimanje imovinske koristi pribavljene krivičnim djelom u Bosni i Hercegovini-između ideala i stvarnosti. In *Međunarodna naučno-stručna konferencija "Izgradnja modernog pravnog sistema"*. Zbornik radova (pp. 871-896). Sarajevo: International Burch University.
- Mujanović, E., Datzer, D., & Kadribašić, N. (2018). Upravljanje imovinom stečenom krivičnim djelima u međunarodnom i poredbenom pravu. *Kriminalističke teme*, XVIII (1-2), 71-95.
- Pavišić, B., Grozdanić, V., & Veić, P. (2007). *Komentar Kaznenog zakona*. Zagreb: Narodne novine d.d.
- Vettori, B. (2006). *Tough on Criminal Wealth*. Dordrecht: Springer.
- Council of Europe (2007). *Financial Investigations and Confiscation of Proceeds of Crime*. Strasbourg: Author.
- International Council for Human Rights Policy & Transparency International (2010). *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities*



Printing of this publication has been supported by the UK Government.
The views expressed in this publication do not necessarily represent the views of the UK Government.

RAI

Regional Anti-Corruption Initiative (RAI) is an intergovernmental organization with nine member countries: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Northern Macedonia, Moldova, Montenegro, Romania and Serbia. Poland, Georgia and Slovenia are countries with Observer status. RAI's Mission is to lead regional cooperation to support anticorruption efforts by providing a common platform for discussions through sharing knowledge and best practices.

The organisation's Secretariat is based in Sarajevo with projects throughout the South East Europe primarily focusing on strengthening regional cooperation in conflict of interest & asset disclosure, corruption proofing of legislation, corruption risk assessment, whistleblowing, building integrity of law enforcement, and strengthening national capacities in asset recovery.

The AIRE Centre

The AIRE Centre is a non-governmental organisation that promotes awareness of European law rights and provides support for victims of human rights violations. A team of international lawyers provides information, support and advice on European Union and Council of Europe legal standards. It has particular experience in litigation before the European Court of Human Rights in Strasbourg and has participated in over 150 cases. Over the last 20 years the AIRE Centre has conducted and participated in a number of seminars in Central and Eastern Europe for the benefit of lawyers, judges, government officials and non-governmental organisations.

The AIRE Centre has been focusing on the countries of the Western Balkans, where it has been conducting a series of long-term rule of law programmes in partnership with domestic institutions and courts for over 15 years. Our aim throughout these programmes has been to promote the national implementation of the European Convention on Human Rights, assist the process of European integration by strengthening the rule of law and the full recognition of human rights, and encourage regional cooperation amongst judges and legal professionals.