SEIZURE AND CONFISCATION OF PROCEEDS FROM CRIME

Overview of comparative practices in Serbia, Macedonia and Bosnia and Herzegovina

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For the publisher
Nenad Koprivica, MSc

Authors
Milena Vasić, Lawyers' Committee for Human Rights (YUCOM), Serbia
Simona Nikolovska, Macedonia
Eldan Mujanović, Criminal Policy Research Centre, Bosnia and Herzegovina

Editor
Marija Vuksanović

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Content

Ms. Milena Vasić, Lawyers' Committee for Human Rights (YUCOM)[1]

Seizure and Confiscation of Proceeds from Crime in the Republic of Serbia

Seizure and confiscation of proceeds from crime is regulated by the Criminal Code of the Republic of Serbia[2], Criminal Procedure Code[3] and the Law on Seizure and Confiscation of Proceeds from Crime[4]. To a certain extent, this area is also regulated by the National Anti-Corruption Strategy[5] and the Action Plan for its implementation. The National Strategy envisages consistent application of the legislation on mandatory seizure and confiscation of corruption proceeds, while the Action Plan defines and elaborates mechanisms for declaring and controlling the assets owned by relevant individuals employed in the public sector in

1 Ms. Milena Vasić graduated from the Law School of the Union University in Belgrade in 2009, after which she actively practiced commercial law for two years. She has been with the Lawyers' Committee for Human Rights (YUCOM) since 2013 in the capacity of a legal adviser.

2 Criminal Code of RS (Official Gazette 85/2005, 88/2005 – corrigendum, 107/2005 – corrigendum, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014).

3 Criminal Procedure Code of RS (Official Gazette of RS 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, and 55/2014).

4 Law on Seizure and Confiscation of Proceeds from Crime.

5 National Strategy for Combating Corruption in the Republic of Serbia 2013–2018 (Official Gazette of RS 57/2013).

potentially corruption-risky positions as well as political party officials. It also regulates records of assets.

Serbia has signed and ratified important international documents in this field: United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Council of Europe Criminal Law Convention on Corruption, International Convention for the Suppression of Financing of Terrorism, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

National legislation makes a difference between seizure and confiscation of proceeds from crime and seizure and confiscation of assets originating in criminal activities. The former is the substantive law institute, decided on in the procedure defined in the Criminal Procedure Code, while the latter is decided on in the procedure defined in the special law and it refers only to the pre-determined criminal offences to which norms of the Criminal Procedure Code are applied subsidiary, as *lex generalis*.

The Criminal Code of the Republic of Serbia defines the basis for seizure and confiscation of proceeds from crime in the provision that reads: *No one may retain proceeds from crime.* It further stipulates that money, items of value and any other proceeds acquired through a criminal offence shall be seized from the offender and that if such a seizure is impossible, the offender shall be obliged to pay a pecuniary amount commensurate with the acquired proceeds. Proceeds acquired through a criminal offence are to be seized/confiscated from legal entities and natural persons that such property has been transferred to without any compensation or with a compensation that is clearly disproportionate to the value of the property, as well as in the cases where the criminal activity resulted in the proceeds for another. If a claim for damages is accepted within the criminal procedure, the court orders seizure/confiscation of proceeds only if they exceed the awarded amount of damages.

The Criminal Procedure Code regulates the procedure for seizure and confiscation of proceeds from crime. It primarily regulates that the procedure is initiated and the evidence collected *ex officio*. The procedure

provides for the possibility to impose a temporary security measure, in accordance with the Law on Enforcement and Securing of Claims. The seizure and confiscation of proceeds can be imposed by the court in the convicting judgment or in a decision on imposing security measures of mandatory psychiatric treatment. If the process of establishing the amount of proceeds is complex, the court has discretion in determining the amount. Legislation that applies to the appeal against the first instance judgment applies accordingly to this decision of the court.

The Law on Seizure and Confiscation of Proceeds from Crime (hereinafter referred to as: "the Law") regulates seizure and confiscation of property if it is acquired through the following criminal offences: organised crime; abduction; showing, procuring and possessing pornographic material and child pornography; criminal offences against property; criminal offences against economic interests; unlawful production, keeping and distribution of narcotics; criminal offences against public peace and order; abuse of office and; criminal offences against humanity and other goods protected by international law. For some of the criminal offences from this list there is a threshold, i.e. the condition that the proceeds have to amount to more than a million and five hundred thousand dinars.

The Law was challenged before the Constitutional Court of Serbia more than once, since some of its provisions on seizure and confiscation of proceeds from crime have a retroactive effect. The Constitutional Court of the Republic of Serbia has taken a legal position that the retroactive effect of the Law can be disputable only if confiscation of assets originating from crime functions as a punishment. However, since according to the opinion of the Constitutional Court this is not a punishment, but a special measure applied to the assets acquired in an illicit manner, there is a ground to apply the constitutional guarantee of legal certainty in criminal law.

The law defines seizure and confiscation of proceeds from crime, while the procedure of confiscation of assets is possible only after the judgment for the criminal offence in relation to which confiscation of assets can be done becomes final. The procedure for seizure of assets is initiated where there is a threat that, if done later, the confiscation of assets acquired

through crime would be more difficult or impossible. The request for initiating the procedure of seizure is submitted by the prosecutor and decided upon by the judge for preliminary procedure or the president of the panel of judges, depending on the stage of the procedure in which the request is submitted.

If there is a threat that the owner of the assets might dispose of the assets before the court decides about the request for seizure, the prosecutor issues an order prohibiting the disposal of the property and ordering the seizure. This order is entered in the real estate records and sent to banks and other financial organisations that where monetary assets and securities can be deposited (mechanism of rapid freezing of assets). This decision of the prosecutor may be in force until the court decides on the request of the prosecutor for seizure of assets, but not longer than three months after it was rendered.

The requirements for seizure of assets include:

- reasonable doubt that the natural person or legal entity has committed a criminal offence to which the provisions of the Law on Seizure and Confiscation of Proceeds from Crime apply;
- reasonable doubt that the owner's assets originate in crime;
- the value of the assets exceeds the amount of one million and five hundred thousand dinars (about 12 000 euros);
- there are reasons to justify the seizure.

The court must decide about the prosecutor's request within 8 days, without appearance in court. It is within 8 days that an objection can be filed against the court's decision on seizure of assets. If such an objection is rejected by the court the parties may lodge an appeal within 3 days. Seizure can last until the court decides about the request for confiscation of assets and not longer.

The request for confiscation of assets is submitted by the prosecutor within three months from the service of the final judgement which establishes that the committed criminal offence is in the group of criminal

offences defined in the Law. This request must contain: the final judgement; information about the defendant, i.e. the collaborator; the name of the criminal offence as defined in the Law; an indication of the assets that is to be confiscated; proof of property that the defendant, i.e. the defendant collaborator owns or used to own and proof of legal incomes; circumstances implying the property has origins in a criminal offence, i.e. the circumstances that indicate the existence of clear disproportion between the assets and legal income; as well as the reasons that justify the need for confiscation. If the request is filed against the legal successor, it also has to contain the appropriate evidence that the legal successor has inherited the assets that originate in crime, while the request against a third party also has to contain the proof that the assets were acquired against a disproportionate compensation that does not match the real value of the assets, or that they were transferred without any compensation.

The decision about the prosecutor's request is made in the main hearing, preceded by a preliminary hearing where evidence is proposed. The owner has to be delivered the summons for such a hearing in such a way that he/she is left at least 15 days for preparations. The procedure is adversary – the prosecutor presents the evidence alongside the request, while the defendant, i.e. the defendant collaborator or the third party make statements regarding the allegations presented by the prosecutor. After the main hearing the court renders its decision accepting or dismissing the prosecutor's request. The Law authorizes the court to render the decisions on the claims for damages of the injured parties and on the costs of managing the seized assets. Besides, in the decision of confiscation of assets, the court will leave a part of the assets to the owner, if the confiscation would endanger the existence of the owner and his/her dependants. Decision of the court imposing confiscation of assets can be appealed against within 15 days from the service of the decision.

The Law defines jurisdiction of state bodies for acting in the procedure of the search, seizure/confiscation and managing the assets that have origins in crime. These bodies include the prosecutor (who submits the request for seizure/confiscation of assets, proposes evidence, issues the order prohibiting disposal of assets and the order on starting the financial investigation), the court (that renders decisions in the procedure for

seizure/ confiscation of assets), the organisational unit of the Ministry of Interior in charge of financial investigations (that conducts the financial investigation, identifies the assets that originate in crime, and does other tasks in accordance with the law) and the Directorate for management of seized and confiscated assets.

The Directorate for management of seized and confiscated assets is a body within the Ministry of Justice and the state administration. The Directorate is managed by a director appointed and dismissed by the Government upon the proposal of the minister in charge of the field of justice. The conditions for appointment to the position of the director include: general conditions for employment in state administration bodies, university degree (from the faculty of law or faculty of economics) and at least nine years of work experience. The director of the Directorate reports to the minister in charge of the field of justice. The Directorate has the capacity of a legal entity. The competences of the directorate are:

- managing seized/confiscated assets that originate in crime, assets seized upon the order of the prosecutor, instrumentalities of crime, proceeds from crime, assets given as a bail in the criminal proceedings, and items seized in the criminal proceedings;
- assessing the value of the seized and confiscated assets originating in crime;
- storing, keeping and selling seized assets originating in criminal activities and managing assets acquired in this way in accordance with the law;
- keeping the records of the assets it manages and of the judicial proceedings concerned with seizure and confiscation of assets originating in criminal activities;
- participating in mutual legal assistance;
- other activities in accordance with the law.

In dealing with administrative matters the Directorate applies general legislation on administrative procedure. After receiving the decision

on seizure or confiscation of assets, the Directorate immediately acts in accordance with its competences defined in the Law. A standard of a good housekeeping, i.e. a good expert work, applies to managing seized and confiscated assets.

Seized/confiscated assets are is entered into records, which contain the following: data about the owner, data about the assets and the condition in which they was taken, data about the value of the assets that were seized/confiscated, note on whether the assets are being seized or confiscated, note on whether the seized assets remained with the owner or were entrusted to another natural person or legal entity, as well as other data. Decisions on seizure of assets rendered by the court are enforceable and the Directorate is in charge of their enforcement. The law regulating enforcement and securing of claims applies accordingly to seizure of assets. The expenses of keeping and managing seized assets are to be covered by the Directorate.

In certain justified cases the director of the Directorate can decide for the seized/ confiscated assets to remain with the owner who is then obliged to manage such assets with due diligence and to cover the costs of managing and maintaining the assets. The director can also contract out the management of the seized assets to another natural person or legal entity.

Seized assets are handed over for safeguarding to competent institutions if the law requires so. Thus the items of historical, artistic and scientific value are handed over to competent institutions; foreign currency and foreign cash holdings are paid into a dedicated account of the Directorate in the National Bank of Serbia; seized dinars are paid into the dedicated account of the Directorate kept in the ministry in charge of finance; items containing precious metals, precious and semi-precious stones and pearls are handed over to the National Bank of Serbia for safeguarding; seized weapons are handed over to the ministry in charge of internal affairs. For every type of handover of assets contract is concluded with the competent institution or establishment.

In order to preserve the value of seized assets, the Directorate can sell tangible assets directly or through a certain natural person or legal en-

tity within a public competition. Perishable items can be sold directly, without any public competition. Tangible assets are sold at the same or higher price than the value determined by the Directorate, and if it is not sold following two public competitions, it can be sold by direct agreement. Tangible assets not sold within a year can be donated to charity or destroyed.

Assets and money acquired from the sale of assets become property of the Republic of Serbia when the decision on confiscation of assets becomes final. Confiscated intangible assets are managed by the Directorate for Assets Management until the Government issues a decision regarding the disposal of such assets. As for the disposal of the money acquired from the sale of confiscated assets, after the deduction of the expenses of assets management and settlement of the claims for damages lodged by the injured parties, the remaining funds are paid into the national budget. From the budget such funds are distributed in the following way: relevant state bodies – court, prosecution service, Financial Intelligence Unit and Directorate for Assets Management are allocated 20% each for the financing of their work, while the remaining amount is used for financing social, health, educational and other institutions in line with a Government enactment thereon.

If we compare it to earlier legislation, the 2013 amendments to the Law have significantly contributed to the improvement of the institute of seizure and confiscation of assets originating in crime. However, it cannot be said that the current legislation is perfect. First of all, it often happens in practice that the courts themselves confuse the institute of **seizure and confiscation of proceeds from crime** stipulated by the Criminal Code and the institute of **seizure and confiscation of assets originating in crime**, even though these two institutes are of a different legal nature, which makes a very significant difference in their use in practice.

Since the Law on Seizure and Confiscation of Proceeds from Crime, as a subsidiary law, is provided for in the Criminal Procedure Code, there is a difficulty in determining the notion of the parties in the procedure. According to the Criminal Procedure Code, namely, the parties in the procedure are the prosecutor and the defendant, while according to the

Law on Seizure and Confiscation of Proceeds from Crime, the parties in the procedure are the prosecutor and the owner. This further leads to the situation that no third party (who was transferred the assets but is not a defendant in the proceedings) is authorized to submit a request for the protection of legality against the final decision in the procedure in which the decision on seizure/confiscation of proceeds of crime was made. This was also the position of the Supreme Cassation Court of the Republic of Serbia (Kzz OK 4/2012) which on 11 April 2013 held that the parties who are not defendants in the procedure, but have the status of a party according to the Law on Seizure and Confiscation of Proceeds from Crime are brought to a less favourable (subordinate) position than the defendant, which, in the opinion of the Court, undermines the principle of equality of parties in the procedure.

The Law on Seizure and Confiscation of Proceeds from Crime regulates the process of returning the seized assets very superficially in only two articles[6]. The owner of the seized assets for which it was, according to the law, established that it does not originate in a criminal offence, is promptly returned the seized money or the money acquired through the sale of assets, increased by an average at sight interest rate (*a vista*). The owner is also entitled to damages, if the Directorate did not manage the assets in the manner stipulated in the Law.

The problem in the implementation of this institute in practice lies in the fact that the Law, in spite of stating that the assets will be returned *ex officio* or upon the owner's request, does not stipulate any mechanism for such return. It rarely happens in practice that the Directorate initiates the procedure of returning the assets *ex officio*. The owners of assets have difficulties since they do not know who to submit the request for the return of assets to and how. They do not know what such a request should contain and what the procedure for deciding about it is. Another problem lies in the fact that the law stipulates that assets should be returned 'promptly' without stipulating any deadline within which the Directorate is obliged to return such assets upon the request submitted

6 Articles 46 and 47 of the Law on Seizure and Confiscation of Proceeds from Crime.

by its owner. The Law does not define what happens in the situation where the Directorate for some reason refuses to return such assets to the owner either. It is therefore necessary to amend the Law adequately in order to regulate the procedure for the return of assets – clear steps of the procedure, deadlines and legal remedies.

Conclusion: The institute of seizure and confiscation of proceeds from crime, as a new institute in the national law has undergone multiple changes. The amendments to the Law from 2013 have significantly contributed to the improvements in the implementation of this institute in comparison to earlier legal solutions[7]. However, not even the current legislation is fully defined. First of all, it often happens in practice that the courts themselves confuse the institute of **seizure and confiscation of proceeds from crime** stipulated in the Criminal Code and the institute of **seizure and confiscation of assets originating in crime**, although these two institutes are of a different legal nature, which makes a very significant difference in their implementation in practice.

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7 Primarily through changes in the provisions which stipulate that confiscation of assets can be initiated only after the judgment for the offence that is the basis for confiscation is final. This was not the case in the earlier law.

party according to the Law on Seizure and Confiscation of Proceeds from Crime are brought to a less favourable (subordinate) position than the defendant, which, in the opinion of the Court, undermines the principle of equality of parties in the procedure.

Due to all of the above, Republic of Serbia should adopt appropriate amendments to the legislation so that the provisions of the Criminal Procedure Code and the Law on Seizure and Confiscation of Proceeds from Crime are harmonized, and the parties in the procedure are ensured an equal treatment.

Ms. Simona Nikolovska, independent expert[1]

Seizure and Confiscation of Proceeds from Crime in the Republic of Macedonia

Confiscation, as a special measure in criminal law, consists of taking away direct and indirect proceeds from crime and assets acquired through crime committed by an offender or a third party. The legal basis for the measure of confiscation is that no one may retain the goods acquired by committing criminal offences. In the legal system of Macedonia, the confiscation of indirect and direct proceeds from crime and assets acquired through crime is a legal consequence of criminal offences. There are three important laws regulating this question: Criminal Code of the Republic of Macedonia, Criminal Procedure Code and the Law on Managing Assets, Proceeds and Instrumentalities Seized and Confiscated in the Criminal or Misdemeanour Procedure. Although Macedonia has a developed legislative framework and a good distribution of competences between different institutions, the procedures in practice show a different picture – the measure of confiscation is rarely used, which additionally encourages criminal activities.

1 Ms. Simona Nikolovska acquired the title of a Master of Law in the University "Sv. Kiril i Metodij", the School of Law Iustinianus Primus in Skopje, Macedonia. She graduated from the Master studies in the field of criminal law with the GPA of 10.00 and in 2015 she passed the judicial exam. Some of her earlier engagements include internship in the Basic Court in Skopje, where she worked as a legal assistant in the Criminal Division. In the last couple of years she participated in a large number of seminars and trainings, some of which organized by ELSA, YEF and British Council. She currently works in a Law Office in Skopje.

In the legal system of Macedonia, seizure and confiscation of direct and indirect proceeds from crime and assets acquired through crime are legal consequences of crime, rather than punishments or criminal sanctions. Confiscation is perceived as a special penal measure not linked to the main sentence. It is not a criminal law measure, because it does not restrict or violate any rights or freedoms of the offender. It is not a punishment since its non-retributive nature means it is not a measure of retaliation against the offender. And it is not a security measure, because it is not a medical measure (which would be of restrictive nature as the security measures are in the Macedonian penal system) and because it is not focused on the threat that the offender poses. The key idea behind this measure is that no one can keep proceeds from crime and assets acquired through crime. It would be unjust to allow anyone to keep the goods acquired by any illicit activity, since that would actually mean the legalization of the right to assets acquired through crime.

With that in mind, Macedonia introduced the measure of confiscation in the Criminal Code of the Republic of Macedonia and ratified a number of international documents to secure its implementation in practice. The legislative framework for confiscation is defined in the Criminal Code (Chapter 7, Confiscation of Assets and Proceeds and Seizure/ Confiscation of Instrumentalities of Crime – Articles 97, 97-a, 98, 98-a, 99, 100 and 100-a). Technical aspects are regulated in the Criminal Procedure Code in the articles that deal with the procedure of confiscation (Chapter 34, Articles 529 – 541). In addition to this, there is also the Law on Managing Assets, Proceeds and Instrumentalities Seized and Confiscated in Criminal and Misdemeanour Procedures that deals with the Agency for Managing Seized/Confiscated Assets, the range of its competences and its operational procedures.

Confiscation as a special measure in criminal law implies seizure/confiscation of indirect and direct proceeds from crime committed by the offender or a third party. It is based on the principle that "No one can keep indirect or direct proceeds from crime". This provision envisages two requirements that have to be met: that the criminal offence was committed and that it resulted in indirect or direct proceeds. The Criminal Code of the Republic of Macedonia also stipulates that the "proceeds

referred to in paragraph 1 shall be confiscated by the ruling of the court establishing that the crime was committed and under the conditions provided for in this Code". However, this article does not envisage that the decision of the court must be convicting. On the contrary, the court enacts the decision on seizure/confiscation *ex officio* even if it is not possible to conduct a criminal procedure against the offender because of legal or factual reasons, e.g. where the offender is not available to the prosecution (when he/she is on the run), has passed away or ceased to exist (in case of legal entities), but also where the offender is a minor, where he/she enjoys immunity of any kind, where the criminal offence is barred by time, or where the president of the state has granted a pardon to the offender.

The legal framework that regulates the measure of confiscation was amended in 2009, after the ratification of several relevant international and European conventions against organized crime, and particularly: Framework Decisions of the Council 2005/212/JHA from 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism (the Warsaw Convention), United Nations Convention Against Corruption (2003), United Nations Convention against Transnational Organized Crime (Palermo Convention – 2000), Criminal Law Convention on Corruption (1999), Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (1990) and the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances.

The Warsaw Convention requires each party to adopt "such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass: a) the assets into which the proceeds have been transformed or converted; b) assets acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds; c) income or other benefits derived from proceeds, from assets into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up

to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds[2].

The term 'indirect and direct proceeds' is defined in Article 98(1) of the Criminal Code of the Republic of Macedonia, which contains an almost identical definition as the article 122(38) which proposes that: "Indirect and direct proceeds from crime consisting of money, movable and immovable assets, as well as any other property, tangible and intangible rights shall be confiscated from the offender"

The term assets and proceeds are used for both the assets and income that have increased and for those that have not been reduced as a result of crime (stolen items, money from the sale of drugs, bribe, tax evasion, etc.) and for all types of assets and incomes that may be confiscated with real confiscation or confiscation based on the value: "Direct and indirect proceeds are confiscated also from any third party they were procured for by crime, as well as from family members of the offender they have been transferred to, if there is no proof of compensation that matches their real value or if the third party proves that the item or assets were acquired for a compensation that matches the value of the proceeds."

This Article also protects the injured party, since it stipulates that "confiscated proceeds shall be returned to the injured party, and if there is no injured party, they shall become state property." The injured party can also exercise his/her right to compensation from confiscated proceeds in a special litigation procedure, if a claim is lodged within 6 months from the day on which the court decision becomes final.

In addition to this, in 2009 Macedonia introduced the institute of extended seizure and confiscation, in accordance with international documents and comparative experience of developed countries that already apply this approach successfully in the fight against organized crime. Thus, the new Article 98-A (1) of the Criminal Code provides the following: "The perpetrator of a criminal offence committed within a criminal organiza-

2 This particular provision was added to the Criminal Code of the Republic of Macedonia in 2009, which provoked the need to define the terms "proceeds" and "indirect and direct proceeds". This provision also ensured that the term "indirect proceeds" is defined.

tion that profited from it and that is punishable by minimum four years of imprisonment, or of a criminal offence related to terrorism (Articles 313, 394-a, 394-b, 394-v 419) punishable by minimum five years of imprisonment, or of a criminal offence related to money laundering and punishable by minimum four years of imprisonment, shall be confiscated all the incomes and proceeds acquired in the period before the judgment. This shall be done by the court ruling and after all the circumstances of the case have been taken into account but not more than five years before such a criminal offence was committed and only if the court firmly believes on the basis of all the evidence that the assets that exceed the legal income of the perpetrator have resulted from such a criminal offence."

Comparison between the measure of confiscation and the measure of extended confiscation shows that in the former, the court establishes the assessed value *ex officio*, while in the latter, the law imposes *presumptio iuris* (legal assumptions that may be questioned). In this case, *onus probandi* is in the hands of the offender who must prove that the incomes come from legal sources, and if he/she fails to do so, the incomes and assets exceeding his lawful income will be seized/confiscated. On the other hand, in the cases of criminal offences committed within a criminal organization, criminal offences connected with terrorism punishable by minimum 5 years of imprisonment, or criminal offences related to money laundering punishable by minimum 4 years of imprisonment, the burden of proof is on the prosecutor.

A step forward has been made by accepting the concept of *societas delinquere potest*, which means that legal entities are also criminally liable. This also encourages the need for introducing income confiscation for these entities. As stated above, in such cases they are not treated as perpetrators of criminal offences, but as "third parties" the incomes were procured for.

In addition to this, Article 100-a of the Criminal Code of the Republic of Macedonia regulates the seizure and confiscation of *instrumenta et producta sceleris*. This regulation provides that no one can keep items procured through crime (e.g. counterfeited money, produced weapons, drugs, etc.) nor can anyone keep instrumentalities of crime (e.g. a gun used for murder, a vehicle used for transport of immigrants etc.). If there

is a concern for national security or public health, or if there are moral reasons, seizure/confiscation of instrumentalities of crime from the offender or a third party is mandatory. On the other hand, if there is a risk that these instrumentalities might be used again in committing a crime, seizure/confiscation is possible but not mandatory. Just like in the case of confiscation of proceeds and assets, it is the court that should decide to confiscate instrumentalities even if there are factual or legal obstacles. These instrumentalities should be confiscated even if the criminal procedure has not ended in the convicting judgment. The court that conducted the proceedings should render a separate decision thereon.

To ensure harmonization with article 20 of the United Nations Convention against Corruption, Macedonia has introduced a new criminal offence in Article 359-a of the Criminal Code "Illegal enrichment and concealment of property", as one of the crimes against official duty. The basic form of this criminal offence contains two parts: 1) civil servant or a responsible person in a public company, public institution or other legal entity that manages state funds, contrary to his/hers legal obligation to declare assets or any changes thereof, gives false information about his/hers income and property, and 2) during the mandate, previously mentioned entities or members of their families have acquired property that significantly exceeds his/hers lawful income and for which he/she gave false information or concealed true sources. For these actions, the law provides for prison sentence of up to 5 years or a fine, and if the criminal offence includes assets of massive proportions, the law provides for up to 8 years of imprisonment and a fine. Paragraphs 5 and 6 of this Article provide for a mandatory confiscation in both cases.

Criminal Procedure Code provides for measures aimed at identifying and safeguarding people and items. These include temporary measures of seizure and safeguarding items and assets. According to this law, the implementation of the measures of confiscation of incomes and assets includes several key actors: prosecution (state prosecutor or judicial police), the court, the accused, and the Agency for Managing Seized and Confiscated Assets which is actually not mentioned in this law, but it is defined in the Law on Managing Assets, Proceeds and Instrumentalities Seized and Confiscated in Criminal and Misdemeanour Procedures.

The Criminal Procedure Code reads that: "The items that should be seized/confiscated according to the Criminal Code or those that can be used as evidence shall be seized and handed to prosecution or other institution to be safeguarded." In such a case, the court issues a seizure order based on the proposal of the prosecution or judicial police. Furthermore, during the criminal procedure and upon the request of the prosecution, the court may impose temporary measures of seizure of items and assets that may be seized/confiscated according to the Criminal Code. These can be seized or subject to any other measure needed to prevent use and disposal of such items or assets. If there is a risk that confiscation of proceeds can be delayed, the judicial police can seize or freeze items or assets or it can undertake any other measures to prevent the use, alienation or disposal of such items and assets.

If such an action is undertaken, the judicial police is obliged to inform the prosecution, while the judge has to approve the application of such measures within 72 hours: "In the case of seizure/confiscation of proceeds from crime, the person to whom the income and assets were transferred to, (including the representative of the legal entity), will be invited for interrogation in the pre-trial stage and during the trial before the court." The court will impose the measure of extended confiscation if the accused cannot prove that his/her income originates in legal sources within a year from the start of the criminal procedure. If the court delivers its judgment before this deadline and the legal requirements for extended confiscation are met, the court will impose this measure in a separate decision that can be disputed at a later date.

Given the fact that the prosecution cannot always make a solid case against the offender, the Criminal Code and the Criminal Procedure Code provide for the procedure for confiscation of incomes acquired through a criminal offence, even where there are factual or legal obstacles for conducting the criminal procedure. This type of special procedures may be conducted at a request of the prosecution if the requirements for seizure/confiscation defined in the Criminal Code are met. Within the procedure, the prosecution will present evidence and it must prove that the income and assets have been acquired through crime, so that the court can impose this measure. The court decision can be appealed

against later in the proceedings. The measure of seizure/confiscation is enforced in the period of 30 days after the decision becomes final. The order is issued by the court and the measure is enforced in relation to the remaining assets of the offender.

Law on Managing Assets, Proceeds and Instrumentalities Seized and Confiscated in Criminal and Misdemeanour Procedures was adopted in 2008. It regulates the managing, use and disposal of the seized assets and income, of the assets and income confiscated on the basis of final court rulings rendered in criminal or misdemeanour procedure, and of assets confiscated through administrative procedure. This Law also deals with the establishment, competences and operational procedures of the Agency for Managing Seized/Confiscated Assets that is in charge of enforcing the court rulings on seizure/confiscation. The primary goal of this Law is to prevent illegal treatment of the seized/confiscated assets, which is a form of combating corruption.

Agency for Managing Seized/Confiscated Assets was established to implement this Law. It is in charge of managing various types of confiscated and seized assets, like movables, immovable property, buildings and assets with historical importance and *res extra commercio* ("a thing outside of commerce), such as drugs and weapons. It also has the competence to confiscate incomes, i.e. to keep and secure seized assets, asses its value, rent confiscated assets, keep records of all seized/confiscated assets, sell seized/confiscated assets, prepare statistical, financial and all other reports about the seized/confiscated assets etc.

According to this Law, after the court has made the decision on confiscation, the Agency must be notified within 2 days and confiscated assets and incomes must be handed over to the Agency within 3 days of the seizure/confiscation. The decision of the court is enforced by the Agency and in this way the Agency is obliged to treat the seized/confiscated assets in a fair and honourable manner.

In 2013 the Agency adopted the Strategic plan for the following two years (2014–2016), which states that the Agency has increased the income of the state budget for over 2 million euro, through the enforcement of final decisions of the court concerning confiscation. The Agency has

set several priorities for the following two years, such as: collecting and recording all seized/ confiscated assets by courts, Customs Administration, Police and other institutions; opening of new warehouses and warehouses in other cities that will improve operation and efficiency and reduce expenses of transport; cooperation with other agencies outside Macedonia and inclusion in international organisations, etc.[3]

Given the above, we can only assume that this is one of the efficient ways and instruments to prevent future criminal activities and that would certainly seem so if we took into account only what is written on the paper. Unfortunately, it is not true in reality – on one hand only a small number of judges decide to use the measure of confiscation, while on the other only a small number of prosecutors is able to build a strong case and to prove the illicit sources of the offender's income.

Statistical reports of the National Statistics Office of the Republic of Macedonia[4] for 2014 show that confiscation, as a measure, was imposed only in 133 cases, while seizure/confiscation of items and assets was imposed only in 1,041 cases. The total number of the convicted adult offenders was 11,683. These data show what the strengths of the prosecution are and how the prosecution is willing to collect proper and sustainable evidence to make a strong case. However, on the other side, the data also show the lack of courage, knowledge and cooperation with other institutions in the efforts to prove the illicit origin of the assets and proceeds from crime.

For example, for criminal offences against human health, in 2014 confiscation was imposed 14 times; while it was imposed in 27 cases for criminal offences against public finance, payment operations and economy

3 In 2014 the director of the Agency, Baškim Ameti, said that "Confiscation of proceeds from crime is increasingly recognized as one of the efficient ways to combat organized crime". He stated that the Agency has broad authorities, but that it still does not have all the required human resources and finances and that it would be difficult to asses the total value of seized/confiscated assets because they encompass various movable and immovable assets that keep changing and that are located in different places. Source: http://www.utrinski.mk/?ItemID=0FFB66881D52AA4882D1FF9D0EFAFF6B

4 http://www.stat.gov.mk/Publikacii/2.4.15.12.pdf

– in 19 cases for money laundering (Article 273) and in 6 cases for tax evasion (Article 279). This measure was imposed 66 times for abuse of office and authorities (Article 353) and only three times for criminal conspiracy (Article 394).

On the other side, in 2014 the measure of seizure/confiscation of items and assets (Article 100) was imposed 146 times for the criminal offences against property, 54 times for the criminal offences against public finances, payment operations and economy, out of which 12 times for money laundering (Article 273). Same year this measure was imposed 72 times in cases of abuse of office and authorities (Article 353), 6 times in cases of passive bribery and 4 times in cases of active bribery (Article 358). It was imposed 86 times in cases of criminal conspiracy (Article 394) and 84 times for illicit production, possession, and trafficking in weapons or explosive devices (Article 395).

According to these statistics, the measure of seizure/confiscation of items (instrumentalities) (Article 100 of the Criminal Code) was used much more than confiscation. The primary reason for that is the fact that the law gives a general permission to the judge to seize/confiscate the items, but the fact is also that there are *lex specialis* in various criminal offences, where compulsory seizure/confiscation is required. It is simple to seize/confiscate the gun used to kill the victim, a vehicle used for smuggling migrants, or drugs found in the offender's basement and this can be easily supported by evidence, such as fingerprints, expert opinions, witness statements etc. However, when it comes to confiscation, it is usually a question of cases that include more than one perpetrator, money, plans to hide or conceal illegal activities, as well as committing of other criminal offences. It is far more complicated to establish the value of incomes and goods the offender acquired by committing a crime if we take into account that it is possible that a part of such goods was acquired in legal manner.

Alongside this discouraging statistics, there is a large number of cases known to the public, in which the prosecution successfully used the confiscation of income and goods from offenders, such as: "Bachilo" ("Tor"), "Miodrag Markovikj", "Ohis", "Tor 2", "Zivko Eftimovski", "Daravelski and Docevski", "Borko Markovikj", "Trafiking djecom", "Slavija", "Prevoznik" etc.

In the case "Bachilo" ("Tor"), after 7 years of work, the Government of the Republic of Macedonia succeeded in conducting a criminal procedure and confiscating all illegal assets from Inifaris Dzemaili. The accused in this case were convicted for abuse of office and authority (Article 353), evasion (Article 249) and money laundering (Article 273). The measure of confiscation was imposed alongside other measures, but court has specifically ordered the confiscation of money in the total amount of 122,208,602.00 dinars or almost 1,987,000 million euro, confiscation of a real estate of 7,240 m^2 in the form of an undeveloped construction land and confiscation of land – 178,222 m^2.

In the case "Miodrag Markovikj" the court convicted one person to 4 years of imprisonment for money laundering (Article 273) and decided to confiscate all indirect and direct proceeds from crime in the total value of 544,207.00 dinars (about 9 million euro). The confiscation was enforced on the basis of the value of the assets was in the possession of the offender.

In the case "Ohis" the accused were convicted for abuse of office and authority (Article 353), and income and assets worth 892,812 euro were confiscated.

In the case "Daravelsmi and Docevski" the accused were convicted and sentenced to prison sentences of 7 years, 4 years and 10 months for abuse of office and authority (Article 353) and for counterfeiting official documents (Article 361). The court decided to seize and confiscate assets and income worth 103,575,167.00 dinars.

In the case "Child Trafficking", the accused were convicted and sentenced to 5 years imprisonment for the offence of trafficking in children (Article 418-g), and the court made a decision to confiscate the bar named "Bravos", in the centre of Gostivar, the surface of which is 65m^2, which was owned by the convicted A.Gj, as well as the hospitality establishment "Coffee", also in Gostivar, of the surface of 120 m^2, owned by the convicted Lj.Z.

One of the recent cases is the case "Transporter", where one of the accused was the mayor of Bitolj – Vladimir Talevski. In this case, the presi-

dent Gjorge Ivanov pardoned the mayor, which is a legal obstacle to conducting a criminal procedure against him. However, on the basis of the provisions of the Criminal Code of the Republic of Macedonia and of the Criminal Procedure Code, special public prosecution office requested the criminal court to freeze and seize income and proceeds from crime. They noted that they, as prosecutors, "had a duty according to the law to conduct the procedure so that the evidence of illicit acquisition of assets and income can be secured, and to conduct the procedure of seizure/ confiscation of all the assets and income acquired through crime and to return them to the budget of the Republic of Macedonia, i.e. to its citizens." This case is one of the numerous cases that the special state prosecution started on the basis of the taped conversation that the opposition party published. This was an example that, although there are factual or legal obstacles to conducting criminal procedure, there are other ways to annul the consequences of crime. However, since it was actually the first time that the public learned of such a possibility, it will take time for it to become a regular institutional practice.

Conclusion: It is a general opinion that Macedonia has a developed legal framework for seizure and confiscation of proceeds and that it has the necessary distribution of competences amongst prosecution, courts and the Agency for managing seized/ confiscated assets, but that it lacks organized inter-institutional cooperation and coordination. The prosecution must invest more efforts to secure sustainable evidence to prove illegal origins of income and assets. They should also invest more efforts and use their legal authorities more. These authorities include procurement of information from other entities that have to comply with the law. The Law also poses a serious challenge for offenders. It namely requires the offender to prove that his/her assets come from legal sources. However, this has not yet become a regular practice. One of the good features of the current system is a widespread use of confiscation of items, which is a way to ensure that instrumentalities of crime or items generated in the process of committing the crime cannot be re-used as a part of legal flows of money and goods.

Mr. Eldan Mujanović, Criminal Policy Research Center[1]

Seizure and Confiscation of Proceeds from Crime in Bosnia and Herzegovina

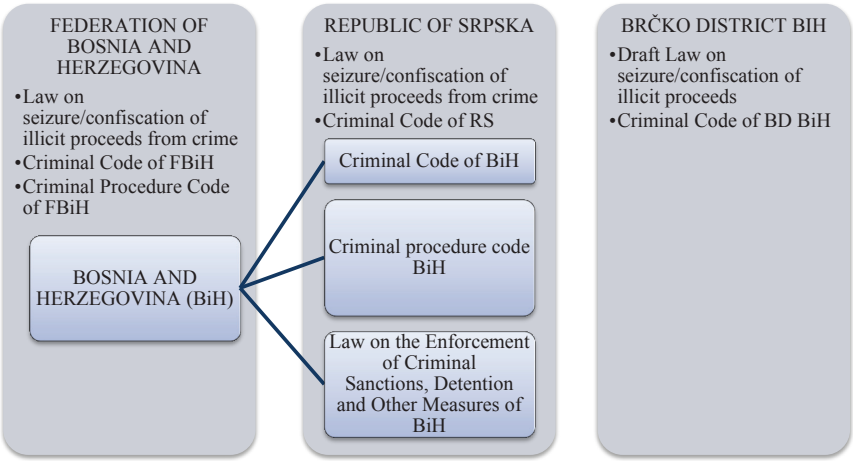
Seizure and confiscation of illegally acquired assets are defined in various legislative solutions across Europe. In Bosnia and Herzegovina (B&H) there is no law on the national level that regulates this area[2].

On the lower level – level of entities, there are two adopted laws: the Law on Seizure and Confiscation of Assets Acquired Illegally through Criminal Offence of the Federation of Bosnia and Herzegovina (FB&H) and the Law on Seizure and Confiscation of Assets Acquired through Criminal Offence of the Republic of Srpska (RS), while in the Brčko District of BiH (BD BiH) drafts of this law are currently being considered.

1 Mr. Eldan Mujanović, PhD is the director of the Criminal Policy Research Centre (CPRC) from Sarajevo, B&H. He teaches in the University of Sarajevo and deals with the field of seizure/confiscation of proceeds of crime. He is the author of several publications, articles, reports and studies in the field of combating corruption, organized crime and felonies, and implementation of the measures of seizure/confiscation of proceeds of crime. He is the leader of several projects that deal with improvements to the system of seizure/confiscation of proceeds of crime in Bosnia and Herzegovina and he has been hired by national and international institutions and organizations as a consultant and expert in the field of the rule of law.

2 Criminal Code of B&H, B&H Law on Enforcement of Criminal Sanctions, Detention and Other Measures and the Law on Enforcement Procedure of B&H before B&H Court are the pieces of legislation in this field on the national level.

Scheme 1. Legislation in the field of seizure and confiscation of assets acquired through crime in Bosnia i Hercegovina



Source: Adapted by the author

The 2003 reform of the criminal legislation, as well as the recent amendments to the Criminal Code of B&H have introduced a clearer meaning of the institute of extended seizure and confiscation of assets acquired through crime.

Legislation that was at that time in force in B&H is aligned between FB&H and BD B&H, while RS adopted an entirely new Law on seizure/confiscation of assets acquired through crime[3]. However, several years later the initiative of the ruling political parties[4] led to the adoption of a completely new law in FB&H – the Law on Seizure/Confiscation of Illegally Acquired Assets through Crime[5], while in BD B&H a draft of this type of law is already being considered.

3 Official Gazette of RS, 12/10

4 In the process of European integration B&H took the obligation to cooperate with the Member States in the field of prevention and combating of serious crime. In that it accepted the obligation to harmonize national legal framework with the so-called minimum legal rules and measures of the EU criminal law.

5 Official Gazette of FB&H, 71/14

Article 110 of the Criminal Code of B&H[6] stipulates seizure and confiscation of proceeds from crime for all criminal offences defined in the Titles XVII, XVIII, XIX, XXI, XXI A and XXII[7] of the Code. As the Law stipulates, the court may seize/confiscate the total of the proceeds for which the prosecutor can provide sufficient evidence that it was acquired through criminal offences. Furthermore, the Criminal Procedure Code of B&H[8] contains provisions that define the authorities of the persecutor, as well as seizure and confiscation of proceeds from crime (Articles 35, 72, 73, 74, 197 and 392–400).

The Law on Seizure and Confiscation of Illicit Proceeds Acquired through Crime of FB&H came into effect in September 2014. It has been implemented since March 2015. This law is the key piece of legislation that the relevant institutions will use to fight crime and corruption clearly stating the message that no one can keep any assets that was acquired unlawfully.[9] This Law regulates management of seized and confiscated assets and stipulates the establishment of the Federal Agency for Seized/Confiscated Assets Management providing the room for the establishment of other organizational units. The basic goal of this Law is to ensure comprehensive, precise and simple rules the procedures to be used by the judicial and police forces to identify, secure and seize effectively the proceeds originating from the activities that have the features of criminal offences. The procedure is conducted at the proposal of the prosecutor, and in case that the prosecutor fails to submit a request for seizure/confiscation of proceeds (during the procedure) the court can make this sort of decision *ex officio*.

It is important to emphasize that this Law leaves the opportunity for using subsidiary legal solutions (Criminal Code of FB&H and the Criminal

6 Official Gazette of FB&H, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, 47/14, 22/15, and 40/15

7 Crimes against humanity and values protected in the international law, crimes against economy and single market and crimes in the field of customs, crimes of corruption and crimes against official and other duties, crimes of infringement of copyrights, crimes against armed forces of B&H and arranging, preparing and conspiring and organized crime.

8 Official Gazette of B&H 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13

9 This Law is a part of the anti-corruption legislation.

Procedure Code of FB&H). This is related to the *lex specialis* and *lex posteriori* character of this Law – which means that it is applied as *lex specialis*, while the provisions of other laws are applied if they are not stipulated by this Law. Thus, in its Articles 114, 114a, 115 and 116, the Criminal Code of FB&H stipulates the basis and the manner of seizing/confiscating proceeds from crime, as well as the way to protect the injured party. It also contains the general principles that *'no one can retain proceeds from crime'* and that the proceeds can be seized/confiscated by a court decision establishing that the crime was committed. Hence, the condition for seizure/confiscation is the existence of the court decision establishing that the criminal offence was committed.

The above listed articles enable the seizure of proceeds from criminal offences defined in chapters XXII, XXIX and XXXI of the Criminal Code of B&H[10] – for which the prosecutor offers enough evidence to prove that the assets were acquired unlawfully. As for the seizure of proceeds from crime, in the context of the Criminal Procedure Code of FB&H, the following provisions are interesting: those that refer to the competences of the prosecutor and those that refer to seizure of assets originating in crime. Articles 413–421 provide a clearly defined legislative framework treating the field of seizure/confiscation of proceeds, procedure of seizure/confiscation of proceeds, establishing the value of the proceeds, temporary security measures, contents of the decisions imposing the measure of seizure/confiscation of proceeds, request for repetition of the procedure in the part related to the measure of seizure/confiscation of proceeds, lodging appeals and the procedure of revocation of suspended sentences.

The law in FB&H mentions, for the first time, legal, institutional and organisational preconditions for a comprehensive seizure of every form of assets from the perpetrators of criminal offences listed above that led to proceeds. For the first time in the criminal-law sense, there is a possibility to seize/confiscate the proceeds, not just from the perpetrators of criminal offences but also from the so-called 'related persons' to whom this form of assets was transferred in order to conceal them and

10 Crimes against economy, business operations and security of payment operations, crimes against the justice system, crimes against bribery and crimes against official duty and other responsible duties.

to hinder the seizure/confiscation. Thanks to this novelty, the criminals will not be able to sign various contracts transferring their assets to their family members and accomplices.

It is also for the first time that the Law mentions the institute of financial investigation within which the prosecutor will try to identify the volume and structure of lawful income of individual or legal entity in order to determine the origins of the available assets. Financial investigations will lead to requests for temporary or permanent seizure of all assets of a suspicious origin, i.e. for which legitimate origin cannot be proven.

One of the key expectations is concerned with contributing to the establishment of an efficient system for seizure of proceeds in B&H as a prerequisite of EU integrations. It is necessary to emphasize that the Law is in accordance with EU standards and that it offers highe-quality solutions for seizure of proceeds from crime. It will be possible to enjoy the benefits of all these solutions if all necessary and competent institutions get involved. On the other hand, dilemmas surrounding the Law on Seizure/Confiscation of Illicit Proceeds from Crime of FB&H should not be neglected, particularly the cultural barriers, the lack of knowledge of the matter and developed practice. Nevertheless, every positive example of a good practice should get affirmation, should be promoted and used for further transfer of knowledge and experience.

Republic of Srpska adopted the Law on Seizure/Confiscation of Proceeds of Crime already in 2010. Thanks to this Law it has seized or confiscated the assets in the value of about 23 million convertible marks (KM) This Law provides for seizure or confiscation of assets where the assets can be seized/confiscated already within the investigation. Thanks to this Law the Agency for Seized/Confiscated Assets of the Republic of Srpska was established. It is a technical body and support to the courts to seize/confiscate, deposit and store the assets. The revenues earned on the basis of judgments are deposited into the budget of the Republic of Srpska, while the immovable property is recorded into the land registry as the property of the Republic of Srpska.

As presented in the scheme above, BD BIH does not have any officially adopted law that would treat the field of seizure/confiscation of proceeds

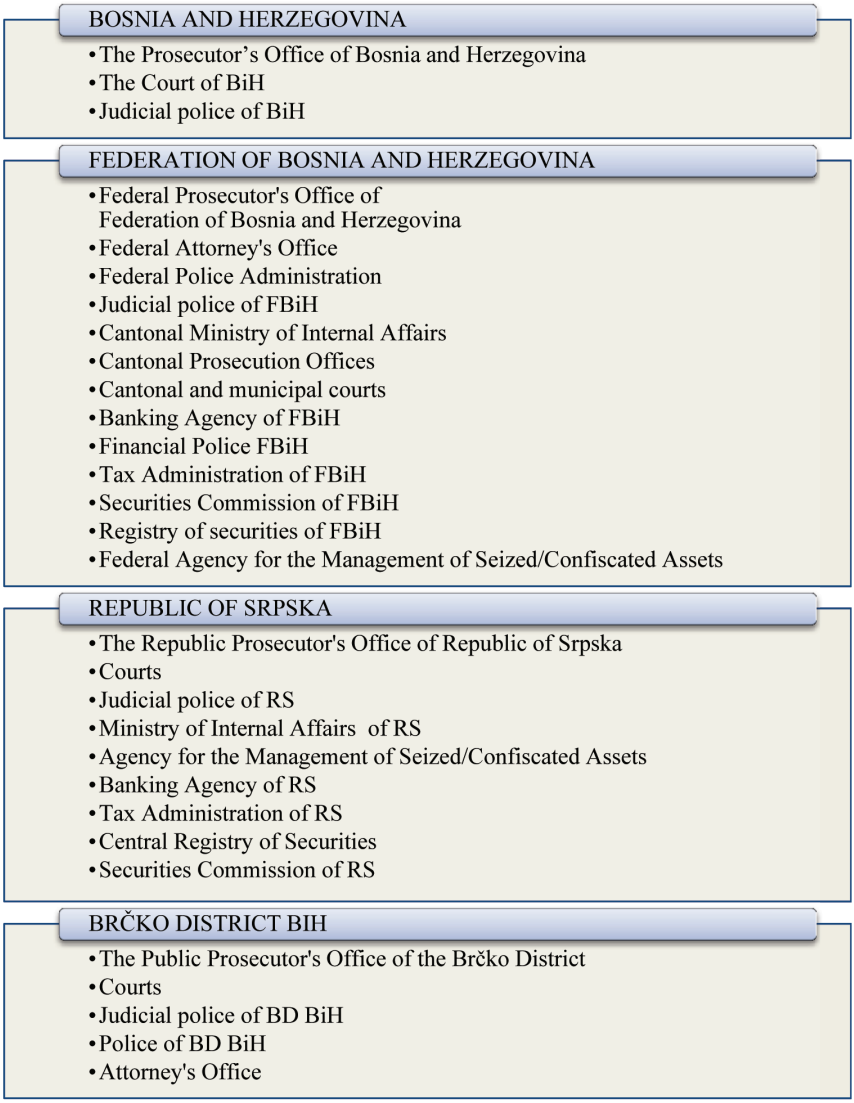
from crime. A draft of such a law is waiting for potential amendments and adoption. However, the Criminal Code of BD B&H contains certain provisions that deal with the issues of seizure/confiscation of illicit proceeds. Thus, the entire Chapter XII of the Criminal Code of BD B&H defines the provisions that refer to the seizure/confiscation of the proceeds from crime and legal consequences of a convicting judgment. This Chapter is identical to the provisions of the Criminal Code of BD B&H that define the extended seizure/confiscation and the manner of seizure/confiscation of proceeds from crime and protection of the injured party.

Having analysed the entire situation of the B&H legislation that deals with the seizure/confiscation of the proceeds of crime, we can say that there is a significant extent lack of harmonization. It is not systematic and it is inefficient. A large problem is the lack of an integral law and the state agency that would ensure enforcement of the adopted judgments. The state, namely, loses about 4 million (KM) annually because there is no clear legal framework for this matter and even after the judgments are adopted the convicted criminals keep the assets that they acquired through committing various criminal offences.[11]

Bosnia and Herzegovina (B&H) is the state with a very complex state organization, which faced numerous problems in the processes of defining the Constitution and competences of the state, because the role of the state was frequently put in the shadow of the more prominent role of the entities. Thus, from the very moment of drafting the Constitution, as a part of the Dayton Peace Agreement, there was a tendency to reduce the integration of the state, in general to the benefit of the entities. That is precisely why there are complex institutional mechanisms in charge of seizing/confiscating proceeds of crime.

11 In addition to the legal basis for financial investigation and seizure/confiscation of proceeds, there is a large number of other pieces of legislation, and strategies that deal with the field of seizure/confiscation of proceeds from crime and organized crime. They include: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2007) and the Strategy for Combating Corruption 2009–2014. Strategy for Combating Corruption 2015–2019 and its Action Plan are currently being prepared.

Scheme 2. Institutional mechanisms for seizure/confiscation of proceeds of crime in Bosnia and Herzegovina



Source: adapted by the author

Each of the above stated institutions, regardless of what the level of authorities it belongs to, has its own duties and competences that should be implemented in line with the legislation. Although some of the institutions do not act using their full capacities and do not have all the required resources, the civil servants that work for them are trying to ensure continuous fight against corruption and organized crime, particularly the procedures for seizure/confiscation of proceeds from crime. Thus, the comprehensive fight against organized crime and corruption is the key priority, and it is also a challenge for all institutions in B&H, both on the state level and on the level of entities, since it is precisely the efficient and successful fight against crime that is one of the preconditions for accessing EU and NATO. Therefore, all the institutions should develop efficient modalities of cooperation in criminal and financial investigations, in order to reduce the lack of communication and coordination between the institutions, and in order to improve compliance with the legislation.

As for the institutions on the level of the state that participate in the procedure of seizure/confiscation of proceeds of crime, it is particularly important to emphasize the roles of the Prosecution Service of B&H and Court of B&H. The Prosecution Service of B&H is a *sui generis* institution and its competences are limited to the prosecution of criminal offences defined in the Law on the Court of B&H, Law on Prosecution Service of B&H, Criminal Code of B&H, Law on Criminal Procedure of B&H, Law on Formation of Cases in the International Criminal Tribunal for Former Yugoslavia for the Prosecution Service of B&H.

The key role of the prosecutor is to provide all the relevant evidence to ensure reasonable belief that the proceeds were acquired through commission of criminal offences. Collecting such evidence and information implies conducting a large number of investigations and consulting other institutions that are directly and indirectly connected to these criminal offences. Criminal Code of B&H stipulates that it is the Court of B&H that renders the decision on seizure/confiscation of proceeds, incomes, profit and other benefits. It is also the Court that revokes the security measures and legal consequences of convicting judgments.

Since Federation of B&H and Republic of Srpska have laws that deal with the field of seizure/confiscation of proceeds of crime, these laws emphasize the prominent role of certain institutions. As for FB&H, it is the courts that have the prominent role (Supreme Court, Cantonal and Municipal Courts), as well as the prosecution offices (federal and cantonal prosecution offices), and there is also the newly established Federal Agency, that is in charge of managing the seized/confiscated assets.

The Court is the only body that has the authority to limit constitutional rights of the citizens to enjoy their property peacefully if it is acquired in an illegal manner. The property or assets can in such cases be seized or confiscated.[12] According to Article 300, paragraph 1, item e of the Criminal Procedure Code of the Federation of B&H the Court shall render the decision on seizure/confiscation of proceeds if the accused is convicted in the judgment. In the same decision, according to Article 471, paragraph 2 of the Criminal Procedure Code of the Federation of B&H, the Court has to state precisely which type of assets is to be seized/confiscated. According to Article 305, paragraph 7 of the Criminal Procedure Code of the Federation of B&H and Article 10, paragraph 5, the Court is obliged to provide clear statement of reasons, i.e. the evidence used to render the decision on confiscation of proceeds.

The court is also obliged to inform the person authorized to lodge the claim for damages about that right and to interrogate such a person about the facts stated in the claim for damages. The circumstances important for such a claim are established on the basis of the information obtained in that way. The Court will impose the measure of confiscation of proceeds only if the proceeds are not fully covered by the awarded damages. It is worth mentioning that the court can award damages in full or in part, while for the rest it can refer the parties to use the civil procedure.

The prosecution service has multiple roles in the procedure of seizure/confiscation of proceeds from crime. First of all, according to the Law on Seizure/Confiscation of Illicit Proceeds of Crime of the Federation of B&H, the whole procedure is based on the proposal of the prosecutor. Fur-

12 Article 10 of the Law on Seizure/Confiscation of Proceeds from Crime of FB&H (Official Gazette of FB&H 71/14)

thermore, according to Article 8, paragraph 2 of the Law, the responsible prosecutor can issue an order for enforcement (but also for suspension) of the financial investigation aimed at a comprehensive establishment of the genuine origin, value and structure of the proceeds that are suspected of having been earned in an illicit manner. The prosecutor gets special support in conducting the financial investigation from all the relevant authorities and institutions in the Federation of B&H, particularly the internal affairs bodies in the cantons and the Federal Ministry of Interior, Financial Police of the Federation of B&H, Tax Administration of FB&H, Commission for Securities of FB&H and Register of Securities in FB&H.

After the investigation, the institutions are obliged to compose and submit to the responsible prosecutor the report that will contain presentation of all the collected evidence and summary of all the information and description of facts obtained during the financial investigation.[13] The documents that, in addition to those from the financial investigation, are offered to the court by the responsible prosecutor within the appropriate procedures are listed in the table below.

Scheme 3: Documents sent by the Prosecutor to the Court

DOCUMENTS	DESCRIPTION
The request through which the responsible prosecutor initiates the special procedure	Explanation of the procedural barriers for regular procedure of seizure/confiscation of proceeds of crime;
Proposal for seizure/ confiscation of proceeds in the special procedure	Data about the person that is to be seized/ confiscated the proceeds; description and the name of the criminal offence as defined in the law; data or description of the assets that are to be seized/confiscated; evidence about the assets collected through financial investigation; evidence on legal incomes of the person; circumstances that show the disproportion between assets and incomes of the person and reasons for seizure/ confiscation of assets;

13 Article 9, paragraphs 2 and 3 of the Law on Seizure/Confiscation of Proceeds from Crime FB&H (Official Gazette of FB&H, 71/14)

Proposal against a related person	Evidence that the person inherited the assets originating in crime;
Proposal against a third party	Evidence that the proceeds from crime were transferred without any compensation, or with a compensation that does not match the real value with the view to prevent seizure/confiscation;
Proposal of the interim security measure	Brief description of the facts of the criminal offence, the name of the criminal offence as defined in the law (if it does exist), specific circumstances that indicate to the existence of the threat that it will be impossible to meet the claim of the FB&H related to the seizure/confiscation of proceeds of crime or that it will be difficult to meet it without imposing the interim security measure;
Proposal for seizure/ confiscation of illicit proceeds from crime	Data about the person to be seized/confiscated the proceeds; description and the name of the criminal offence as defined in the law; data or description of the proceeds to be seized/ confiscated; evidence about the assets to be seized/confiscated; evidence about the legal incomes of the person and circumstances that indicate to the discrepancy between the incomes and assets of the person.

Source: Law on Seizure/Confiscation of Criminal Proceeds (Official Gazette of the FB&H 71/14)

Thus, the role of the relevant prosecutor is particularly important in the special procedure of seizure/confiscation of proceeds, in the procedure of ensuring the seizure/confiscation of proceeds, in the regular procedure of seizure/confiscation of proceeds and in the procedure after confiscation of proceeds.[14]

The third institution that has a very important role in the procedure of managing the seized/confiscated assets is the Federal Agency for Managing the Seized/Confiscated Assets. This Agency was established by the

14 Prosecutor and/or court should inform the Federal Prosecution Office that the judgment became final so that the procedure for enforcement of the judgment can start.

Law on Seizure/Confiscation of Proceeds of Crime as an independent administrative organization that reports to the Government and the Parliament of FB&H. This Agency started working officially on 2 June 2015. The key function of the Agency is to manage the seized/confiscated assets in line with the legislation with the view to protecting security, integrity and values. This Agency is thus the service to the relevant courts within the procedure for seizure/confiscation of proceeds.

According to Article 31 of this Law, the Agency has the following duties:

- it stores, safeguards, sells, and rents the assets seized/confiscated on the basis of the Law;
- it assesses the value of the seized assets and the assets seized/confiscated based on this Law and other laws;
- it keeps the records of assets it manages, and of court proceedings in which the assets are decided on;
- it collects all the data, reports and other information from the procedures for confiscation of assets that ended in final judgment in order to process the data and inform the public about the situation in the field of seizure/confiscation of proceeds from crime in FB&H;
- it initiates and issues recommendations for the improvement of legislation related to financial investigations and seizure/confiscation of proceeds from crime, etc.

The above analysis provides details about the role of certain institutions in the procedure of seizure/confiscation of proceeds from crime i.e. from illicit activities. However, there are other institutions that also have a very important role in this procedure, because it is thanks to the information they collect and provide, that the prosecution offices and courts conduct all the procedures aimed at processing the perpetrators of criminal offences in line with the Law.

The Ministry of Interior of the Republic of Srpska has a special Unit that deals in identifying the assets acquired through crime (Article 6, paragraph 2 of the Law on Seizure/Confiscation of Assets Acquired through

Crime in the Republic of Srpska). The role of this Unit is particularly important in collecting evidence and identifying the assets acquired through crime in the procedure of financial investigation. The Agency for Managing the Seized/Confiscated Assets, which is a part of the Ministry of Justice of the Republic of Srpska (Article 8, paragraph 1), does all the activities related to managing the seized/confiscated assets. They also do the expert assessment of the seized/confiscated assets acquired through crime, and they store, safeguard and sell the seized/confiscated assets, and keep the records of such assets etc. (Article 9, paragraph 1).

In addition to these two bodies, the prosecution service and courts have an important role in the procedure of seizure/confiscation of proceeds of crime. As the Law stipulates, the procedure for seizure/confiscation of proceeds from crime is started by financial investigation. Financial investigation is initiated and managed by the prosecutor. The prosecutor has the authority to request from the Unit to collect the data about the assets and legal incomes that the owner of the property acquired, i.e. made before the criminal procedure started for the criminal offence; data that are related to the property that the legal successor inherited and the data about the assets and the compensation for which the assets was transferred to a third person (Article 15, paragraph 2). Just like in the case of the Law in FB&H, in the Republic of Srpska the prosecutor submits certain documents to the court so that the assets acquired in an illegal manner can be seized/confiscated (the request for seizure of assets, request for imposing an interim measure, and request for confiscation of assets acquired through crime). After the trial the court renders the decision either to accept or to reject these requests.

The prosecutor that has jurisdiction in the case should provide all the relevant evidence so that in the final stage of the procedure the court can confiscate the proceeds for which it has been proven that they were acquired by a criminal offence or offences. In order to collect all the required information and data, the prosecutor issues an order to conduct the investigation and demands various authorities to submit the relevant data.

As B&H does not have the state law that would deal with the seizure/confiscation of proceeds of crime, it does not have any unique institution that would be in charge of managing the assets seized/confiscated in such a way. However, as the entities have their own laws in this field, such laws imply the establishment of separate Agencies that are primarily in charge of managing the seized/confiscated assets.

In the FB&H, the Law on Seizure/Confiscation of Assets Acquired through Crime defines (in Articles 25–37) the organization and competences of the Federal Agency for Managing Seized/Confiscated Assets. These articles also define the process of managing such assets. In this context, the Agency is an independent federal administration organization with the capacity of a legal entity.[15] It is particularly important to emphasize that the Agency does not have any operational competences for conducting financial investigations and for seizure/confiscation of proceeds from crime, since that lies within the jurisdiction of the prosecution service and courts.

According to the Law, the key role of the Agency is to manage the seized/confiscated assets in the criminal procedures that are in progress as well as in the procedures that have been finally completed in the court with jurisdiction. Managing such assets requires special capacities, resources, and knowledge of the procedures for preserving the value of such property.[16] It is worth mentioning that before this Agency was established there were no mechanisms for managing the seized/confiscated assets in the Federation of Bosnia and Herzegovina. The proceeds that were seized/confiscated were usually deposited in the police premises or in the places where police kept the instrumentalities of crimes.

The procedure for managing the seized assets is initiated after the court with jurisdiction renders the decision on the security measure that contains the measure of seizure of assets. The Agency then takes over such assets, assesses the value and informs thereof the court that rendered

15 Article 26, paragraph 1 of the Law on Seizure/Confiscation of Proceeds from Crime (Official Gazette of FB&H, 17/14)

16 Revenues from the sale of confiscated property are paid to the budget of FB&H and used for financing various costs of assets management.

the decision on seizure. The decision on the manner of safekeeping and managing the seized assets is rendered by the Agency with the view to preserving the value of the assets.[17]

As for modalities in managing the seized/confiscated assets, the Agency, according to the law, has the option to sell such assets, to rent it, give it as a present or to destroy it – if the requirements are met. The assets can be sold at the same or lower price than assessed. If the assets are not sold, they can be given as a gift to the institutions that are financed from the budget of the FB&H or to humanitarian causes or they can be destroyed.[18] The funds acquired in this way are paid directly into the budget of the FB&H.[19]

Unfortunately, due to numerous administrative and political barriers in the FB&H, the Agency still does not have the required material, technical or human resources (except for the Director) to take over and manage such assets. It is expected that these problems will be solved in the future and that the Agency will be fully operational becoming thus an efficient and effective service for the authorities, as defined in the Law.

The Republic of Srpska also has the Agency for Managing Seized/Confiscated Assets. The Agency was established by the Law on Seizure/

17 Agency has a very important duty – to preserve the value that the assets had when seized/confiscated so that the assets can be used later, or returned to the state or donated to social and other programmes.

18 Decision on giving the assets as a gift and the decision on destroying the assets referred to in paragraph 1 of this Article shall be adopted by the Government of the Federation of Bosnia and Herzegovina upon the proposal of the Director of the Agency. The costs of destruction of assets are to be covered by the Agency (Article 32, paragraph 5).

19 In May 2016 the Director of the Agency started the initiative to open a separate analytical account for the payments and records of the amounts procured through the implementation of the Law on Seizure/Confiscation of Proceeds of Crime in FB&H. The initiative was adopted by the Minister of the Federal Ministry of Finance B&H and thus the Rulebooks on the manner of payment of public budget revenues and extra-budgetary funds in the territory of FB&H a special type of revenues will be created, bearing the title "Funds from the implementation of the Law on Seizure/Confiscation of Proceeds from Crime in FB&H". In this way the amount of funds paid into the FB&H budget through the implementation of this Law will be transparent.

Confiscation of Assets Acquired Through Crime (Official Gazette of RS 12/10). The competences and functions of the Agency in RS are defined in the Law (Articles 8–14). Article 8 defines that the Agency, as an administrative unit, is a constituent part of the Ministry of Justice of RS. Although its role is not explained in details as in the federal law, it is very important in the overall procedure of seizure/confiscation of proceeds from crime. Thus, Article 9 of the Law defines the competences of the Agency as follows:

- it manages the seized/confiscated assets acquired through crime, instrumentalities of crime referred to in Article 62 of the Criminal Code of RS[20], proceeds from crime defined in Articles 94–96 and the assets given as a bail in the criminal procedure,
- it assesses the value of the assets acquired through crime,
- it stores, safeguards and sells the seized/confiscated assets acquired through crime and manages the funds secured in such a a way;
- it keeps the records of assets it manages as defined in item a) of this paragraph and of the court proceedings where such assets were decided on,
- it participates in providing legal assistance,
- it participates in the trainings for civil servants related to seizure/confiscation of assets acquired through crime, etc.

The Agency currently manages different forms of assets in the value of more than 4 million KM, which are the assets seized/confiscated from the owners by court decisions because of the crimes that were committed. To preserve the seized/confiscated assets, the Agency has two storages for movable assets. The seized/confiscated money in foreign currency and the precious metal and other stones items are given to the Treasury of RS for keeping. The pieces of historical, art and scientific value are stored in the institutions for keeping similar items.

20 The items that were used or were intended for committing a crime or those that were generated through the crime can be confiscated if they are in the ownership of the offender.

Conclusions:

Bosnia and Herzegovina

Prosecution service of Bosnia and Herzegovina, particularly its Division for organized crime, economic crime and corruption, conducted a number of financial investigations in the cases of organized crime – in relation to the criminal offences of human trafficking, trafficking of narcotics, smuggling of persons, financial crime, etc. After such investigations the measures of confiscation of the proceeds from crime were proposed and the proceeds were confiscated by final judgments of the B&H Court. Some of the key judgments on the level of the state are presented below.

Upon the indictment of the Prosecution Office (2005), the accused R.P., T.L. and others were convicted of the criminal offences of money laundering, tax evasion and counterfeiting of documents. The indictment included 29 responsible persons in 31 legal entity where through the legal entity "Uzdah" LLC Doboj, more than 13 million KM were "laundered". The accused were seized illicit proceeds in the total amount of 2,871,390.00 KM, and they were imposed prison and suspended sentences and fines for responsible persons in the amount of 674,000.00 KM and fines for legal entities in the amount of 252,000.00 KM.

In the B&H Court case of 25 November 2006, N.Ć. was convicted upon the indictment of the Prosecution Office of B&H and sentenced to the imprisonment of 14 years for the criminal offence of organized crime – trafficking in human beings and money laundering. In the financial investigation, on the basis of Articles 110 and 111 of the Criminal Code of B&H, the accused was confiscated proceeds in the amount of 38,518.45 KM acquired through crime and the apartment of 82m² in Mostar (built with the funds in the amount of 61,481.00 KM). The accused were also obliged to pay the remaining part of 45,000. KM.

One of the cases of confiscation of illicit proceeds is the confirmed indictment of the Prosecution Office of B&H (2009) in the case of T.K. and M.P. The accused T.K. was sentenced to imprisonment of 12 years for the criminal offence of organized crime – human trafficking and money laundering, as well as to the fine of 20,000.00 KM, while the accused Pjević was

sentenced to imprisonment of 6 years and the fine of 10,000.00 KM. Both parties were confiscated illicit proceeds in the amount of 286,440.00 KM.

Upon the indictment of the Prosecution Office of B&H from 2011, the accused A.Š. was sentenced to imprisonment of 11 years for the criminal offence of organized crime – illicit trafficking in narcotic drugs. The accused was confiscated the illicit proceeds in the amount of 28,920.00 EUR and 19,770.00 KM. It is worth mentioning that in an earlier judgment the B&H Court rejected the proposal of the B&H Prosecution Office for confiscation of certain items. It was even ordered that the accused is to be returned all the seized items and the monetary amounts (that were later confiscated in the second instance judgment of the B&H Court).

One of very important cases where proceeds from crime were confiscated is the case of F.Č. and others where the court imposed the total prison sentence of 23 years and ordered the confiscation of proceeds in the amount of 7.5 million KM for the criminal offences of organized crime, tax evasion and money laundering. This judgment is the most significant one in the history of B&H in the field of financial crime. The judgment included six natural persons and three legal entities. The first accused F.Č. was sentenced to 10 years of prison, while the others were sentenced to prison sentences of 7 years, 2.5 years, 1,5 years and two one-year sentences.

There are also certain cases where the Prosecution Office of B&H did not manage to prove that proceeds were acquired through crime and where the offenders were imposed only prison sentences. Hence, it is worth mentioning that although there is no national law that contains detailed provisions regulating seizure/confiscation of proceeds from crime, we can see that in practice the use of this institute has produced results.

Federation of Bosnia and Herzegovina

Federal agency for managing seized/confiscated assets conducted a research analysing the value of the seized/confiscated proceeds from crime.

The findings show that in the period 2003–2014[21] the seized/confiscated assets amounted to around 12 million KM. The small amount of these funds actually ended in the state budget.

The first case of implementation of the Law on Seizure/Confiscation of Illicit Proceeds in the FB&H was the case of the former Director of the Penal-Correctional Institution Tuzla – Hasan Hodžić. The court in Tuzla rendered the first instance judgment in which it ordered the confiscation of the proceeds in the amount of 190,000 KM from the former director. In the same judgment the court also sentenced the former director to seven years of prison for abuse of office and authorities related with illegal employment of persons in the Penal-Correctional Institution in Tuzla in the period 2006–2010. Hodžić acquired illicit proceeds by requesting the trainees for prison guards to pay him to employ them. The amounts they paid ranged between 7 and 20 thousand KM. The total amount of the confiscated illicit proceeds will be paid to the budget of FB&H.

Since the Law on Seizure/Confiscation of Illicit Proceeds from Crime is being implemented for more than a year, this is indeed one of the positive sides of this law because the law is recognized as the piece of legislation that introduced a number of novelties that should help the prosecution, courts and other law enforcement bodies in implementing the law and proving the basis for seizure/confiscation of proceeds from crime.

Republic of Srpska

In 2014 the value of confiscated goods that became the ownership of the state of B&H amounted to 11.2 million KM, while more than 100,000.00 KM were paid to the account of the budget of RS. According to the data of the Agency for Managing Seized/Confiscated Assets in the RS, only in 2014 more than 20 court rulings were rendered ordering confiscation of assets that was confirmed to be of illicit origin.

The first case of confiscation of assets acquired in an illegal manner in the Republic of Srpska was the case of D.B. who was accused for organiz-

21 From the reform of the judiciary (2003) to the adoption of the Law on Seizure/Confiscation of Proceeds from Crime (2014)

ing illegal games of chance. After accepting the plea bargain, D.B. was convicted and imposed a six months prison sentence and confiscation of illegally acquired assets in the value of half a million KM. According to the documentation from the Special Prosecution Service of RS they seized the vehicle BMW X6, the value of which was 135,000 KM, motorcycle "Piaggo" , the value of which was 8,460 KM, and the computer and other electronic equipment in the value of 90,000KM. They also seized the cash in the amount of 260,000 KM that was then deposited into the safe of the District Court in Banja Luka.

In 2014, in the judgment Š. and others, the Supreme Court ordered confiscation of assets in the value of 20 million euro from the accused Z.Ć. for the criminal offences of money laundering. He was also sentenced to four years of imprisonment and confiscated all the shares he had in the sugar plant (Bijeljina). Those shares were handed over to the authorities of RS for management.[22] This was the first final judgment in this case that is being processed in several countries.

All the levels of authorities have defined the legislation that contains the legal basis for seizure/confiscation of proceeds from crime, but the most significant problem is the enforcement of court judgments ordering confiscation of proceeds from crime in practice. In the last couple of years B&H particularly worked on the strengthening of the adequate legal framework, but now the focus should be on the strengthening of institutional capacities and other conditions required for the systemic, comprehensive and efficient implementation of financial investigations, which is the foundation for seizure/confiscation of proceeds from crime. The attention should also be focused on securing and safeguarding the seized assets, i.e. disposal of it after the final judgment of the courts. The priority should be to strengthen the institutional capacities, particularly of the existing Agencies in both entities, and to emphasize the need to adopt national laws and strengthen the institutions with the view to ensuring the seizure/confiscation of illicit proceeds from crime.

22 This is the largest value of confiscated assets, not only in RS, but in the region as well (Serbia – three million KM, Croatia about four million KM).