Confiscation of Property Obtained From a Criminal Offense as a Measure to Fight Against Organized Crime

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Abstract

An analysis of most definitions of organized crime point to the fact that its main goal is the acquisition of financial profit. That is why one of the basic measures that most affects organized crime is confiscation of illegally acquired property. The purpose of that confiscation, through different historical epochs, was to punish the perpetrator of a criminal act, to compensate the injured party, or to prevent and deter others from committing criminal acts. The goal of this paper is to review scientific literature and analyze the content of various legal acts and documents, with the application of the comparative method, and to point out the specifics of the institute of confiscation of property acquired through criminal activities as one of the measures in the fight against organized crime. Property confiscation as a special measure in the fight against crime has encountered numerous criticisms and controversies in domestic and foreign literature, which will be the subject of a separate part of this paper. Seizures differ from country to country due to different legal qualifications, making it difficult to apply this institute in a uniform manner, on a global level. We point out the results that this measure gave at the international level and the success and criticism of its application in domestic legislation and practice.

Keywords: confiscation of property, organized crime, money laundering, economic crime, Directive 2014/41/EU

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The financial profits achieved by organized crime exceed the budgets of some of the most developed countries in the world. That is why special attention of the international community and international organizations and bodies, the scientific and professional public, is focused on the creation of policy measures aimed at combating organized crime at the global level. At the beginning of this century, the international community recognized organized criminal groups as the greatest threat to modern society, primarily in economic terms. The damages suffered by states as a result of the criminal acts of organized criminal groups are enormous and for smaller states disastrous, in terms of taking over the levers of power through corruption and money laundering (Marković & Spaić, 2022, p. 41). The traditional model of punishment did not fully fulfill its purpose and achieve a preventive function, and because of this, the views that there is no successful fight against organized crime without confiscation of property can be found more and more frequently in literature (Manes, 2016, p. 143). The assumptions on which this position is based are:

1. Since the acquisition of property in an illegal manner is the main motive for organized crime activities, its confiscation will affect a reduction in the motivation of criminals if the threat that, regardless of all the efforts aimed at concealment, they will be left without illegal income is shown to be real.
2. Confiscation of illegally acquired property acts as a preventive measure against the possibility of "dirty" money infiltrating into the legal economy, primarily money that stems from powerful criminal organizations.
3. In this way, illegally acquired funds that can be used in the commission of other criminal acts are confiscated.
4. The fourth premise is of a moral nature – no one can be allowed to make money from criminal activity and enjoy its use (Naylor, 1999, p. 11).

As a result of all of the above, numerous activities were assumed at the international level, which resulted in the adoption of numerous legal acts and documents whose purpose is to confiscate property (movable and immovable) acquired through illegal activities. One of the most significant documents from this area, which was adopted by the European Union in 2014, is Directive 2014/41/EU on the freezing and confiscation of funds and proceeds of crime in

the European Union. The goal of this document was the uniform regulation of the legislation of EU members and countries seeking membership, which would enable coordinated measures aimed at confiscating property and funds acquired through criminal activities, as well as the collection of evidence with respect to criminal offenses committed by organized crime. One of the main problems concerning this issue is the difference in legal qualifications in EU states and other countries. What is meant by the term confiscation has also not been clearly defined. Does this mean the temporary confiscation of things and property, are only items that resulted from the commission of criminal acts confiscated, can property be confiscated only from the perpetrator of the criminal act, or from persons who are related to him and whose property does not have proof of origin, or it was received as a gift from a member of an organized criminal group? Certainly, the prevailing view is that financial penalties, such as confiscation of property, deter crime by making it less profitable (Nicholson, 2006, p.368). On the other hand, by definition, if you allow a criminal to use property, and that property facilitates the crime, you are assisting the criminal in the commission of the crime. Confiscation of property is therefore just another type of punishment for already criminalized forms of behavior (McCaw, 2011, p. 202). Foreign professional literature contains various expressions related to confiscation of property, such as confiscation, confiscation, confiscation, etc. In our criminal legislation, the term confiscation of property was accepted, while the term confiscation was not used. One of the most frequently encountered dilemmas is whether confiscation of property is an alternative sanction, the main sanction, or whether it should be imposed as an additional measure in addition to the incriminations already foreseen by law. Numerous controversies followed the implementation of this measure both here and at the international level. A special debate is taking place in the US, where the position, that the implementation of this measure threatens basic human rights, is strongly defended.

All doubts, criticisms, but also the positive sides of this measure, which despite all criticisms is increasingly being used in the fight against organized crime, will be the subject of consideration in the following text.

History of Property Confiscation

Limiting the owner's freedom and right to dispose of his property as he sees fit, is not a new phenomenon in legal jurisprudence, these limitations are defined by statutory provisions and regulations. Interference with private property

rights by government authorities can have major consequences for the owner and may lead to confiscation proceedings when the property has been used in violation of the law or for illegal purposes. Further exacerbating the controversy is the distinction between actual non-conviction forfeitures, which are civil actions against the defendant's so-called property, and in personam or criminal confiscation actions, which form part of the post-conviction sentencing process and are directed against the owner (Fourie & Pienaar, 2017, pp. 22–23).

Confiscation of property has been present since the Old Testament, in which examples of confiscation of movable or immovable property due to an offense can be found. Different interpretations of property confiscation, throughout history, has contributed to its gradual regulation through legal norms. One of the first legislations that regulated this area was Roman law. The principles of morality, ethics, religion, and public law require censors to prevent the misuse of property, which is contrary to the general interest, by publishing valid legislation (Van Jaarsveld, 2006, p. 141). The mechanisms of confiscation and confiscation of property have developed in Western culture within two different traditions of the legal system, civil and common law. This dichotomy significantly influenced the emergence of two special methods for property confiscation that are present to this day. There are two separate court proceedings for confiscation of property in connection with a criminal offense, i.e., in personam ("against a person") and in rem ("against things") proceedings. The in personam proceeding usually relied on an individual's previous conviction, while the other was originally based on the legal fiction that the property itself was guilty of a crime. In rem confiscation can therefore be sought outside of criminal proceeding and without any consideration of the guilt or prosecution of its owner. The most severe and rigorous example of confiscation of property was in cases of "corruption of blood" which derives from the biblical concept that the sins of the fathers "visit their sons" (Greek, 2016, p. 4). This implies that the person who committed a criminal act has corrupted his blood and that his relatives (wife, children, etc.) cannot inherit his property, but it must be confiscated. This practice persisted in England until 1814 (Boudreaux & Pritchard, 1996, p. 603). The provisions of these acts have evolved into today's statutory regulations. Under the influence of American and British legislation, numerous other countries have adopted similar concepts, and it is particularly represented in modern statutory regulations aimed at fighting organized crime. The opinion that illegally acquired property should be confiscated is no longer questioned. Confiscation of crime-acquired property removes criminals from the financial gain obtained through socially

unacceptable behavior, without it being part of the punishment itself, that is, it does not mitigate or aggravate it (Levi & Osofsky, 1995, p. 12).

In the past 30 years or so, confiscation of property acquired through criminal acts has been increasingly applied in most countries and represents one of the most significant measures in the fight against organized crime. In addition to certain differences in the legal qualification itself, seizure forfeiture or confiscation represent a powerful tool in the fight against crime. At the end of the last century, Italy, as one of the countries considered to be the cradle of the mafia and organized crime, intensified the fight against organized crime by increasingly applying the measure of confiscation of movable and immovable property. The 1992 murder of judge Falcone and prosecutor Borsellino was a turning point in its fight against the mafia. Until that time, the measure of confiscation of proceeds from a criminal offense was applied in cases where the verdict was a conviction. After these incidents, it would expand the range of measures aimed at property that was disproportionate to the personal income of an individual, or to the property of relatives of suspects involved in criminal proceedings. Confiscation is mandatory for all crimes committed within a mafia-type criminal organization, as well as for crimes of evasion, i.e., embezzlement, corruption, slave ownership, extortion, human trafficking, kidnapping, embezzlement, money laundering, concealment, and drug trafficking, and for all property that is directly or indirectly related to the committed criminal act. For the first time, Italian legislation applied the measure of property confiscation without the court having to look for any connection between the origin of the confiscated property and the criminal offense for which the conviction was pronounced. This meant that confiscation would always be applied when there was a disparity between the economic value of the property, with which the convicted person disposed of, and that person's reported income, if convincing proof of the origin of that property could not be provided (Laudatti, 2007, p. 4). Germany, as one of the leading EU countries, has taken serious steps in the fight against organized crime by introducing a set of laws that enabled the confiscation of property acquired illegally. In the beginning, it referred to confiscation of property from persons convicted of criminal offenses, but later the scope of confiscation of property was extended to criminal offenses associated with organized crime. These changes allowed profits, assumed to have been acquired through criminal activity, to be confiscated, which activity must be accompanied by appropriate evidence (Vettori, 2007, p. 62). Similar to German legislation, in the Netherlands the law foresees confiscation of illegally acquired property, with the procedure being conducted outside of criminal proceedings,

while in certain cases property can be confiscated even without a person being prosecuted or suspected (Lajić, 2012, p. 16). France also foresees the confiscation of crime acquired property in the form of a penalty, security measure or compensation. In France, all relevant ministries (police, justice, economy) are involved in the implementation of financial investigations. The subject of the investigation can be any person who is suspected of having received profit from crime, or obtained profit from crime in the role of an accomplice, whereby the use of special investigative techniques is permitted (Vettori, 2007, p. 58).

Throughout history, both in the world and in Serbia, the measure of confiscation of property benefits has been present as one of the sanctions against perpetrators of criminal acts. The application of property sanctions encroaches on the property or property rights of a convicted person (as a perpetrator of a criminal offense), which acts as a disincentive in the direction of neutralizing or reducing their lucrative motives (intentions, drives) (Jovašević, 2022, p. 24). Ever since Dušan's Code from 1349, the legislation of the Republic of Serbia, regardless of the framework of its state, has foreseen property confiscation as part of property penalties. This sanction was an integral part of all laws enacted after World War II, and consisted in the forced confiscation without compensation in favor of the state, of the entire property or a specific part of the property of a convicted person. This means that the law distinguished two types of property confiscation. Namely: a) complete confiscation, which consisted in the confiscation of the entire property of a convicted person and was imposed with the penalty of loss of citizenship, and b) partial confiscation, which consisted in the confiscation of precisely specified property in the verdict. The subject of confiscation were objects with which the criminal offense was committed or the objects intended for the commission of the criminal offense. Regardless of the type of property confiscation, it could be imposed as the primary and ancillary punishment (Jovašević, 2022, p. 28). Deprivation of property benefits, as a criminal sanction in the form of a security measure, existed in our criminal legislation until 1976, when this measure was removed from the system of security measures and prescribed as an independent measure. One of the main reasons for distinguishing confiscation of property benefits as a separate measure is that confiscation of property benefits could only be imposed on the perpetrator of a criminal act, given that criminal sanctions cannot be applied to third parties. At the same time, there is a clear need to confiscate the property benefit obtained through a criminal act not only from the perpetrator, but also from other persons to whom it was transferred or on behalf of whom it

was acquired. Such legal solutions were present until 1990, when confiscation was removed from the law as a criminal sanction. As a measure to combat organized crime, it was re-introduced by the Law on Amendments and Supplements to the Criminal Code of the Federal Republic of Yugoslavia in 2001. Then, in accordance with the decision from Article 3 of the Law on Amendments, Article 34 of the Criminal Code of the Federal Republic of Yugoslavia introduced the penalty of confiscation of property, which could only be imposed as an ancillary penalty. The Criminal Code of the Republic of Serbia from 2006 foresaw under Chapter 7, confiscation of property benefit, which defines the basis (Article 91), conditions and method (Article 92) of deprivation of property benefits, as well as protection of the injured party (Article 93). Successful opposition to organized crime also requires a series of measures by which the perpetrators of criminal acts, in addition to the property benefit resulting from the criminal act itself, would, in certain cases, also be deprived of other property resulting from the perpetrator's criminal activities. For this purpose, the Law on Seizure and Confiscation of the Proceeds from Crime (2008) was adopted. The objectives for the passing of this Law were as follows: preventive action on the commission of future criminal acts, considering that confiscation of property from a criminal organization prevents it from participating in the legal market with profits obtained from crime, then, to destroy the economic power of criminal organizations, to compensate the injured party from that property, to strengthen the application of the law by using the funds seized from the perpetrator for the benefit of the state and for the purpose of encouraging and strengthening cooperation between authorities and services in the fight against organized crime (Torbica, 2010, p. 108).

Terminological Definition of the Concept

In domestic and foreign literature and legal qualifications, different terms can be found that basically represent confiscation of property benefits acquired through criminal behavior. Throughout its history, our legislation has frequently used the term confiscation. In the latest statutory regulations, that term is no longer used, but it refers to confiscation of property. Different terms are also present in foreign literature. Confiscation is the most commonly used term in the legislation of Eastern European countries such as Russia, Romania, Ukraine, Latvia, and Lithuania. In America, the terms forfeiture property, asset forfeiture, seizure of property, etc. are used. Property confiscation is an umbrella term for all modalities of seizure of property of criminal origin, but the use of

different terms for some of its modalities can create confusion and cause mixing of different terms related to this issue. Some of the definitions for property confiscation state that it is a form of violent confiscation of property and rights from the perpetrator of a criminal offense, or other persons for whom the court judges that this measure should be applied (Ignjatović, 2007, p. 150). In recent times, we have noticed a new appearance of various forms of confiscation. From a legal point of view, confiscation appears as a multiple concept, with different forms and classifications. The first significant difference is whether confiscation is treated as the main penalty or only as an ancillary penalty. In some cases, confiscation is seen as the primary criminal sanction. Certain international documents foresee the possibility for the confiscation of property resulting from a criminal offense to be treated as punishment. The Strasbourg Convention states that the term "confiscation" means a punishment or measure imposed by a court, following a procedure in connection with one or more criminal acts, by which property is legally confiscated. Similarly, in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (The Warsaw Convention), this term is defined as a punishment or measure passed by a court in connection with a criminal offense, which has resulted in permanent seizure of property.

In some jurisdictions such as France, it can be used as a substitute for a prison sentence. However, in most European legislation, confiscation is an ancillary/complementary criminal sanction, i.e., a punishment that complements the main criminal sanction. In some cases, it can also appear as an alternative or security measure or an administrative or even civil measure (civil forfeiture represented in the USA). Fragmentation has increased in recent years, in conjunction with the growing importance of confiscation in the fight against organized crime. Cases of extended confiscation (after conviction) can be found in foreign literature, where seizure refers to property owned by the perpetrator that is not directly related to any criminal act. In England or the Netherlands, the confiscation procedure can be unique and combined with the basic criminal procedure or it can be separate (Simonato, 2016, p. 217). There are cases in which property that did not result from a criminal offense was seized, rather valuables were confiscated as a substitute for property that should have been confiscated but could not be confiscated because it could not be found (Ligeti & Simonato, 2017, p. 30). One of the cases of confiscation is the seizure of objects and property from persons who are not connected to the crime (perpetrator, accomplice), but the property, transferred to them, was the result of the crime.

American law is particular because it foresees the seizure of property even when there is only a suspicion that it resulted from a criminal act. This mechanism of property seizure, so-called civil confiscation, has met with numerous criticism, so that most states have repealed such laws, but the federal law that provides the possibility for such seizure remains in force. Civil forfeiture allows law enforcement agencies to seize, alienate, and permanently retain movable and immovable property based solely on a suspicion of the property's connection to possible criminal activity. Civil forfeiture is accomplished in civil proceedings and is usually the product of a civil, in rem proceeding, in which the property is treated as the perpetrator. The guilt or innocence of the property owner is irrelevant; it is sufficient that the property was involved in the criminal offense to which forfeiture applies in the manner prescribed by law (Doyle, 2023, p. 4). According to current laws, seized property is most often transferred to the budget of the agency that carried out the forfeiture, and this is one of the main objections to this mechanism of property forfeiture. Critics argue that allowing police agencies to use seized property distorts law enforcement priorities, encouraging agencies to put profit above public safety or justice (Kelly & Kole, 2016, p. 563). Proponents of this model, however, argue that revenue generation through forfeiture is justifiably linked to the police given that they directly fight crime. At the same time, they argue that forfeiture is essential to fighting crime because it deprives criminals of assets they might otherwise use to commit new crimes and ensures that crime does not pay. Another argument is that revenue seizure can help law enforcement agencies fight crime, either directly through greater engagement and technical training or indirectly through population education (Kelly & Kole, 2016, p. 569).

In our criminal legislation, the term confiscation is no longer used, but the phrase "confiscation of property resulting from a criminal offense" has been introduced, which can be found in the title of this paper as well as in the name of the law governing this area. The institute of confiscation of property resulting from a criminal offense was introduced into our criminal law as part of the process of harmonizing the domestic legal system with the law of the European Union and the fulfillment of certain internationally assumed obligations by our country. Among the scientific and professional public, there is often a polemic about the similarities and differences between this term and the term “confiscation of material grain” prescribed under Articles 91 and 93 of the Criminal Code. Confiscation of material gains has been foreseen by provisions 91 to 93 of the CC and provisions of the Criminal Procedure Code (CPC). According to Article

91, no one can keep proceeds obtained by a criminal offense, such proceeds will be seized under the conditions prescribed by law. It follows from this legal provision that seizure of proceeds is mandatory yet, in practice, the courts use it more as an optional provision. Researching the legal nature of the measure of confiscation of property resulting from a criminal offense is much more complex than it is the case with the traditional criminal law measure of seizure of material gains. The traditional measure is always applied in relation to property that have been fully proven to be the result of a specific criminal offense, subject to a conviction for that offense. In literature, confiscation of property resulting from a criminal offense is also called "extended confiscation". The reason for this is that the subject of confiscation does not have to be only the property and material gains that resulted from the commission of the criminal offense itself, but also all other property of the suspect, his associates, accomplices, or persons to whom the property was transferred, which is not commensurate with his property status and for which no can prove origin. This mechanism of property confiscation was considered redundant because there is a measure in the Criminal Code (Articles 91, 93) whose extension could be used to satisfy all cases in which confiscation of property was necessary. Proponents of such legal solutions as arguments to defend their position state that such legal solutions have contributed to the successful fight against organized crime and removed all doubt related to the questions of what, how and from whom confiscation can be carried out, during proceedings conducted against organized criminal groups. A deeper analysis of the terms "material gain" "criminal profit" "property acquired from crime" exceeds the needs of this work, so we will not deal with them, although there are conflicting opinions among theorists, according to some there are differences while others consider them synonymous.

Statutory Regulations of the Republic of Serbia

Following the trends and obligations that it assumed as a member of the United Nations, and numerous other international organizations, our country has implemented numerous institutes and mechanisms in its legal solutions in the fight against all forms of crime, especially organized and transnational crime. As we have stated, through different historical eras and different state creations in which the Republic of Serbia existed, the idea of seizure of property resulting from a criminal offense evolved into what today is sublimated

by the Law on Seizure and Confiscation of the Proceeds from Crime (hereinafter: the Law). The first Law was adopted in 2008 and then, under the same name, in 2013, and it remains in force today although it underwent certain amendments in 2016 and 2019. Immediately after its adoption, this Law caused numerous controversies among the professional public, but the opinion prevailed that it represents one of the most comprehensive legal solutions on European soil that deals with confiscation of property stemming from organized criminal groups. It introduced a new measure into criminal law – the measure of confiscation of property, regulated the existence of a special procedure that has a number of specifics in relation to regular criminal procedure and, in the end, special bodies or sectors were formed within existing bodies which were given the exclusive authority to implement the regulations referring to the new measure. The documents and acts on which this law is based and which were taken into account during its drafting are:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols to the Convention
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on December 19, 1988. (The Vienna Convention),
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted on November 8, 1990 in Strasbourg,
- The Criminal Law Convention on Corruption, adopted by the Council of Europe on January 27, 1999 in Strasbourg (The Strasbourg Convention (1999)),
- The International Convention for the Suppression of the Financing of Terrorism, adopted by the United Nations on December 9, 1999 in New York (The New York Convention 1999),
- The United Nations Convention against Transnational Organized Crime, adopted in Palermo December 12–15, 2000 (The Palermo Convention),
- The United Nations Convention against Corruption, adopted in New York on October 31, 2003. (The New York Convention 2003),
- The Council of Europe Convention on Laundering, Search, Seizure and. Confiscation of the Proceeds from Crime and on the Financing of Terrorism from May 16, 2005 (The Warsaw Convention).
- Directive of the European Parliament and the Council of the EU on the freezing and confiscation of funds and proceeds of crime in the

European Union No. 42/2014.

One of particularly important documents, without diminishing the importance of the others, is Directive 2014/41/EU on the freezing and confiscation of funds and proceeds of crime in the European Union. The objective of the Directive was to establish minimum rules for the convergence of positions on the freezing (temporary confiscation) of assets of organized criminal groups, in member states, and confiscation regimes, thereby facilitating mutual trust and successful cross-border cooperation. The Directive foresees four different measures that are subject to harmonization at the European level: confiscation (Article 4), extended confiscation (Article 5), confiscation from a third party (Article 6) and freezing (Article 7). In the proposal of the draft Directive, a fifth measure was foreseen, which provided for confiscation without conviction, but it was rejected in the working part and the previously mentioned four measures remained. The Directive pays special attention to extended confiscation. This measure foresees that the conviction for a criminal offense is accompanied, in addition to property related to the criminal offense, by confiscation of additional property that the court determines is the criminal product of other criminal offenses. According to the Directive, extended confiscation can only be based on the conviction of the court that the property in question originates from criminal activities. These modalities of property confiscation and freezing have also been implemented in the Law. In addition to international documents, numerous documents and acts from domestic criminal legislation are connected and closely intertwined with the Law on Seizure and Confiscation of the Proceeds from Crime. The procedure for confiscation of property resulting from a criminal offense is related to the course and outcome of the criminal procedure, in which the guilt of the person accused of the criminal offense is decided, and which is the basis for the application of the provisions on the procedure for confiscating property resulting from a criminal offense. It is precisely in the relationship between these two procedures that there is a clearly visible and inseparable connection between the law regulating the confiscation of property resulting from a criminal offense and the Criminal Procedure Code. The Criminal Code of the Republic of Serbia (CC) is also inextricably linked with the Law on Seizure and Confiscation of the Proceeds from Crime and the provisions of the CC are carried throughout, almost, the entire text of the Law. Starting from Article 2 of the Law, which lists the criminal offenses to which the provisions of the Law apply, and directly refers to the provisions of the Criminal Code and the incriminations set forth in it. Without this article, which is related to the CC, any further discussion and the

drafting of the Law would not exist. The harmonization of these two laws was also necessary due to the numerous changes that the CC has undergone over the years, and which the Law would necessarily have to accompany especially in the part that prescribes the acts to which the Law applies. According to the provisions of the Law, the public prosecutor can issue an order prohibiting the disposal of property and highlight a request for temporary seizure of property, if there is a risk of disposal of the property by the owner in a manner that prevents its confiscation at a later stage of the procedure. For the duration of the temporary seizure of property, in the absence of appropriate provisions, the provisions of the Law on Enforcement and Security are to be applied. The Law on Civil Servants is also one of the laws that is intertwined with the Law, especially in the domain of the election of civil servants to the Directorate for Confiscated Property, which is sometimes considered the executive body for the implementation of the Law. In addition to the Law, a significant number of by-laws, ordinances and regulations are necessary, which regulate the substance of the Law more closely and contribute to its more efficient application.

Confiscation of Property Resulting From a Crime in Serbia

Confiscation of property obtained through criminal offenses in domestic criminal legislation does not represent a criminal sanction, but it certainly represents a criminal measure related to the execution of a criminal offense. Confiscation of property is carried out in favor of the state. As such, it represents one of the most important means in the fight against organized crime because it undermines its basic foundation, which is the acquisition of large financial gain. According to the Law (Article 3, Paragraph 1) "'Assets' shall denote goods of any kind, tangible or intangible, movable or immovable, estimable or of inestimably great value, and instruments in any form evidencing rights to or interest in such good". Assets shall also denote revenue or other gain generated, directly or indirectly, from a criminal offense as well as any good into which it is transformed or which it is mingled, while proceeds from crime (Article 3, Paragraph 2) "shall denote assets of an owner manifestly disproportionate to his/her lawful income". The Law foresees and prescribes the type of criminal offenses according to which this measure must and can be applied (Article 2 of the Law). The list of criminal offenses contains a number of extremely dangerous and serious criminal offenses, with characteristics that require a stronger impact on their perpetrators and which justify the existence of a measure that encroaches on the defendant's

entire property. The first on the list of those crimes are crimes from the scope of organized crime, then crimes against property, economy, crimes against drugs, public order and peace, official duties and a number of other crimes that fall into the category of serious crimes. The specificity of certain types of criminal acts, which are prescribed in this article of the Law, is that the damage caused must exceed the amount of RSD 1,500,000. This clause is important because it separates crimes with less social danger, for which it is sufficient to apply the measure of confiscation of financial gain (CC) from more serious crimes. This kind of law and the measures it foresees provide the opportunity for the judicial authorities to check and determine the origin, by conducting a financial investigation, to seize and freeze the entire property of the defendant that he acquired even before the commission of the specific criminal offense for which the proceedings are being conducted. The basis for this type of confiscation is the prosecutor's suspicion that the property was derived from criminal activities because there is an obvious disproportion between his legal assets and legally generated income. It is irrelevant whether the accused acquired the subject property by committing the criminal offense for which he was accused, or by some other criminal activity (Tešić, 2018, p. 169). The prosecutor must prove that this disproportion exists. It further implies the obligation of the accused to prove how he acquired the disputed property. Such a provision certainly provides guarantees to the owner of the property to respect the rights and the presumption of innocence, because apart from confiscation of property as a temporary measure it is not possible to initiate the procedure of permanent confiscation of property, until a final verdict establishes the guilt of the accused for one of the criminal offenses that are on the list of those that foresee the implementation of the Law. If the accused does not prove the origin of the property and the manner in which he acquired the disputed property, it may be confiscated from the accused, his legal successors or third parties to whom the property was transferred. The prosecutor can submit a request for seizure of property both during the criminal procedure itself, and after the criminal procedure has ended, according to the method and within the legal deadlines prescribed by the Law.

Confiscation of property resulting from a criminal offense is a special process, the realization of which is subject to certain rules and which is entrusted to state authorities. The Law clearly prescribes the role of each of the agents responsible for the detection, confiscation and management of property resulting from a criminal offense, especially the prosecutor, the judge, the

Ministry of Internal Affairs (Financial Investigation Unit) and the Directorate for Management of Seized Property. The jurisdiction of the public prosecutor and the court in proceedings is caused and determined according to the jurisdiction of the court for the criminal offense from which the property originates and regarding which the proceedings are conducted. The role of the public prosecutor is important during the entire procedure, because his procedural activities determine the further course of the procedure. Namely, during the financial investigation phase, he is given a leadership role, and he is authorized, first of all, to assess whether there is a necessary, legally determined degree of suspicion that the owner owns property that requires the initiation of a financial investigation, and then he is also authorized to lead the entire financial investigation (Gluščević, 2016, p. 270). The court is the leading participant during the phase for confiscating property resulting from a criminal offense, because it has the authority to conduct the procedure and make a decision on temporary or permanent seizure of property (Ilić et al. 2009, p. 61). The Financial Investigation Unit (FIU) acts on the orders of the prosecutor or the court, but also ex officio. It is a specialized participant in the procedure, made up of experts of various profiles, who provide the public prosecutor with the necessary information and evidence relevant for the confiscation of property resulting from a criminal offense. Its role is the most significant in the financial investigation because it focuses on gathering evidence that will be presented in court, and on which the final decision on seizure of property will depend. It is also responsible for international cooperation with all subjects of the international community and European and world police organizations, related to cases concerning organized crime and proceeds derived from organized crime. The Law also foresees the establishment of the Directorate for the Administration of Seized Assets (Directorate) as a body within the Ministry of Justice. The Directorate has the status of a legal entity with headquarters in Belgrade, and it can have special organizational units outside its headquarters (Article 10 of the Law). The main role of this body is to manage confiscated property resulting from a criminal act. The Directorate also performs other tasks such as expert evaluation of seized assets, storage, custody and sale of temporarily seized assets and disposes of the funds thus obtained, keeps appropriate records on the property it manages and on the court proceedings related to the same, participates in providing international legal assistance as pertains to the necessary training of personnel from its jurisdiction, as well as performing other tasks in accordance with the Law. The Directorate is involved in the procedure of extended confiscation

of criminal proceeds, as a rule, when it receives a first-instance decision on temporary seizure of property. Its role is to take care of seized property and preserve its value. Its powers are different and that is why it has the status of a legal entity. The assets at its disposal can be leased or given to other persons for a fee, if it is in the interest of preserving the value of the assets. In addition to leasing, seized real estate is also allocated to state bodies, local self-governments, and various organizations for use. The Ministry of Justice allocates part of the funds from sold property that has been permanently seized, to various youth organizations in order to implement projects aimed at crime prevention and youth development. In this manner, the funds obtained from the sale or confiscation of property acquired from crime are redirected to socially useful purposes.

Each of these subjects has a dominant role, during a specific phase of the procedure, but coordinated activity and cooperation is also necessary during each of these phases. The procedure for confiscation of property resulting from a criminal offense usually has three stages. The first is a financial investigation and, depending on its achievements, one can enter the second phase, which is the procedure of temporary seizure of property, while, depending on the results of the second phase, one can enter the third phase, which is the permanent seizure of property. As we can see, all three phases are complementary and interdependent. Financial investigation is a term that has several definitions in literature, but what they all have in common is the fact that financial investigations deal with the discovery of money flows and the examination of assets, which are assumed to have resulted from criminal activities. The Law itself does not provide a definition for the notion of a financial investigation, but based on the constitutive elements that are prescribed, it can be concluded that it is a procedure in which evidence is collected about assets, legal income and living expenses of an accused, the accused's associate or the deceased, evidence about property inherited by a legal successor, and evidence of property and the consideration for which the property was transferred to a third party. By sublimating the above definitions, it can be concluded that a financial investigation is the initial stage in the procedure for confiscating property resulting from a criminal offense, which is initiated by an order of the public prosecutor, if there are grounds for suspicion that the accused or convicted of a criminal offense referred to under Article 2 of the Law, possesses substantial property derived from criminal activity, with the aim of collecting evidence and other relevant data on the assets, income and living expenses of the accused, his legal successor

or other persons to whom it was transferred. If evidence is collected that the property was the result of a criminal offense, or there is an obvious disparity between the property and legal income, temporary or permanent seizure is initiated. The meaning of confiscation is that the property is permanently confiscated from the owner, while temporary seizure has the purpose of ensuring its later permanent confiscation. The Law provides an additional mechanism by which the owner is practically immediately prevented from disposing of the property subject to confiscation, if there is a danger that the owner will dispose of the property before the court decides on the request for temporary seizure of property. In that case, the prosecutor can issue an order prohibiting the disposal of property and temporary seizure of movable property.

As we can see, our legislation and the Law itself provided for all three options of confiscation and prohibition of disposal of property, which deals a serious blow to organized crime. This makes our country one of the few in Europe that unites all the mechanisms whose ultimate goal is the permanent confiscation of property resulting from the criminal activities of organized criminal groups. However, organized crime is transnational in nature and often the assets of criminal groups or individuals are located in several countries, which requires international cooperation and coordination. Part of the provisions of the Law on Seizure and Confiscation of the Proceeds from Crime is dedicated to international cooperation in this field. When solving international legal matters, priority is always given to international documents, so only if some issues are not part of one of the signed international treaties, the provisions of domestic laws are applied. We have already listed and presented most of those documents, numerous conventions. Their provisions directly refer to the cooperation of states in all stages of the confiscation of property, especially in the stages of its identification and forfeiture.

Conclusion

The International Convention against Organized Crime expressly obliges the member states to adopt and implement measures in their criminal legislation that will enable the confiscation of material gain acquired through criminal acts. The problem is that numerous legislations are not harmonized and in many countries there are certain institutes of property confiscation that are not based on a court decision. Domestic criminal legislation ignored such problems by introducing a measure prohibiting the disposal of property and temporary

seizure of property pending a final court decision and permanent confiscation. These measures are primarily intended to suppress organized crime and corruption, that is, crime that generates illegal property of great value. The goal of such procedures is to conduct a financial investigation that should end with the freezing and confiscation of assets, which later implies the prevention of perpetrators of serious crimes from investing illegally acquired profits during the further commission of criminal offenses and the development of organized crime. This Law, with the coordination of all relevant subjects and international actors, created a framework for effective suppression of the financial influence of organized criminal groups in Serbia, whose members retained their influence even after the end of the criminal proceedings, and who possess illegally acquired money and property both in the country and abroad.

It is necessary to constantly work on the specialization and improvement of the authorities and entities that are responsible for discovering and proving property derived from a criminal offense. It is also important to maintain open channels of communication and cooperation with EUROPOL and INTERPOL in order to detect organized criminal groups and determine the assets they possess in any country of the world. Only in this manner can a serious blow be dealt to organized crime, because in this way its base and foundation is directly undermined, which is financial profit and power and the placement of such capital in legal flows of financial business. One of the criticisms of our legal system that is often mentioned in literature is insufficient application of existing legal norms, which are declaratively good, and the slowness of the judicial system. Eliminating these shortcomings would certainly contribute to an even more successful fight against organized crime.

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Oduzimanje imovine proistekle iz krivičnog dela kao mera borbe protiv organizovanog kriminala

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Sažetak

Analiza većine definicija organizovanog kriminaliteta ukazuje na činjenicu da je njegov osnovni cilj sticanje finansijske dobiti. Zbog toga je jedna od osnovnih mera koja najviše i pogađa organizovani kriminalitet oduzimanje nezakonito stečene imovine. Svrha tog oduzimanja, kroz različite istorijske epohe, bila je kažnjavanje učinioca krivičnog dela, nadoknada štete oštećenom ili generalna prevencija i odvraćanje drugih od činjenja krivičnih dela. Cilj ovog rada je da pregledom naučne literature i analizom sadržaja različitih zakonskih akata i dokumenata, uz primenu komparativnog metoda, ukažemo na specifičnosti instituta oduzimanja imovine stečene kriminalnim aktivnostima kao jedne od mera u borbi protiv organizovanog kriminala. Oduzimanja imovine kao posebna mera u borbi protiv kriminala naišla je na brojne kritike i kontroverze u domaćoj i stranoj literaturi što će biti predmet posebnog dela ovog rada. Oduzimanje imovine se razlikuje od zemlje do zemlje zbog različitih zakonskih kvalifikacija što otežava primenu ovog instituta na jedinstven način na globalnom nivou. Ukazujemo na rezultate koje je ova mera dala na međunarodnom nivo i uspešnost i kritiku njene primene u domaćem zakonodavstvu i praksi.

Ključne reči: oduzimanje imovine, organizovani kriminalitet, pranje novca, ekonomski kriminalitet, Direktiva 2014/41/EU