



OECD Anti-Corruption Network for Eastern Europe and Central Asia

# Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia



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## **About the Anti-Corruption Network for Eastern Europe and Central Asia (ACN)**

Established in 1998, the main objective of the Anti-Corruption Network for Eastern Europe and Central Asia (ACN) is to support its member countries in their efforts to prevent and fight corruption. It provides a regional forum for the promotion of anti-corruption activities, the exchange of information, elaboration of best practices and donor coordination via regional meetings and seminars, peer-learning programmes, and thematic projects. ACN also serves as the home for the Istanbul Anti-Corruption Action Plan. Find out more at [www.oecd.org/corruption/acn/](http://www.oecd.org/corruption/acn/).

## **About the thematic studies on criminal liability for corruption and law-enforcement in Eastern Europe and Central Asia**

The ACN Work Programme for 2016-2019 included a thematic cross-country study (review) on the criminal liability for corruption and effective law enforcement. Within the framework of previous Work Programme of the Network, topics for the thematic study were the liability of legal persons for corruption, foreign bribery and international co-operation in corruption cases. Other thematic studies will concern. The objectives of the studies are (1) to analyse the state of play in the relevant area in order to identify common problems and best practices (in particular, by using case studies from particular countries) and to develop regional recommendations; and (2) to identify capacity-building and training needs for the law enforcement authorities and the judiciary.

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## I. FOREWORD

Financial gain is a primary motive in most corruption offences. This makes confiscation of the proceeds of corruption an effective way to combat corruption offences and to stop laundering of the proceeds, as it deprives the perpetrators of their illicit and unjust gains.

This thematic study, *Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia*, analyses the state of play in relevant areas to identify best practices and common problems and to develop regional recommendations for strengthening anti-corruption policies and practices.

This thematic study was prepared within the framework of the Anti-Corruption Network for Eastern Europe and Central Asia (ACN) of the Organisation for Economic Co-operation and Development (OECD) with the funding of the U.S. Department of State Bureau of International Narcotics and Law Enforcement Affairs (INL) for the project Support to Fight Against Corruption through Law Enforcement in Kyrgyzstan.

The study was conducted based on responses to a questionnaire and other materials provided by the governments of ACN participating countries, namely: Azerbaijan, Armenia, Bosnia and Herzegovina, Croatia, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Montenegro, Romania, Serbia, Slovenia, Ukraine.

The study also reflects the discussions and examples of best practices that were presented during the meetings of the ACN Law-Enforcement Network in 2016-2017. Additional research was conducted to enrich the report with the data from OECD countries. The study was prepared mainly in 2017.

## II. ACRONYMS

<b>ACN</b>	OECD Anti-Corruption Network for Eastern Europe and Central Asia
<b>CC</b>	Criminal Code
<b>CE</b>	Council of Europe
<b>CPC</b>	Civil Procedure Code
<b>FATF</b>	Financial Action Task Force
<b>GRECO</b>	Group of States against Corruption
<b>EU</b>	European Union
<b>IAP</b>	Istanbul Anti-Corruption Action Plan
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>UN</b>	United Nations
<b>UN Convention</b>	UN Convention against Corruption
<b>WGB</b>	OECD Work Group on Bribery in International Business Transactions

### III. ABOUT THE THEMATIC STUDY

Criminal prosecution is the key tool for tackling corruption. While preventing corruption has become an important focus in international and national policy-making, criminal prosecution remains essential for curbing corruption. The mere existence of effective criminal law instruments to detect, investigate, prosecute and adjudicate corruption-related offences serves as powerful deterrent to malfeasance. Inevitability of criminal sanctions for committed corruption offences is a crucial element of anti-corruption policy for any country determined to combat corruption.

Many issues related to criminal law responses to corruption have been well studied at the national and international level. However, there are certain areas that pose problems for policy-makers, law enforcement practitioners, judges, academics and other stakeholders. By adhering to various international anti-corruption instruments (e.g. UN Convention, Council of Europe conventions, OECD Anti-Corruption Convention), the countries of Eastern Europe and Central Asia have committed themselves to introduce in their law and practice a number of corruption-related offences and a number of criminal law instruments that enable to investigate and prosecute corruption.

The countries in the region have implemented numerous reforms related to the criminalisation of corruption, but conservative legal traditions and practical difficulties often impede full compliance and effective enforcement. In many cases, offences introduced in the law are not enforced for various reasons such as the lack of political will, insufficient guidance and training, and poor resources. In addition, corruption schemes are becoming more sophisticated and often involve commission of criminal acts in multiple jurisdictions. This makes practical enforcement of criminal legislation more challenging for law enforcement and prosecution agencies.

This thematic study on the confiscation of instrumentalities and proceeds of corruption offences builds on three studies already published by the ACN: Liability of Legal Persons for Corruption in Eastern Europe and Central Asia; Foreign Bribery Offence and its Enforcement in Eastern Europe and Central Asia; and, International Co-operation in Corruption Cases in Eastern Europe and Central Asia.<sup>1</sup>

The study (1) analyses the state of play in the relevant areas to identify best practices and common problems (in particular, by using country case studies ) and to develop regional recommendations; and (2) identifies the capacity building and training needs of law enforcement authorities and the judiciary.

The findings of the study may indicate areas where the expertise and capacity of public officials and institutions need to be strengthened. Depending on available funds, technical peer-learning seminars may be organised to provide training to law enforcement practitioners, judges, policy-makers and to promote the use of best practices on selected topics.

This study was prepared by Mr. Vitaliy Kasko (OECD consultant, Ukraine) and co-ordinated by Mr. Dmytro Kotlyar (OECD consultant, OECD/ACN Secretariat). The English version is a translation of the original text in Russian.

The study is based on the desk research of publicly available materials and information provided by ACN governments, in particular responses to a questionnaire and follow-up questions. In order to verify the information and validate the findings, the draft study was discussed during a meeting of the ACN Law Enforcement Network held on 25-27 October 2017 in Baku, Azerbaijan. The study was finalised based on these discussions and also takes into account a further round of comments from ACN countries. The final study was presented to the ACN Plenary Meeting in July 2018 in Paris and cleared for publication by the OECD.

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<sup>1</sup> Available at <http://www.oecd.org/corruption/acn/lawenforcement>.

## IV. CONCEPT AND PURPOSES OF CONFISCATION

Financial gain is the main motive for corruption offences. As a rule, perpetrators attempt to legitimate the proceeds from corruption offences in order to conceal the source of origin and the inevitable link between predicate corruption offences and laundering of the proceeds of corruption. In top-corruption cases, obtained gains are also used to achieve economic or political influence in the society, to establish control over state's law-enforcement system, to ensure impunity for corruption, and to obtain all-new financial gains.

For this reason, one part of the strategy on the fight against corruption and laundering of the proceeds thereof is to conduct an efficient financial investigation focused on tracing, freezing, seizing and confiscating of instrumentalities and proceeds of corruption offences.

Confiscation of the proceeds derived from corruption is the most effective measure to combat corruption offences and stop the laundering of the proceeds of corruption, since it represents a tool that deprives perpetrators of the illicit and unjust gains.

Confiscation of the proceeds from offences establishes the principle whereby *nobody must obtain gains* from committing an offence. Moreover, there is a global trend of a widespread application of confiscation of criminal proceeds, particularly proceeds of corruption, whereby not only the proceeds from the specific corruption offence, of which the person was convicted, must be subjected to confiscation, but also the part of assets the legitimacy of source of origin of which the person fails to prove in adversarial proceedings.

At the very least, confiscation of the proceeds of corruption pursues the following purposes:

1. **Preventive:** deprivation of corrupt officials of the gains obtained by criminal means not only prevents them from committing new offences, but also serves as a deterrent for other individuals prone to similar wrongdoing.
2. **Reparative / recovery:** compensation of damages and restoration of other rights and interests of victims of corruption offences.

In some countries, confiscation continues to perform a **punitive** function, as not only instruments, means used to commit and proceeds derived from corruption offence are subjected to confiscation, but essentially all assets of the convicted person, including those obtained on lawful grounds and from legitimate sources (see section on the Typology of confiscation measures for more details).

The ACN countries where confiscation performs a punitive function include, among others, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Ukraine. At the same time, in most countries of the region confiscation primarily performs the preventive function – Azerbaijan, Georgia, Lithuania, Moldova, Romania, Serbia, Slovenia, Croatia, Montenegro, Estonia, and others. In a majority of countries, confiscation has a reparative (recovery) function, which, in one form or another, envisages a top-priority recovery of the damages caused to a victim and/or restoration of their rights and legitimate interests at the expense of confiscated assets.

Confiscation of corruption proceeds has several positive effects:

- preventive, as it is the economic gain that is the main reason for committing corruption offences;
- prevention of penetration of illegal proceeds and corruption into the legitimate economy;
- elimination of the instruments used to commit subsequent offences;



- assistance in pointing at masterminds of corruption schemes and individuals who help them to launder the proceeds of corruption;

- supports the rule of law and the moral principle that nobody must gain from a crime.<sup>2</sup>

Nearly all international documents in this area stress the importance of confiscation as the most effective legal instrument to deprive perpetrators of the proceeds obtained by dishonest means.

Thus, the Directive 2014/42/EU of the European Parliament and of the EU Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union states that the main motive for cross-border organised crime, including mafia-type criminal organisations, is financial gain. Among the most effective means of combating organised crime is providing for severe legal consequences for committing such crime, as well as effective detection and the freezing and confiscation of the instrumentalities and proceeds of crime (paragraphs 1 and 2 of the Preamble).

In its 'Forty Recommendations' dated 20 June 2003, the Financial Action Task Force (FATF) noted that countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties. That said, countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law (Recommendation No. 3).

National legislation of the majority of the ACN countries lacks a universal definition for confiscation of property that would cover all types of confiscation measures. As of today, the definition set forth in the UN Convention against Corruption remains to be the most flexible and universal one.

The UN Convention defines 'confiscation' as the permanent deprivation of property by order of a court or other competent authority. Identical definition is provided in Article 2 of the UN Convention against Transnational Organized Crime adopted in 2003. Similar approach is employed in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated 1997 (paragraph 22 of a Commentaries to Convention of 21 November 1997). Such a flexible definition of confiscation provides an opportunity to cover both the criminal confiscation and civil forfeiture that is not based on conviction.

According to Article 2 of the Directive 2014/42/EU, confiscation means a final deprivation of property ordered by a court in relation to a criminal offence.

The CE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism dated 2005 (ETS 198) (the Warsaw Convention) defines confiscation as a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property (paragraph D of Article 1).

As per the FATF International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, approved on 16 February 2012, the term confiscation (which includes forfeiture where applicable) means the permanent deprivation of funds or other assets by order of a competent authority or a court. Confiscation or forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to be transferred to the State. In this case, the person(s) or

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<sup>2</sup> See Robert Golobinek, Financial Investigations and Confiscation of Proceeds from Crime. Training Manual for Law Enforcement and Judiciary. CARDS Regional Programme 2002/2003. Council of Europe, p. 9.

entity(ies) that held an interest in the specified funds or other assets at the time of the confiscation or forfeiture loses all rights, in principle, to the confiscated or forfeited funds or other assets. Confiscation or forfeiture orders are usually linked to a criminal conviction or a court decision whereby the confiscated or forfeited property is determined to have been derived from or intended for use in a violation of the law.<sup>3</sup>

The confiscation procedure can be divided into the following three phases:

1. Investigation phase, where proceeds from crime are identified and located and evidence on their owner(s) (and information on their property) collected is called the financial investigation. The result of the financial investigation can be a temporary measure (seizure) to secure later confiscation ordered by the court.
2. Judiciary phase, where an individual is convicted (or acquitted), or another final decision is rendered by the court that implies confiscation of the property.
3. Disposal phase, where the property is actually confiscated and disposed by the State in line with the law, while taking into account international asset sharing.<sup>4</sup>

The in-depth study of procedures of seizure and confiscation is not the subject of this study.

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<sup>3</sup> See FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, updated October 2016, FATF, Paris, France, p. 114-115.

<sup>4</sup> See Robert Golobinek, Financial Investigations and Confiscation of Proceeds from Crime. Training Manual for Law Enforcement and Judiciary. CARDS Regional Programme 2002/2003. Council of Europe, p. 9.

## V. INTERNATIONAL STANDARDS

International standards in the field of confiscation of instrumentalities and proceeds of corruption offences and laundering of criminal proceeds are contained in the numerous international instruments adopted within the UN, EU, OECD, Council of Europe as well as other international organisations and their institutions. The most important of the international instruments are listed below.

### A. UN Convention against Corruption

UN Convention against Corruption, which was adopted by the UN General Assembly by Resolution 58/4 of 31 October 2003, is the basic, global and the most complete international instrument in the area of combating against corruption nowadays. The total number of States Parties was 186 (as of July 2018).

The Convention envisages a comprehensive set of measures on prevention of corruption and money laundering, commitments of states with respect to the criminalisation of acts of corruption and the laundering of proceeds of crime, measures on freezing, seizure, and confiscation of instrumentalities and proceeds of such crimes, protection of witnesses, compensation for damages caused by corruption, measures of international cooperation on relevant cases, including recovery of assets obtained through corruption.

The acts that States Parties to the UN Convention against Corruption have committed to recognise as crime under their respective national legislation are classified as follows: bribery of foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official, abuse of functions and undue influence for mercenary purposes, illicit enrichment, bribery and embezzlement of property in the private sector, laundering of proceeds of crime, obstruction of justice and concealment of property. The Convention envisages the need to adopt measures to establish the liability of legal persons for participation in the aforesaid offences (criminal, civil or administrative liability).

The Convention provides definition for the proceeds of crime and corruption. Thus, 'proceeds of crime' mean any property derived from or obtained, directly or indirectly, through the commission of an offence (paragraph E, Article 2). 'Confiscation' means the permanent deprivation of property by order of a court or other competent authority (paragraph G, Article 2).

In accordance with paragraph 1 of Article 31 of the Convention, each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

- (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds (paragraph 4 of Article 31 of the Convention).

If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds (paragraph 5 of Article 31 of the Convention).

Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime (paragraph 6 of Article 31 of the Convention).

The Convention also encourages States Parties to consider the possibility of placing the burden of proof onto an offender so that he or she has to demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings (paragraph 8 of Article 31 of the Convention).

At the same time, the Convention protects the property of *bona fide* third parties. For instance, pursuant to paragraph 9 of Article 31 of the Convention, provisions of this article shall not be so construed as to prejudice the rights of *bona fide* third parties.

Mechanisms for international cooperation for purposes of forfeiture of instrumentalities and proceeds of corruption offences and subsequent confiscation thereof are specified in detail in Articles 54 and 55 of the UN Convention against Corruption.

## **B. OECD Anti-Bribery Convention**

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed on 21 November 1997 within the framework of the Organisation for Economic Co-operation and Development. As of today, 44 countries are parties to the Convention (36 OECD Members and 8 Non-Members).

The Convention envisages that each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business, as well as to establish that complicity, incitement, aiding, abetting, or authorisation of an act of bribery of a foreign public official, attempt and conspiracy to bribe a foreign public official shall be a criminal offence (Article 1 of the Convention).

Additionally, Article 2 of the Convention provides obligations for its Parties to take all measures necessary to establish the liability of legal persons for the bribery of a foreign public official.

In accordance with paragraph 3 of Article 3 of the Convention (Sanctions), each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

The Convention envisages the follow-up control mechanism. In accordance with Article 12, Parties shall cooperate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions<sup>5</sup>.

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<sup>5</sup> Country reports on the implementation of the OECD Anti-Bribery Convention are available at <https://www.oecd.org/daf/anti-bribery/countryreportsonteimplementationoftheoecdanti-briberyconvention.htm>.

The 2009 Recommendation for Further Combating Bribery of Foreign Public Officials was an important addition to the OECD Convention.<sup>6</sup>

### **C. CE Criminal Law Convention on Corruption**

This Convention was signed within the framework of the Council of Europe on 27 January 1999, and, as of July 2018, 48 countries are parties to the Convention.

The Convention obliges states to criminalise the following corruption offences: active and passive bribery of domestic public officials, including members of domestic public assemblies; active and passive bribery of foreign public officials and public assemblies, active and passive bribery in private sector; bribery of officials of international organisations, members of foreign parliamentary assemblies, including judges and officials of international courts; trading in influence and money laundering of proceeds from corruption offences.

Complicity in the aforesaid offences as well as in account offences are also subject to criminalisation, when such offences intend to commit, conceal or disguise the circumstances of the corruption offences listed in the Convention.

This international instrument envisages the need to adopt measures to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, as well as underlines the autonomy of such liability from criminal prosecution of natural persons.

In accordance with paragraph 3 of Article 19 of the Convention, Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.

The Convention obliges Each Party to adopt measures to ensure that their entities and public officials are specialised and independent in the fight against corruption; to provide effective protection for those cooperate with the investigating or prosecuting authorities; to perform special investigation actions to identify, trace, freeze, seize the proceeds of corruption or property the value of which corresponds to such proceeds; and to facilitate international cooperation in this regard.

The Group of States against Corruption (GRECO) monitors the implementation of the Convention by the Parties pursuant to Article 24.

### **D. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention)**

The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism was signed within the framework of the Council of Europe on 16 May 2005 in Warsaw and had 34 Member States as of July 2018.

This Convention envisages a comprehensive set of measures on prevention, combating, and investigation of the money laundering and financing of terrorism, obligations on criminalisation of particular conduct, measures on freezing, seizure, and confiscation of instrumentalities and proceeds of relevant crimes, determining liability of legal persons, measures on international cooperation in this regard, including the

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<sup>6</sup> Available at <https://www.oecd.org/daf/anti-bribery/44176910.pdf>.

liability for confiscation at the request of foreign competent authorities and adoption of measures on recovering the assets of crime.

Article 1 of the Convention defines ‘proceeds’ (economic advantage, derived from or obtained, directly or indirectly, from criminal offences), ‘property’ (property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property), and ‘instrumentalities’ (property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences). Additionally, ‘confiscation’ is defined as a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property.

In accordance with Article 3 of the Convention (Confiscation measures), Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property. Provided that paragraph 1 of this article applies to money laundering and to the categories of offences in the appendix to the Convention (which includes, in particular, bribery and corruption), each Party may, at the time of ratification, declare that paragraph 1 of this article applies: a) only in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year; and/or b) only to a list of specified offences. Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime and include in this provision the offences of money laundering, and any other serious offence. Besides that, Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.

Articles 23-26 of the Convention regulate in detail the procedure for confiscation of assets using the international legal assistance mechanisms.

For countries that have not ratified the Warsaw Convention, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990, to which 47 Member States of the Council of Europe, as well as Australia and Kazakhstan, are parties, could be used as a legal basis for cooperation on confiscation issues.

## **E. EU documents**

Among the documents of the European Union that regulate the matters relating to the fight against corruption and money laundering, including confiscation of corruption assets, the followings are worth mentioning:

- Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, dated 1997 (shortly - Convention against Corruption Involving Officials);
- Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;
- Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;
- Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence;

- Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property;
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders;
- Directive 2014/42/EU of the European Parliament and of the EU Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

The last Directive provides definitions for the main notions (confiscation; proceeds; instrumentalities, property), determines the scope, and regulates, to the fullest extent possible, the matters relating to confiscation, extended confiscation, confiscation from a third party, freezing of property with a view to confiscation, safeguards for persons whose rights may be affected by confiscation, execution of confiscation, management of frozen and confiscated property, and statistics in the EU countries on confiscated assets.

In accordance with Article 2 of the Directive 2014/42/EU, confiscation means a final deprivation of property ordered by a court in relation to a criminal offence. At the same time, Article 4 (Confiscation) obliges Member States to take the necessary measures to enable the confiscation (in whole or in part) of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings *in absentia*. Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

Article 2 of the Directive (Extended confiscation) binds Member States to adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

That said, the notion ‘criminal offence’, pursuant to paragraph 2 of Article 5 of the Directive, must include at least the following offences relating to corruption and money laundering: active and passive corruption in the private sector; active and passive corruption involving officials of institutions of the Union or of the Member States (as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials); participation in a criminal organisation, at least in cases where the offence has led to economic benefit; a criminal offence that is punishable in accordance with such instruments mentioned in Article 3 of the Directive as the Convention on the fight against corruption involving officials, developed based on Article K.3(2)(c), the Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, the Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.

Article 6 of the Directive (Confiscation from a third party) has important provisions, which binds Member States to take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least

if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

Safeguards for suspects, accused, and third parties, whose rights may be affected by the confiscation measures, are specified in Article 8 of the Directive (Safeguards). Thus, Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights. This includes the right to legal assistance and to be informed of such right (paragraph 7 of Article 8). Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 6. (paragraph 9 of Article 8).

Article 11 of the Directive provides an obligation for Member States to regularly collect and maintain comprehensive statistics from the relevant authorities, including statistics on the number of freezing orders and confiscation orders executed, the estimated value of property frozen property, and the estimated value of property recovered at the time of confiscation.

## **F. FATF**

Recommendation No. 3 of the FAFT 40 Recommendations, which were developed by the Financial Action Task Force on Money Laundering on 20 June 2003, envisages that countries should adopt measures similar to those set forth in the Vienna and Palermo Conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to: (a) identify, trace and evaluate property which is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation; and (d) take any appropriate investigative measures. That said, countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

Recommendations Nos. 27, 28, 32 also envisage the investigative and other institutional measures, statistics standards pertaining to the confiscation of proceeds of criminal offence.

## **G. CE Parliamentary Assembly**

In its Resolution 2218<sup>7</sup>, the Parliamentary Assembly of the Council of Europe (PACE) stressed that confiscation of illegal assets has multiple benefits: it makes crime less financially rewarding, saps the power bestowed on criminals by their wealth, deprives them of "seed money" needed for future crimes and generates resources to compensate victims and rebuild communities damaged by crimes.

The PACE noted that confiscation of criminal assets is often prevented by heavy burden of proof placed on the competent national authorities and by an ineffective cooperation between the authorities in different countries in this field. It refers to specific legislation passed by Ireland, Italy, the Netherlands and the UK to facilitate the confiscation of criminal assets, in particular by reducing the authorities burden of proof regarding the criminal origin of unexplained wealth, through the use of factual presumptions or even, under

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<sup>7</sup> Resolution 2218 (2018), Fighting organized crime by facilitating the confiscation of illegal assets, adopted by the Assembly on 26 April 2018, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24761&lang=en>.



certain conditions, a de facto reversal of the burden of proof. Such measures (also known as non-conviction-based confiscation, civil forfeiture, confiscation *in rem* or unexplained wealth orders) have successfully withstood scrutiny by the highest courts of the appropriate countries and the European Court of Human Rights and were found to be compatible with human rights provided sufficient safeguards exist (including full judicial review of these measures by independent and impartial courts).

As a result, the Assembly invited all Members of the Council of Europe and other States to provide for non-conviction-based confiscation in their national laws, as well as the possibility of equivalent value confiscation and taxation of criminal gains, whilst establishing appropriate safeguards, and adopt good practices, including:

- allowing for full judicial review, by an independent and impartial tribunal, within a reasonable term, of any decision to freeze or confiscate the assets;
- granting compensation to persons whose assets were frozen or confiscated erroneously;
- providing for legal aid for judicial review and compensation proceedings for persons who cannot afford a legal representative;
- creating a specialized body to deal with the freezing and confiscation of illegal assets etc.

The Assembly also called on the States to promote international co-operation in this field by taking expeditious actions and co-operating with each other to the widest extent possible for the purpose of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds of crime.

## **H. European Court of Human Rights**

Confiscation of property inevitably affects the fundamental human rights and freedoms, including the ones specified in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the protection over observance of which is within the jurisdiction of the European Court of Human Rights (hereinafter referred to as the Court).

Deprivation of an individual's property as part of criminal forfeiture, as well as the application of presumptions, which are set forth by the law, in order to share the burden of proof between a prosecutor and accused, or to reverse the burden of proof onto a defendant in the civil forfeiture cases, when an individual may be obliged to explain the source of origin of their assets to avoid confiscation, may, in one way or another, affect the following rights ensured by the 1950 Convention:

- fair trial (paragraph 1 of Article 6 establishes that, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law);
- presumption of innocence (paragraph 1 of Article 6 establishes that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law);
- free possession of property (Article 1 of the Protocol No. 1 to the Convention establishes that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property).

The European Court of Human Rights has examined the issues of conformity of the Convention with domestic legislations of a number of countries of the Council of Europe that envisage the application of coercive measures on confiscation of criminal property.

Thus, in the *Raimondo v. Italy*<sup>8</sup> case (Judgement of 22 February 1994), the Court examined the conformity of the Convention with Italian laws aimed at the fight against mafia and application of confiscation in relevant cases. The applicant was accused of mafia activities. In January 1986, court of the first instance acquitted the applicant due to the lack of evidentiary support, while the court of appeal acquitted him due to the failure to establish the actual circumstances of the crime in January 1987. Referring to provisions of Article 1 of the Protocol No. 1 to the Convention, the applicant waged a grievance that 16 real estate items and 6 automobiles were seized on 13 May 1985 and that some of the mentioned property was confiscated based on the court decision dated 16 October 1986. With respect to seizure, the European Court noted that, in accordance with the law, the intention was not to deprive the applicant of his property, but rather to prevent its use (control the use of property as per paragraph 2 of Article 1 of the Protocol No. 1).

In accordance with the Italian law, that was a temporary measure in order to secure the opportunity for future confiscation of the property that, apparently, was the fruit of unlawful activity performed to the detriment of the society. The measure in itself, therefore, was justified by public interest and, taking into account the particular danger posed by the economic might of such 'organisation' as the mafia, it is hard to say the measure was disproportionate to its cause. In view of this, the Court did not find a violation of Article 1 of the Protocol #1 in terms of application of the measures on seizure of applicant's property.

With respect to confiscation of a number of property items, which took place on 16 October 1985, the European Court did not find a violation of the Article either. That said, the Court proceeded from the basis that, in accordance with Italian judiciary practice, confiscation of such nature did not entail the transfer of title of ownership to the State until the final court decision in that regard. Such final decision was not rendered in that case, since the applicant appealed the order dated 16 October 1985 in the court of appeal, and, therefore, the issue was about controlling the use of property and such control measure was proportionate to its cause, considering also that it entailed no further limitations compared to seizure. However, the European Court did find a violation of Article 1 of the Protocol No. 1 with respect to the fact that, after, on 2 December 1986, the court of appeal had taken the decision on resumption of the whole property to its owners following the removal of the relevant registry records, it took from 7 months up to 4 years and 8 months for the authorities to resolve the legal status of that property. Such measure was not based on the law and there was no need to execute control over the property for the sake of public interest within the meaning of Article 1 of the Protocol No. 1.

In the *Phillips v. the United Kingdom*<sup>9</sup> case, the European Court of Human Rights examined a complaint by the applicant who had been convicted of drug trafficking and compelled to pay GBP 91,400 which the court found to be the estimated benefit from drug trafficking in line with the Anti-Drug Trafficking Act 1994. The financial investigation revealed that the applicant did not declare the legitimate source of income, yet being the owner of one four flats and a number of other assets, including five automobiles. Previously the applicant had been convicted several times, but never of drug trafficking. During his trial, the applicant failed to adduce solid arguments and dispose the presumption of obtaining the money by virtue of drug trafficking.

In his application to the European Court, Phillips referred to violations of his presumption of innocence (paragraph 2 of Article 6 of the Convention) and his right to peaceful enjoyment of possessions (Article 1 of the Protocol No. 1). However, the Court did not find violations in the case. Thus, the Court noted the presumption was not applied in order to facilitate finding the applicant guilty of an offence, but instead to enable the national court to assess the amount at which the confiscation order should properly be fixed. The right to be presumed innocent pursuant to paragraph 2 of Article 6 of the Convention arises with respect to

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<sup>8</sup> See *Raimondo v. Italy*, Judgement of 22 February 1994, application no. 12954/87.

<sup>9</sup> See *Phillips v. the United Kingdom*, Judgement of 5 July 2001, application no. 41087/98.

a particular offence, against which the ‘charges have been brought’. As soon as, in due course, the accused is convicted of a relevant offence, the provisions of paragraph 2 of Article 6 of the Convention are no longer applicable, neither in connection with the statements made towards the accused, nor as a part of the sentence fixing process, unless such statements are ‘new’ in terms of their nature and extent.

The European Court also denied the claims made by the applicant on violations of his right for a fair trial and the right against self-incrimination as part thereof, due to the fact he had to explain himself with respect to legitimacy of assets he had owned in the last 6 years. Upon examining the relevant law and judiciary practice, the Strasbourg Court concluded that the presumptions application procedure was attended by sufficient guarantees for a fair trial. The main basis for guarantee was the fact that the assumption, made pursuant to the 1994 Act, could have been denied, if the applicant had demonstrated, based on the balance of probabilities, that he acquired the property in question other than through drug trafficking. Moreover, a judge is vested with the discretionary powers not to administer an assumption, should they believe that such administration entails a grave risk of injustice.

In the context of the complaint filed by the applicant with respect to a violation of Article 1 of the Protocol No. 1, the European Court noted that orders on confiscation, in the context of the 1994 Act, were the deterrent for those who pondered of involvement in drug trafficking, as well as were aimed at the deprivation of proceeds gained from drug trafficking and the elimination of a possibility of their deployment in future drug trafficking. Despite that GBP 91,400 was a significant amount, the Court, at the same time, noted that such amount corresponded to the value of benefit, which, as established by the judge in the domestic trial, had been derived by the applicant from drug trafficking in the previous six years, and that was an amount the applicant could have recovered from the property at his disposal. Considering the abovementioned, the Court determined that the intervention, which the applicant had been subjected to in his right for respect of his property, was proportionate, and that there was no violation of Article 1 of the Protocol No. 1 to the Convention.

In one of its recent decisions, the European Court of Human Rights examined the conformity of the Convention with the civil forfeiture practiced in Georgia. The *Gogitidze and Others v. Georgia*<sup>10</sup> case concerned the civil forfeiture of the assets belonging to the former Deputy Minister of Interior of Adzharia, who was charged with abuse of powers and extortion, and to members of his family (brother and two sons), as part of domestic anti-corruption measures. The prosecutor of the case claimed that the applicant had legally earned EUR 1,644 and EUR 6,023 during his terms in office, while, in the respective period of time, the applicant, as well as his brother and children, who neither had corresponding legitimate sources of income, managed to purchase a property to the amount of EUR 450,000. National courts established that legitimate incomes of the applicant were only enough to provide for the needs of a family of four. Whereas earnings of the children and brother were neither surplus, and, hence, rendered a decision to confiscate the majority of assets, the lawful origin of which the applicants failed to justify. As the result, all four of them complained to the European Court on a violation of Article 1 of the Protocol No. 1 and Article 6 of the Convention due to confiscation of their property, referring to the arbitrary nature of the confiscation, the reversal of the burden of proof upon them, and the retroactive nature of the confiscation which they considered as a measure of criminal punishment.

In the *Gogitidze* case, the European Court, firstly, noted that the procedure in question, despite the ‘administrative’ terminology used in the law, was linked to the prior existence of a criminal charge against a public official and thus represented by its nature a civil action *in rem* aimed at the recovery of assets wrongfully or inexplicably accumulated by the public officials concerned and their close entourage.

Secondly, the Court stressed that where a confiscation measure has been imposed independently of the existence of a criminal conviction but rather as a result of separate “civil” (within the meaning of Article 6 § 1 of the Convention) judicial proceedings aimed at the recovery of assets deemed to have been acquired

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<sup>10</sup> See *Gogitidze and Others v. Georgia*, Judgement of 12 May 2015, application no. 36862/05.

unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (and not to deprive of property within the meaning set forth in paragraph 1 of that Article).

Thirdly, the Court recalled about the three criteria applied to assess the conformity with paragraph 2 of Article 1 of the Protocol No. 1, that is if the state's interference: 1) in the convention's law was lawful; 2) was justified, or, in other words, was it aimed at a legitimate public purpose; 3) was it reasonably proportionate to its cause. Otherwise speaking, there should be a reasonable balance between the public interest needs in general and the requirement to protect basic human rights. The required balance will not be stricken, if an individual and excessive burden is imposed on a particular person or persons.

Moreover, under the Convention, a state is provided with a broad margin of appreciation when it comes to general measures of political, economic or social strategy, and the Court generally respects the legislature's policy choice unless it is "manifestly without reasonable foundation".

All the aforesaid criteria have been carefully examined by the Court in the *Gogitidze* case, and the Court drew the following conclusions:

a) Lawfulness of interference. The Court noted that the language of legislation that serves as the basis for civil forfeiture in Georgia is clear, precise, and foreseeable. With respect to applicants' claims as to the retroactive nature of the legislation, the Court observed that the amendment in question was not the first piece of legislation in the country which required public officials to be held accountable for the unexplained origins of their wealth. The legislation with a requirement for civil servants to declare and substantiate the origin of their property and that of their relatives, under the threat of various types of liability, has been in effect since 1997 in Georgia.

Moreover, the Court reiterated that the "lawfulness" requirement contained in Article of Protocol No. 1 cannot normally be construed as preventing the legislature from controlling the use of property or otherwise interfering with pecuniary rights via new retrospective provisions regulating continuing factual situations or legal relations anew. Thus, the Court found that the forfeiture of the applicants' property was in full conformity with the "lawfulness" requirement contained in Article 1 of Protocol No. 1.

b) Legitimate aim. According to the Court, the rationale behind the forfeiture of wrongfully acquired property and unexplained wealth owned by persons accused of serious offences committed while in public office and from their family members and close relatives was twofold, having both a compensatory and a preventive aim. The compensatory aspect consisted in the obligation to restore the injured party in civil proceedings to the status which had existed prior to the unjust enrichment of the public official in question, by returning wrongfully acquired property either to its previous lawful owner or, in the absence of such, to the State. This was, for instance, a consequence of the proceedings *in rem* in the present case, where one of the houses in the first applicant's wrongful possession turned out to have been obtained from a third party as the result of duress; that third party, a private individual, then acquired entitlement to benefit from the confiscation of that particular property.

The aim of the civil proceedings *in rem* was to prevent unjust enrichment through corruption as such, by sending a clear signal to public officials already involved in corruption or considering so doing that their wrongful acts, even if they passed unscaled by the criminal justice system, would nevertheless not procure pecuniary advantage either for them or for their families. The Court accordingly found that the forfeiture measure in the instant case was effected in accordance with the general interest in ensuring that the use of the property in question did not procure advantage for the applicants to the detriment of the community.

c) Proportionality of the interference. The applicants complained of violation of the proportionality principle by calling into question the two major constituent elements of the civil proceedings *in rem*. They considered it to be unreasonable (i) that the domestic law allowed for confiscation of their property as having been

wrongfully acquired and/or being unexplained, without the first applicant's guilt on corruption charges having first been proved and (ii) that the burden of proof in the associated proceedings had been shifted onto them.

In this regard, the European Court of Human Rights noted that the property, in respect of which the presumption was applied, was purchased, in full or in part, from the proceeds gained from drug trafficking or other illegal activity of mafia-type or criminal-type organization. In its previous decisions, the Court did not see a problem in recognizing the proportionality of confiscation measures, even in the absence of a conviction establishing the guilt of the accused persons. Additionally, the Court also found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of civil proceedings *in rem* which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1.

Taking this into account and by drawing similarities, the Court found that the civil proceedings *in rem* in the present case could not be considered to have been arbitrary or to have upset the proportionality test under Article 1 of Protocol No. 1.

After examining the procedures followed in civil forfeiture proceedings in Georgia and the application thereof in the applicant's case, the Court ruled that there was nothing in the conduct of the civil proceedings *in rem* to suggest either that the applicants were denied a reasonable opportunity of putting forward their case or that the domestic courts' findings were tainted with manifest arbitrariness.

In the context of the applicant's claims that the confiscation of their property represented a violation of fair trial and presumption of innocence, the Court reiterated that proceedings for confiscation such as the civil proceedings *in rem* in the present case, which do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty but rather represent a measure of control of the use of property within the meaning of Article 1 of Protocol N. 1, cannot amount to "the determination of a criminal charge" within the meaning of Article 6 § 1 of the Convention and should be examined under the "civil" head of that provision. As to the applicants' argument that they should not have been made to bear the burden of proving the lawfulness of the origins of their property, the Court noted there can be nothing arbitrary, for the purposes of the "civil" limb of Article 6 § 1 of the Convention, in the reversal of the burden of proof onto the respondents in the forfeiture proceedings *in rem* after the public prosecutor had submitted a substantiated claim.

With respect to the presumption of innocence under paragraph 2 of Article 6 of the Convention, the Court reiterated, in the light of its well-established case-law, that the forfeiture of property ordered as a result of civil proceedings *in rem*, without involving determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature and thus cannot give rise to the application of the provision in question.

Accordingly, in applying the confiscation, it is important to bear in mind the position established by the case law of the European Court of Human Rights, which can be summarised as follows:

Measures on confiscation of property will not violate Article 1 of the Protocol No. 1 to the Convention (the right to the peaceful enjoyment of possessions), subject to adherence to the following cumulative conditions:

1) interference was lawful (carried out based on and in accordance with the procedures established by the law, with the assumption that the law itself is clear and foreseeable);

2) interference was justified (pursued a legitimate aim);

3) interference was reasonably proportionate to its aim.

The confiscation measures will not violate Article 6 of the Convention (right to a fair trial), if a person, in respect of whose property the court is to render a decision, is provided with a reasonable opportunity to adduce their arguments and evidence in adversarial proceedings, and if other procedural guarantees of Article 6 of the Convention have been respected. The application of various types of presumptions in the confiscation process, if they are accompanied by adequate safeguards of a fair trial, does not constitute a problem in terms of Article 6 of the Convention. That said, presumptions may not be unchallengeable, and the court should have a margin of appreciation. Only the total reversal of the burden of proof upon a defendant or accused is not allowed.

## VI. OBJECTS OF CONFISCATION MEASURES

The most widespread objects of confiscation measures are the **instrumentalities** used to commit corruption offences and the **proceeds** derived from commission thereof (both direct and indirect, as well as any profit gained therefrom). For the purposes of this study, the corruption offences will include money laundering (see the section on Corruption offences triggering confiscation for more details).

The obligation for countries to take measures on confiscation of such objects as the instrumentalities used to commit and proceeds derived from crimes is set forth in all relevant international instruments: paragraph 1 of Article 31 of the UN Convention against Corruption, paragraph 3 of Article 19 of the CE Criminal Law Convention on Corruption, Article 4 of the Directive 2014/42/EU of the European Parliament and of the EU Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union and others.

Within the framework of the study, it is worth mentioning that, in some ACN countries, the legislation still contains the punitive concept of confiscation, whereupon the property of convicted individuals that they purchased on lawful grounds and from legitimate sources is also classified as the object of confiscation measures. The ‘Typology on measures of confiscation’ section has more detail.

The objects of confiscation measures, in most cases, are determined predominantly through the ‘property’ term that requires common understanding. In accordance with Article 2 of the 2003 UN Convention against Corruption, ‘property’ means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets. Similar definition is provided in Article 1 of the Warsaw Convention and paragraph 2 of Article 2 of the Directive 2014/42/EU. Paragraph 12 of the Preamble of the Directive notes that definition of ‘property’ includes legal documents or instruments evidencing title or interest in such property. Such documents or instruments could include, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures.

The typical definition for property in the context of confiscation may be the one set forth in Article 132-1 of the Criminal Code of **Moldova**, pursuant to which, the property means financial means, any type of material or immaterial, movable or immovable, tangible or intangible values (assets) as well as acts and other legal instruments in any form, including electronic or digital form that confirm a legal title or right including any share (interest) in these values (assets).

### A. Instrumentalities

Instrumentalities of corruption offences are typical objects for confiscation in accordance with the universally recognised international instruments in this field.

Thus, paragraph 1 of Article 31 of the UN Convention against Corruption mandates each State Party to take measures to enable confiscation of the **property, equipment or other instrumentalities used in or intended to be used in** the corresponding offences. According to paragraph 1 of Article 3 and paragraph C of Article 1 of the Warsaw Convention, the instrumentalities, namely any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences are subject to confiscation. Similar definition is provided in paragraph 3 of Article 2 of the Directive 2014/42/EU. Instrumentalities often make it possible or easier to commit an offence.

Analysis of the questionnaire replies and the legislation of the ACN countries gives grounds to assert that the property, equipment and other instrumentalities of crime are, to an extent, the objects for confiscation in every country. Some countries distinguish “instruments of crime” and “means of crime”, others use the term “instruments and objects used to commit a crime”; in their legislation, different countries may sometimes

place different emphasis on the ‘instrumentalities’ and use different terminology for denomination. This question is discussed in detail in the following paragraphs.

Thus, for example, in accordance with paragraph 2 of Article 52 of the Criminal Code of **Georgia**, confiscation of the instrumentalities of crime shall mean the deprivation in favour of the State of the object owned or rightfully held by the accused or convicted person, which was used for the commission of an intentional crime or that was in any form intended for this purpose. The term ‘instrumentalities’ of crime is described in Article 73 of the Criminal Code of **Slovenia**. Objects that may be subjected to confiscation shall be in direct relation with a perpetrator, and they shall be confiscated for such relation precisely. The mere fact that a perpetrator still has the instrumentalities of crime at their disposal constitutes a threat in itself. Confiscation of the instrumentalities is intended to remove such threat<sup>11</sup>.

In accordance with Article 70-12 of the Criminal Code of **Latvia** (entered into force on 1 August 2017), the objects of a criminal offence, that is tools or means that were intended or were used to commit a crime, are subject to confiscation.

In **Ukraine**, the subject to confiscation shall be both the property selected, produced, adapted, or used as the instrumentality of offence and the property intended (used) to induce a person to commit an offence, provide the financial and/or material support for an offence or the reward for commission of an offence (paragraphs 2 and 4 of Part I of Article 96-2 of the Criminal Code of Ukraine). As per the legislation of **Kazakhstan**, money or other property, used in or intended to be used in financing or otherwise supporting a crime, is subject to confiscation only if this relates to terrorist or extremist activities or to a criminal group (paragraphs 3 of Article 48 of the Criminal Code of Kazakhstan).

In accordance with the amendments introduced to the Criminal Code of **Poland** (came into force on 27 April 2017), at the time of conviction of the offence from which a perpetrator derived a financial, yet indirect, benefit to a substantial amount, the court is entitled to render a decision on confiscation of an enterprise owned by the perpetrator or the sum equivalent thereof, if the enterprise was used to commit an offence or conceal the benefits derived therefrom (Article 44 of the Criminal Code). That said, the premises, enterprises, and proceeds exceeding the amount of EUR 50,000 are confiscated. Such confiscation is not applied in cases if the confiscation is not proportionate to the gravity of an offence, guilt of a person or motive and conduct of the enterprise owner; the damage caused by the offence or the value of concealed benefit is insignificant compared to the business of the enterprise; or the confiscation causes disproportionate damage to the owner of the business (paragraphs 4-5 of Article 44 of the Criminal Code).

Some ACN countries add the property that was the subject of a criminal encroachment, but also objects and property, to the list of instrumentalities used to commit an offence (Article 87 of the Criminal Code of **Serbia**, Article 75 of the Criminal Code of **Montenegro**, Article 73 of the Criminal Code of **Slovenia**, etc.). As applied to corruption acts, the subject of such encroachment rather relates to the proceeds of corruption offence than to the instrumentalities thereof.

The confiscation of such objects in **Serbia** is carried out as a security measure when there is a danger that a certain object may be reused to commit a crime or when it is so required for the purpose of ensuring public safety or for moral reasons (Article 87 of the Criminal Code of Serbia). Separately from confiscation of objects as a security measure, the legislation of Serbia provides for confiscation of property that is a material benefit or income of a crime.

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<sup>11</sup> See the Questionnaire on the ‘Confiscation of instrumentalities and proceeds of corruption offenses’ thematic study, filled out by the relevant authorities of Slovenia; answer to question No. 7.



In some countries, it is impossible to confiscate a property **intended** to be used, but not **actually used** to commit an offence (paragraph 2 of Article 72 of the Criminal Code of **Lithuania**, paragraph 3 of Article 83 of the Criminal Code of **Estonia** in reference to the third party property).

The differences between the legislation of the ACN countries lies, mainly, in the permission to confiscate the instrumentalities of a criminal offence from third parties, as well as in the particular cases thereof. For example, paragraph 2 of Article 52 of the Criminal Code of **Georgia** provides for the confiscation of the instrumentalities owned or rightfully held by the accused or convicted person. Paragraph 2 of Article 75 of the Criminal Code of **Montenegro** envisages that the instrumentalities of a criminal offence may be confiscated even if they are not owned by the perpetrator if so required for reasons of security of people or property, or for moral reasons, but also where there is still a risk that they may be used for the commission of a criminal offence notwithstanding however the rights of third persons to claim damages from the perpetrator

The legislation of **Romania** allows confiscation of the instrumentalities of a criminal offence belonging to third parties, if they knew the purpose of their use or intended use (paragraphs 1(b) and 1(c) of Article 112 of the Criminal Code of Romania). In **Ukraine**, the instrumentalities of a criminal offence shall also be confiscated from third parties, if they knew or could know about the illegal use (part 1 of Article 96-2 of the Criminal Code of Ukraine).

In accordance with paragraph 3 of Article 83 of the Criminal Code of **Estonia**, the objects used to commit a criminal offence, which belong to a third person at the time of making the judgment by a court, may be confiscated, if this person: 1) assisted to commit or prepare a criminal offence by negligence in the very least; 2) acquired, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; or 3) knew that the assets were transferred to the person in order to avoid confiscation.

In accordance with the amendments introduced to the Criminal Code of **Poland** (came into force on 27 April 2017), at the time of conviction of the offence from which a perpetrator derived a financial, yet indirect, benefit to a substantial amount, the court is entitled to render a decision on confiscation of an enterprise owned by not the perpetrator, but other natural person, or the sum equivalent thereof, if the enterprise was used to commit an offence or conceal the benefits derived therefrom, while the owner intended to use the enterprise for the aforesaid purposes or agreed thereto foreseeing such possibility (Article 44 of the Criminal Code).

As part of the questionnaire replies, **Lithuania** provided a summary of its case law on the application of confiscation of the instrumentalities of a criminal offence. The summary of case law of the Supreme Court of Lithuania (18 February 2010) notes that the instrumentalities shall mean any property which has been used to commit an offence. It should be determined that without this property the offence could not be made. The property must have specific properties, which support the commission of the crime, and economic value. Additionally, the Supreme Court stated that the property was recognized as the instrumentality of a criminal offence, if it had been used to reduce the effort or concentrate the forces, and with which a culprit makes an effect on the target of the offence or the victim and makes the harm to the values which are protected by criminal law. The mechanisms, equipment, tools, and other property used by the guilty person to condition or facilitate a criminal offence are considered as the instrumentalities of criminal offence as well. This could be property that was specially adapted for the commission of the crime. This could also include property that was not specially adapted for the commission of the crime, but without which the commission of the crime would have been significantly more difficult. A tool or other means can be property which was used

deliberately by the offender. This could be, in particular, the monetary resources used by the perpetrator to commit a criminal offence<sup>12</sup>.

For example, if a perpetrator intentionally used their country house to hold meetings and discussions on corruption transactions, in most countries of the ACN, such house could be subjected to confiscation as the instrument of corruption offence. If a country house was provided by a third party with the perpetrator using the house to hold meetings and discussions on corruption transactions, such house may be subjected to confiscation from the third party pursuant to the legislation of a number of countries that tolerate such confiscation, under the stipulation that the third party knew, should or could have known, or were obliged to know about the purpose the house had been used for.

## **B. Proceeds (direct and indirect) derived from crime**

The obligation for all states to adopt effective measures on confiscation of the proceeds derived from corruption is set forth in all universally recognized international instruments against corruption.

The UN Convention against Corruption defines the ‘**proceeds of crime**’ as any property derived from or obtained, **directly** or **indirectly**, through the commission of an offence (paragraph E of Article). Similar definition is provided in the Warsaw Convention, with an exception that the term ‘any economic advantage’ is used instead of ‘any property’. Proceeds of crime derived from offences and money laundering are subjected to confiscation pursuant to paragraph 1A of Article 31 of UN Convention against corruption.

According to the Recommendations by the Committee of Ministers of the Council of Europe No. 2001 (11) named 'Guiding Principles on the Fight Against Organised Crime' and dated 19 September 2001, member states should introduce the possibility of confiscation or asset forfeiture in relation to the proceeds of organised crime by means of judicial procedures that be independent from other proceedings and, exceptionally, may involve mitigation the onus of proof regarding the illicit origin of the assets (clause 16 of the Recommendations).

As per paragraph 11 of the Preamble of the Directive 2014/42/EU, there is a need to clarify the existing concept of proceeds of crime to include the **direct** proceeds from criminal activity and **all indirect benefits**, including subsequent **reinvestment** or **transformation** of direct proceeds. Thus, proceeds can include any property including that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It can also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled. Therefore, Article 2 of the Directive 2014/42/EU establishes that proceeds mean any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits.

For example, in case of improper advantage, a bribe itself is the direct proceeds derived from the offence, while indirect proceeds may typically include services or advantages derived indirectly from the offence or from the appreciation in the value of the direct proceeds. For example, if a company bribes an official to win a contract and the direct proceeds of the contract are USD 5 million, the indirect proceeds would be USD 500 000 if the company invested the money for one year and earned 10 % simple interest. Other examples of indirect proceeds may include the increase in the value of a company that was awarded a lucrative contract or the value of other contracts obtained as “follow-ups”<sup>13</sup>.

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<sup>12</sup> See the Questionnaire on the ‘Confiscation of instrumentalities and proceeds of corruption offenses’ thematic study, filled out by the relevant authorities of Lithuania; answer to question No. 7.

<sup>13</sup> See OECD/The World Bank (2012), Identification and Quantification of the Proceeds of Bribery: Revised edition, February 2012, OECD Publishing, pages 17-18.

The questionnaire results and the analysis of the legislation of the ACN countries showed that the proceeds derived from criminal offence are, to an extent, the objects for confiscation almost in every country.

Thus, according to paragraph 3 of Article 52 of the Criminal Code of **Georgia**, confiscation of criminally obtained property shall mean gratuitous deprivation from the convicted person of the criminally acquired property (all property and intangible assets as well as title deeds for property), also of any income from this property or of property that is equivalent in value. The first category refers to the direct proceeds, and the second one to the indirect (derivative) proceeds, covering both categories.

In accordance with paragraph 1 of Article 83-1 of the Criminal Code of **Estonia**, a court shall confiscate the assets acquired through an offence, while the assets obtained directly by means of an offence constitute the direct proceeds of crime. In such instance, conditions for application of the confiscation are as follows: 1) person committed an intentional offence; 2) person acquired the substance through a particular offence; 3) the substance belong to the person at the time of making the judgment or ruling, or to a third person, in which case the following additional conditions apply: substance was acquired, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; or the third person knew that the substance was transferred to the person in order to avoid confiscation. In other words, everything acquired through direct proceeds of crime is considered as derivative proceeds of crime (paragraph 1-1 of Article 83-1 of the Criminal Code of Estonia). For example, these are, as follows: profit made from sale of the property acquired through an offence; property purchased for the money gained directly from commission of an offence (for example, on account of a monetary bribe); profit generated by the property acquired through an offence (interest income, investment returns, and etc.).

According to paragraph 1(e) of Article 112 of the Criminal Code of **Romania**, assets acquired by perpetrating any offense stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim, shall be subject to special confiscation. At the same time, according to paragraph 6 of the Article, the assets and money obtained from exploiting the assets subject to confiscation as per paragraph 1(e) shall be also confiscated.

In accordance with Article 96-2 of the Criminal Code of **Ukraine**, the money, valuables, and other property that have been acquired as the result of an offence and/or comprise the proceeds from such property are subject to confiscation; and, if it was transformed, fully or partially, into other property, the fully or partially transformed property will be the subject to confiscation.

In **Armenia**, any property derived or acquired, directly or indirectly, through commission of an offence, as well as profit or other benefits made from using such property, (except for the property belonging bona fide third parties and the property to be used to recover the damages of victim, civil plaintiff) shall be confiscated (Article 103.1 of the Criminal Code of Armenia).

According to Article 70-11 of the **Latvian** Criminal Code (entered into force on 1 August 2017), the object of confiscation is the property obtained by criminal means, namely property which has come into the ownership or possession of a person as a direct or indirect result of a criminal offence. A property which is at the disposal of such person who maintains permanent family, economic or other kind of property relationships with the person referred to in Paragraph two of this Section can also be recognised as a criminally acquired property, if the value of the property is not proportionate to the legitimate income of the person and the person does not prove that the property is acquired in a legitimate way. The criminally acquired property, proceeds of crime which the person has obtained from the disposal of such property, and also the yield received as a result of the use of the criminally acquired property shall be confiscated, unless it must be returned to the owner or legal possessor (Part 4 of Article 70-11 of the Criminal Code).

In accordance with the legislation of **Poland**, the gain acquired through assets and rights comprising the gain must be considered as the pecuniary gain acquired through an offence (paragraph 1a of Article 45 of the Criminal Code). The most comprehensive reflection of the derivative proceeds concept, set out in the

Directive 2014/42/EU, is provided in Article 97-a of the Criminal Code of **Macedonia** (confiscation of the derivative proceeds).

The volume of 'direct' and 'derivative' proceeds depends on the legal framework in effect in every country of the ACN. In some countries, courts may confiscate all, with no exception, proceeds, advantages, saved resources, privileges, or income acquired through a transaction stained by corruption offence; whereas in other countries, some of the advantages can be considered to be linked to an offence directly. Moreover, the assets, considered as the direct proceeds in some countries, can be classified as derivatives in others.

Not all ACN countries have clearly distinguished the direct and derivative proceeds of crime in their legislation. However, in general, the legislative provisions enable confiscation of both types of proceeds, though the notion of the derivative proceeds may have a diverse meaning. According to paragraph 6 of Article 112 of the Criminal Code of **Romania**, assets and money obtained from exploiting the assets subject to confiscation and the assets produced by such, with certain exceptions, shall also be confiscated. According to part 2 of Article 72 of the Criminal Code of **Lithuania**, confiscation of property should be applied only in relation to property that is an instrument or means of committing a crime or the result of a crime; in the latter case it refers to property directly or indirectly obtained as a result of the commission of a crime. In its response to the questionnaire, **Montenegro** referred to paragraph 5 of Article 113 of its Criminal Code, as the governing definition for the derivative proceeds of crime; however, this provision envisages confiscation of the gain originated from an offence and transferred to third persons, which, seemingly, may not be regarded as the derivative proceeds of crime, but, rather as the direct proceeds transferred to third persons.

Some countries of the ACN neither have a concept of derivative proceeds of crime in their respective legislations, nor is confiscation of such proceeds possible in practice; or the scope of such confiscation is restricted. For example, in accordance with paragraph 1 of Article 52 of the Criminal Code of **Kyrgyzstan**, only the portion of profit, derived from criminal proceeds, that was generated as the result of its legalization (laundering) is subject to confiscation. After the changes made to the Criminal Procedure Code of Kyrgyzstan, which will enter into force on 1 January 2019, money, valuables and other property, when this property was gained as the result of a crime, has been partially or fully transformed or converted will be subject to confiscation (paragraph 3 of part 1 of Article 96 CPC).

Nonetheless, despite the existence of the norms on confiscation of the derivative proceeds of corruption in the legislation of most of the ACN countries, examples of the practical application of such confiscation were merely presented in the questionnaire (**Lithuania** and **Serbia**), while many countries openly pointed at the lack or underdevelopment of judicial practice in this regard.

Thus, most of the ACN countries confirmed that, under their respective legislations, confiscation theoretically covers the derivative proceeds of corruption, such as the following:

- a) savings earned thanks to lowering of costs as the result of a crime (for example, the amount of tax payments or customs fees exempted due to bribery);
- b) incomes generated from investment of the direct proceeds of crime (for example, bank deposit interest, income from securities or any other property purchased on account or as the result of a crime);
- c) increase of the company value following a crime (for example, thanks to lucrative government contracts and/or entry to a new market);
- d) subsequent incomes from exercising the rights based on a licence or permit obtained through a crime (for example, incomes generated from operating an oil or gas based on the rights obtained due to a bribery) (in particular, Latvia, Lithuania, Slovenia, Georgia, Croatia, Montenegro).

In November 2016, Article 230 of the Criminal Code of **Lithuania** was supplemented with part 5, according to which – for the purposes of applying the confiscation rules – proceeds from bribery can be recognized as any form of property directly or indirectly obtained as a result of the bribe, including the material advantage obtained from the desired action or inaction of a civil servant or equivalent person in the performance of his duties, regardless of whether it was received in the course of activity that, according to the law, was legal or illegal. This addition simplifies the confiscation of assets obtained from legitimate sources, if they were obtained as a result of a bribe or trade in influence.

In some countries, paragraphs ‘c’ and ‘d’ raised uncertainty (Estonia used the phrase ‘not impossible’; Serbia referred to the need to prove the relation between the company value increase and the crime – paragraph ‘c’). Romania, Ukraine, Armenia, Kyrgyzstan did not give a clear reply on the possibility of application of confiscation with respect to each of the aforesaid objects. Romania did specify that in theory these points are covered by paragraph 6 of Article 112 of the Criminal Code, but in practice they only allow confiscation of “fruits of direct proceeds” (interest on bank deposits, rent for apartment purchased for a bribe etc).

The methodology, applied by the ACN countries to assess indirect (derivative) proceeds of corruption offences, appeared challenging too. Most of the countries relied on the special expertise (specialists and expert opinions) for this purpose (Azerbaijan, Bosnia and Herzegovina, Montenegro, Serbia, Georgia, Latvia, Lithuania). Some countries pointed at the discretionary powers of a court and noted the need to develop such methodology in the judiciary practice (Lithuania, Estonia, Montenegro). A number of countries cited the absence of such methodology per se (Ukraine, Kyrgyzstan). At the same time, the absence of such methodology (methodologies) can be viewed as an obstacle for a more active application of confiscation of the derivative proceeds of corruption precisely.

In some jurisdictions, the terms ‘proceeds’ or ‘benefits’ may be legally defined or understood as the ‘gross’ proceeds or benefits, and in others, as the ‘net benefits’ or ‘profit’ after deduction of expenses incurred in deriving the benefit. For example, under the ‘gross’ proceeds definition, if a company paid bribes to win a government contract, the proceeds would be the whole value of or revenues from the contract. Under a ‘net profit (or benefits)’ definition, that same company could deduct certain expenses incurred in connection with the contract to arrive at ‘net’ proceeds. But when bribes are paid not to obtain a contract per se but to secure specific advantages or conditions (higher prices, lesser quality of goods or services, excessive quantity), then courts may consider that only the additional profits linked to these specific advantages are proceeds from bribery<sup>14</sup>.

The ‘net benefit’ methodology is applied in **Slovenia** (Supreme Court Decision I Ips 438/2006, supported by legal science of Slovenia). In the mentioned case, the Supreme Court ruled that the derivative proceeds of crime are the net positive balance from the property acquired through a crime<sup>15</sup>.

The confiscation regime in the **USA** does not distinguish between the proceeds and profit when it comes to civil forfeiture of the property acquired through unlawful activity. This means that ‘gross proceeds’ or benefits (net profit + expenses) are subject to confiscation<sup>16</sup>. The **UK** follows the same approach.

It should also be noted that, similarly to the confiscation of instrumentalities of crime, it is important to confiscate the proceeds of crime not only just from the perpetrator, but also from the informed third persons (both legal and natural), irrespective of whether such corruption proceeds are direct or derivative (treatment of such cases is described in detail below).

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<sup>14</sup> Ibid, page 19.

<sup>15</sup> See the Questionnaire on the ‘Confiscation of instrumentalities and proceeds of corruption offenses’ thematic study, filled out by the relevant authorities of Slovenia; answer to question No. 13.

<sup>16</sup> See M. Michelle Gallant, *Money Laundering and the Proceeds of Crime: Civil Remedies and Economic Crime* (London: Edward Elgar Publications, 2005), page 86.

### C. Mixed proceeds

In accordance with paragraphs 4-6 of Article 31 of the UN Convention against corruption, if proceeds of corruption crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the confiscation measures. If such proceeds of crime have been **intermingled** with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the **estimated value of the intermingled proceeds**. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been **intermingled** shall also be **liable to the confiscation measures in the same manner and to the same extent as proceeds of crime**.

Similarly, according to paragraphs 'b' and 'c' of Article 1 of the Warsaw Convention, confiscation shall be applied with respect to the property 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, as well as to income or other benefits derived from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds.

The paragraph 11 of the Preamble of the Directive 2014/42/EU clarifies the existing concept of proceeds of crime to include the **direct** proceeds from criminal activity and **all indirect benefits**, including subsequent **reinvestment** or **transformation** of direct proceeds. In accordance with new approach envisaged in the Directive, the 'proceeds of crime' shall include the proceeds which have been **intermingled** with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. The concept shall also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or **intermingled**. Thus, intermingling the criminal proceeds with property acquired from legitimate sources does not exclude, by no means, the application of confiscation of proceeds of corruption and profit or other benefits from such proceeds.

In the ACN countries, the confiscation of mixed proceeds derived from corruption offences is regulated in different ways. The laws of Azerbaijan, Armenia, Georgia<sup>17</sup>, Latvia, Lithuania, Slovenia, and Croatia do contain the 'mixed proceeds' concept at all. At the same time, the legislation of Kyrgyzstan, Serbia, Estonia, and Montenegro directly envisage the possibility of confiscation of mixed proceeds.

Thus, according to Article 3 of **Serbia's** Law of on Seizure and Confiscation of Proceeds from Crime, 'proceeds from crime' shall denote the assets and other benefits, which represent a direct or indirect consequence of committed crime, and any property item into which such benefits have been converted or with which they have been intermingled. Similar approach is applied in Article 3 of **Montenegro's** Law on Seizure and Confiscation of Pecuniary Gains from Criminal Activity.

In accordance with Article 83-1 of the Criminal Code of **Estonia**, if the assets acquired through commission of crime have been intermingled with other assets, such assets represent the assets partly acquired through a crime. When the criminal proceeds have been intermingled to the property acquired from legitimate sources, the confiscation will be substituted with the procedure set forth in Article 84 of Estonia (substitution of confiscation).

According to paragraph 2 of Article 96-2 of the Criminal Code of **Ukraine**, if the criminal proceeds have been converted, fully or partly, into another property, such fully or partly converted property shall be liable to special confiscation. If, at the time of rendering a decision on special confiscation, the confiscation of criminal proceeds is inapplicable due to the impossibility to separate such proceeds from the property acquired from legitimate source, the court shall render a decision on confiscation of the money equivalent to the value of such property. In **Romania's** Law No. 656 on the prevention and sanctioning of money

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<sup>17</sup> According to Georgia's comments, the transformed property can be confiscated in case of conviction for money laundering.

laundering and combating terrorism financing, similar approach is observed with respect to offences therein (Article 33). In accordance with paragraph 2 of Article 36 of the Criminal Code of **Albania**, if the criminal offence's proceeds are transformed or partly or fully converted into other assets, the latter is subject to confiscation<sup>18</sup>.

According to paragraph 4 of Part I of Article 52 of the Criminal Code of **Kyrgyzstan**, subject to confiscation is also the property or part thereof which corresponds to the assessed value of the intermingled criminal proceeds, if such criminal proceeds have been intermingled to the property acquired from legitimate source.

One should bear in mind that, although the legislation of some countries includes the concept such as 'mixed proceeds of crime', clear regulations for confiscation are not necessarily in place (only just the intermingled property, or the money equivalent of the intermingled property, or the intermingled property in full is subject to confiscation; whether profit and other benefits from such proceeds are subject to confiscation or not, if yes, to what extent). Moreover, the questionnaire did not generate information about judiciary practice in confiscation of intermingled property and profit therefrom. Many countries directly indicated that they lack the judiciary practice in confiscation of criminal proceeds of this type.

The lack of the 'mixed proceed of crime' concept in the legislation of any given country may be compensated by the existence of effective forms and mechanisms of confiscation of property to the equivalent amount in cases where the criminal proceeds, due to manipulations with them (intermingling, transforming, converting), could not be ascertained, which is discussed hereafter.

#### **D. Property of equivalent value**

UN Convention against corruption binds the State Parties to take measures to enable confiscation of proceeds of crime derived from offences established in accordance with this Convention or **property the value of which corresponds to that of such proceeds** (paragraph 1 of Article 31). Analysis of paragraphs 1, 4-6 of Article 31 of the Convention points to the fact that the followings must also be subject to confiscation: the proceeds of crime that have been transformed or converted, in part or in full, into other property; the proceeds of crime that have been intermingled with property acquired from legitimate sources; income or other benefits from all the aforesaid categories of proceeds; **or** any property the value of which corresponds to the value of such proceeds, income, other benefits.

In accordance with paragraph 1 of Article 3 of the Warsaw Convention, Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or **property the value of which corresponds to such proceeds** and laundered property. Confiscation of property, with which proceeds of crime have been intermingled, is applied up to the assessed value of the intermingled proceeds (paragraphs 'b' and 'c' of Article 5 of the Convention).

According to paragraph 1 of Article 4 of the Directive 2014/42/EU, Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or **property the value of which corresponds** to such instrumentalities or proceeds, subject to a final conviction for a criminal offence. That said, Member States are free to define the confiscation of property of equivalent value as subsidiary or alternative to direct confiscation, as appropriate in accordance with national law (paragraph 14 of the Preamble). When implementing this Directive in respect of confiscation of property the value of which corresponds to instrumentalities, the relevant provisions could be applicable where, in view of the particular circumstances of the case at hand, such a measure is proportionate, having regard in particular to the value of the instrumentalities concerned. Member States may also take into account whether and to what

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<sup>18</sup> See Technical paper on Comparative analysis between the provisions on forfeiture in the Albanian criminal code and the new Albanian Anti-Mafia Law provisions on civil forfeiture, and their applicability with regard to offences of money laundering and the financing of terrorism, Project against corruption in Albania (PACA), ECD/04/2010, page 11.

extent the convicted person is responsible for making the confiscation of the instrumentalities impossible (paragraph 17 of the Preamble).

Value confiscation is provided for in the majority of countries of the ACN. All but two EU countries (Cyprus and Malta) implement such confiscation<sup>19</sup>.

In accordance with paragraph 3 of Article 52 of the Criminal Code of **Georgia**, criminally obtained property of the convicted person and any income from this property or of property that is equivalent in value is subject to confiscation. This rule applies to all intentional crimes, including corruption and money laundering, provided for by the Criminal Code of Georgia. At the same time, legal doctrine and judicial practice of Georgia defines 'property the value of which corresponds to that of proceeds of corruption offences' as any property the value of which corresponds to that of direct and derivative criminal proceeds which have not been identified. Equivalent value property includes not only monetary funds, but any other property of value.

According to Article 92 of the Criminal Code of **Serbia**, money, items of value and all other material gains obtained by a criminal offence shall be seized from the offender, and if such seizure should not be possible, the offender shall be obligated to hand over other assets corresponding to the value of assets obtained through commission of criminal offence or deriving there from or to pay a pecuniary amount commensurate with obtained material gain. Moreover, as per Article 4 of **Serbia's** Law of on Seizure and Confiscation of Proceeds from Crime, should it not be possible to seize the proceeds from crime, other assets that commensurate with the value of the proceeds from crime shall be seized.

Pursuant to criminal law of **Romanian**, if the assets [instrumentalities, proceeds of crime and profit thereof] subject to confiscation are not to be found, money and other assets shall be confiscated instead, up to the value thereof (paragraph 5 of Article 112 of the Criminal Code of Romania). The similar approach is observed if the proceeds of crime subject to confiscation cannot be singled out from the licit property. In this instance, there shall be confiscated the property up to the value of the proceeds of crime subject to confiscation. The same provisions shall be also applied to the income or other valuable benefits obtained from the proceeds of crime subject to confiscation, which cannot be singled out from the licit property (Article 33 of Romania's Law No. 656 on the prevention and sanctioning of money laundering and combating terrorism financing).

In accordance with paragraphs 5 and 6 of Article 106-1 of the Criminal Code of **Moldova**, the value confiscation is applied when a property no longer exists or when it has been intermingled with property acquired from legitimate sources, as well as when the instrumentalities and proceeds of crime and profit thereof have been transformed or converted into other property. In such cases, the purpose behind the confiscation of the money or other property is to cover their value.

As per the legislation of **Slovenia**, money, valuables and any other property benefit gained through or owing to the committing of a criminal offence shall be confiscated from the perpetrator or recipient; if confiscation cannot be carried out, property equivalent to the property benefit shall be confiscated from them (Article 75 of the Criminal Code of Slovenia). When the property benefit or property equivalent to the property benefit cannot be confiscated from the perpetrator or other recipient, the perpetrator shall be obliged to pay a sum of money equivalent to this property benefit (Article 501 of the Criminal Procedure Code of Slovenia). This wording allows to effectively apply confiscation of objects, such as the property of equivalent value, from the perpetrator and the informed third persons.

In some countries of the ACN, the property of equivalent value covers only the monetary compensation for the gained criminal proceeds but does not include therein the other equivalent property (for example, real estate items, transport facilities, and so on). Thus, the Criminal Code of **Montenegro** obliges the offender

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<sup>19</sup> See Disposal of confiscated assets in the EU Member States. Laws and Practices. Centre for the study of democracy. 2014, page 18.



pay for the monetary value, should it not be possible to seize the property acquired through a criminal offence for some reason or another (Article 113). Similar provision is set forth in paragraph 4 of Article 77 of the Criminal Code of **Croatia**, which entitles the court to foresee such payment by instalment.

In accordance with Article 70-14 of the Criminal Code of **Latvia** (entered into force on 1 August 2017), if the object of the criminal offence belongs to another person, its value must be confiscated. If property obtained by criminal means has been disposed of, destroyed, disguised or hidden and its confiscation is impossible due to this, its equivalent value must also be confiscated. When confiscation of property is applied, the property subject to confiscation can be replaced by financial means equivalent to the value of the property. Property that has a historical, artistic or scientific value cannot be replaced.

The Criminal Code of **Lithuania** also envisages the confiscation only of the monetary equivalent of property or part thereof, which has been subjected to confiscation, adding to the grounds for its application the situations in which the rapid confiscation of such property itself is not possible (paragraph 5 of Article 72-3 of Criminal Code of Lithuania). Such monetary equivalent may be confiscated both from the offender and from third persons (subject to adherence to legal grounds for application of the confiscation in respect of third persons), instead of the actual instrumentalities and proceeds of crime<sup>20</sup>.

This approach is applied in the criminal law of **Estonia** (Article 84 of the Criminal Code), yet the criminal law doctrine states that assets are not transferred to the State, and the person undertakes to pay the monetary equivalent, in which case the court does not specify the property matters to serve as source for the payment.

According to paragraph 2 of Article 96-2 of the Criminal Code of **Ukraine**, if, at the time of rendering a decision on special confiscation, the confiscation of money, valuables, and other property is inapplicable because it is being used or due to the impossibility to separate it from the property acquired from a legitimate source, to disposal or other reasons, the court shall render a decision on confiscation of the money equivalent to the value of such property. Similar rule is provided in paragraph 3 of Article 48 of the Criminal Code of **Kazakhstan**. According to the criminal law of **Kyrgyzstan**, if the confiscation of a particular item that is part of the property is impossible at the time the court makes the decision on confiscation due to its use, sale or some other reason, the court issues a decision to confiscate the amount of money that corresponds to the value of this item (part 3 of Article 52 of the Criminal Code).

Considering the methods for regulation of confiscation of assets of the equivalent value, which have been analysed above, it appears that the most efficient systems are the ones that enable to seize not only the monetary funds, but also any other property of value with the equivalent value, where confiscation extends to instrumentalities and proceeds of crime (direct and derivative) and profit thereof, as well as contains a broad list of grounds for its application (demolition, use, intermingle to assets acquired through legitimate sources, disposal and other reasons which make it impossible to confiscate the primary objects of confiscation measures).

## **E. Beneficial ownership**

Subparagraph 'a' of paragraph 1 of Article 14 of the UN Convention against Corruption envisages that each state shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, **beneficial owner** identification. Similar measures of prevention of money laundering are provided for in paragraph 2 of Article 13 of the Warsaw Convention. This Article envisages that each party shall adopt such legislative and other measures as may be necessary to identify if a legal and natural person is a holder or **beneficial owner** of one or several bank

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<sup>20</sup> See the Questionnaire on the 'Confiscation of instrumentalities and proceeds of corruption offenses' thematic study, filled out by the relevant authorities of Lithuania; answer to question No. 17.

accounts, regardless of their type, in any bank located in its territory and, if so, to receive all the data from the identified accounts.

Beneficiary property issues are addressed in more detail in the 'Forty Recommendations' adopted by the Financial Action Task Force (FAFT) on 20 June 2003. In the 'Recommendations', the term 'beneficial owner' refers to the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement.

In order to actually confiscate the instrumentalities and proceeds of a crime, law enforcement bodies often have to do hard work on identifying the ultimate owner of title to assets, which may practically be documented in the name of a legal person or arrangement.

In the ACN countries, beneficiary property issues are, mainly, regulated by the anti-money laundering legislation.

In **Georgia**, 'beneficial owner' is defined in paragraph 'q' of Article 2 of the Law On Facilitating the Prevention of Illicit Income Legalization as revised in 2016. According the definition, the beneficial owner – natural person(s) representing an ultimate owner(s) or controlling person(s) of a person or / and a person on whose behalf the transaction (operation) is being conducted; beneficial owner of a business legal entity (as well as of an organizational formation (arrangement) not representing a legal entity, provided for in the Georgian legislation) shall be the direct or indirect ultimate owner, holder or / and controlling natural person(s) of 25% or more of such entity's share or voting stock, or natural person(s) otherwise exercising control over the governance of the business legal entity. That said, any benefit derived from criminal proceeds, from corruption and money laundering in particular, by any person, including the beneficial owner, is subject to confiscation pursuant to the criminal legislation of Georgia, as derivative proceeds of crime. Moreover, if a person knew that they are deriving benefit from proceeds of crime (no matter whether or not they had previous knowledge about the type of crime), then, besides confiscation of the benefit, they are subjected to criminal liability under the Article 186 of the Criminal Code of Georgia (Purchase or Sale of Illegally Obtained Object at Previous Knowledge).

As per Article 8 of the Money Laundering and Terrorist Funding Act of **Estonia**, a beneficial owner shall mean as follows:

(1) a natural person who, taking advantage of their influence, exercises control over a transaction, operation or another person and in whose interests or favour or on whose account a transaction or operation is performed;

(1<sup>1</sup>) a beneficial owner is also a natural person who ultimately holds the shares or voting rights in a company or exercises final control over management of a company in at least one of the following ways: 1) by holding over 25 per cent of shares or voting rights through direct or indirect shareholding or control, including in the form of bearer shares; or 2) otherwise exercising control over management of a legal person;

(2) a beneficial owner is also a natural person who, to the extent of no less than 25 per cent determined beforehand, is a beneficiary of a legal person or civil law partnership or another contractual legal arrangement, which administers or distributes property, or who exercises control over the property of a legal person, civil law partnership or another contractual legal arrangement to the extent of no less than 25 per cent;

(3) a beneficial owner is also a natural person who, to an extent not determined beforehand, is a beneficiary of a legal person or civil law partnership or another contractual legal arrangement, which administers or distributes property, and primarily in whose interests a legal person, civil law partnership or another contractual legal arrangement is set up or operates.

According to Article 4 of **Romania's** 2002 Law No. 656 on the prevention and sanctioning of money laundering and combating terrorism financing, a beneficial owner means:

“(1) Any individual who has or controls the client or the individual in whose name or interest a transaction or operation takes place.

(2) The beneficial owner shall at least include:

a) in the case of corporate entities:

1. the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership over a sufficient percentage of the shares or voting rights sufficient to ensure control in that legal entity, including through bearer share holdings, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Community legislation or subject to equivalent international standards. A percentage of 25 % plus one share shall be deemed sufficient to meet this criterion;

2. the natural person(s) who otherwise exercises control over the management of a legal entity;

b) in the case of legal entities, other than those referred to in para (a), and other entities or legal arrangements, which administer and distribute funds:

1. The natural person who is the beneficiary of 25 % or more of the property of a legal person or other entities or legal arrangements, where the future beneficiaries have already been determined;

2. Where the natural persons that benefit from the legal person or entity have yet to be determined, the group of persons in whose main interest the legal person, entity or legal arrangement is set up or operates;

3. The natural person(s) who exercises control over 25 % or more of the property of a legal person, entity or legal arrangement.”

Based on the abovementioned definitions, the distinctive features of the legal person beneficial owner are as follows: direct or indirect ultimate owner, holder or/and natural person with 25% or larger participation interest, voting stock, including natural person otherwise exercising control over the governance of the business legal entity.

New **Ukrainian** legislation regulates the beneficiary property issue in detail. In particular, according to Article 1 of the Law on Prevention and Counteraction to Legalisation (Laundering) of the Proceeds from Crime or Terrorism Financing, as well as Financing Proliferation of Weapons of Mass Destruction, dated 2014, the ultimate beneficial owner (controller) is defined as a natural person who, regardless of formal ownership, is in the position to exercise decisive influence on the governance or economic activity of a legal person directly or through other persons, including, by exercising the rights to own or use all or majority of the assets, to exercise decisive influence on forming the composition, voting results, as well as to close deals, which enable to determine the conditions for economic activity, to give compulsory instructions and act as a governing body, or who is in the position to exercise influence, both by direct and indirect (through another legal or natural person) ownership, independently or jointly with affiliated natural and/or legal persons with in a legal person to the amount of 25 or larger percent of the charter capital, or voting rights in a legal person. The ultimate beneficial owner (controller) may not be the person who holds the formal right for 25 or larger percent of the charter capital or voting rights in a legal person, but, at the same time, is an agent, nominal holder (nominal owner) or is just an intermediary with respect to such right.

Moreover, Article 46 of the Law of Ukraine on Prevention of Corruption, dated 2014 (with amendments dated 2015) specifies an obligation for declaring agents (a wide range of public sector workers) to indicate, in the electronic declaration, the legal persons, in which they or their family members are the ultimate beneficial owners (controllers). Additionally, declaring agents who hold positions of high or highest importance (in total, approximately 100 thousand individuals) must also indicate the assets, including proceeds, which are the property rights objects of a third person, if a declaring agent or their family member gains or has the right to gain proceeds from this object, or is in the position to, directly or indirectly (through

other legal or natural persons), perform, with respect to this object, actions that are identical within the context of exercising the right to dispose the object. Thereby, the Law of Ukraine introduces a distinct concept of **beneficial property**, although in the context of the duty to declare assets by persons authorised to perform functions of the state and of local self-government.

Extremely narrow definition for ‘beneficial owner’ is set forth in the Law of **Kyrgyzstan** on Anti-Money Laundering and Anti-Terrorist Financing dated 31 July 2006, which provides the following definition: beneficial owner (the beneficiary) - a person who has the right of ownership of cash assets or property on behalf and / or on account of which the client performs operation (transaction) with cash assets or property, or in accordance with the agreement between such person and the client has may directly or indirectly influence the commission of client operations (transactions) with cash assets or property.

Predominantly, the legislation of the ACN countries does not separately regulate the grounds and procedure for applying confiscation with respect to beneficiary property. As part of questionnaire survey, a number of countries noted that, according to their legislation, beneficial owner’s right to derive benefits from securities or other financial instrument may not be the object of confiscation (Latvia, Slovenia, and others). Some countries indicated that such confiscation is possible based on the general provisions for confiscation of the instrumentalities and proceeds of corruption offences and profits thereof. For example, in **Lithuania**, beneficial owner’s right may be the object of confiscation, subject to adherence to the general conditions of confiscation envisaged in Articles 72, 72-3 and part 6 of Article 230 (for cases of bribery) of the Criminal Code of Lithuania.

## F. Third-party property

The instrumentalities used to commit offences and the proceeds derived from corruption offences that belong to **third parties**, who usually act as the **nominal owners**, may be objects of confiscation.

The Directive 2014/42/EU lays a special emphasis on the confiscation of items from the nominal owners. In particular, according to paragraph 24 of the Preamble, the practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread.

The current EU legal framework does not contain binding rules on the confiscation of property transferred to third parties. It is therefore becoming increasingly necessary to allow for the confiscation of property transferred to or acquired by third parties. Acquisition by a third party refers to situations where, for example, property has been acquired, directly or indirectly (for example through an intermediary), by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit, and when an accused person does not have property that can be confiscated.

The rules on third party confiscation should extend to both **natural** and **legal persons**. At the same time, paragraph 25 of the Preamble specifies that Member States are free to define third party confiscation as subsidiary or alternative to direct confiscation, as appropriate in accordance with national law. In this regard, Article 6 of the Directive (Confiscation from a third party) directly binds the Member States to take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

The questionnaire results show that the legislation and/or judicial practice of the majority of ACN countries affords grounds to confiscate the instrumentalities used to commit and proceeds derived from corruption offences that belong to third party persons (natural and legal persons), inclusive of the nominal owners. For

example, confiscation of corruption proceeds registered in the name of nominal owners is enabled in Lithuania, Latvia, Estonia, Moldova, Romania, Georgia, Slovenia, Ukraine (from 2016) and other countries.

Thus, in accordance with Article 83 of the Criminal Code of **Estonia**, the objects used to commit a criminal offence, which belong to a third person at the time of making the judgment by a court, may be confiscated, if this person: 1) assisted to commit or prepare a criminal offence by negligence in the very least; 2) acquired, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; or 3) knew that the assets were transferred to the person in order to avoid confiscation.

According to Article 73 of the Criminal Code of **Slovenia**, objects used or intended to be used, or gained through the committing of a criminal offence may be confiscated if they belong to the perpetrator. Objects under the preceding paragraph may be confiscated even when they do not belong to the perpetrator if that is required for reasons of general security or morality and if the rights of other persons to claim damages from the perpetrator are not thereby affected. Compulsory confiscation of objects may be provided for by the statute even if the objects in question do not belong to the perpetrator.

Furthermore, paragraphs 3-4 of Article 75 of the Criminal Code of Slovenia envisage that property benefit gained through or owing to the committing of a criminal offence may also be confiscated from persons, to which it was transferred free of charge or for a sum of money that does not correspond to its actual value, if such persons knew or could have known that this property had been gained through or owing to the committing of a criminal offence. When a property benefit gained through or owing to the committing of a criminal offence has been transferred to close relatives of the perpetrator of the criminal offence or when, for reason of the prevention of confiscation of property benefits under paragraph 1 of this Article, any other property has been transferred to such persons, this property shall be confiscated from them unless they can demonstrate that they paid its actual value.

However, the Criminal Code of Slovenia moves on and separately specifies, in Article 77b, that the property, which the perpetrator and other persons, whose property is being confiscated, use exclusively or predominantly **for their own benefit** with the consent of owners of such property, shall also be confiscated as the property acquired through a crime or linked to a crime, if those persons knew or ought to have known that the property has been acquired through a crime or that it has been used to prepare, commit, conceal a crime, or that it has been acquired with an intention to use in crime.

In order to expand the possibility for confiscation of instrumentalities and proceeds of a number of crimes, in particular the intentional crimes entailing a punishment in the form of imprisonment, to the third-party property, the legislation of **Ukraine** was amended in 2016 to allow the respective possibility. Thus, as per paragraph 4 of Article 96-2 of the Criminal Code of Ukraine, money, valuables ... and other property ... are subject to confiscation from a third party, if this third party has acquired such property from a suspected, accused or other person free of charge, at the market value or for an amount significantly higher or lower than the market value, and knew, should or could have known that such property [had been an instrumentality to commit or the proceed of a crime].

Confiscation of property belonging to third parties is possible under **Latvian** law in accordance with part 3 of Article 70-11 and part 4 of Article 70-14 of the Criminal Code (entered into force on 1 August 2017). If the property obtained by criminal means cannot be confiscated because it was alienated, destroyed, hidden or disguised, and the offender has no other property that can be recovered, the following property can be confiscated: 1) property that was alienated by the person after the commission of the crime for free or for a price significantly lower than the market price; 2) the property in the joint ownership of the offender and his/her spouse, unless the spouses have a documented agreement on separate property made least one year prior to the commission of the crime; 3) property belonging to another person with whom the offender shared a joint household, if the property was obtained after the commission of the criminal activity (part 4 of Article 70-14 of the Criminal Code). If Article 70-14 of the Criminal Code concerns special confiscation, Article

70-1 of the Criminal Code of Latvia provides the possibility of extended confiscation of property obtained by criminal means from third persons. In particular, in case of committing a crime connected with obtaining financial or other benefits, property of third parties in permanent family, economic or other relations with the offender, the value of which does not correspond to the legitimate income of such persons and who cannot prove that they have legally acquired said property, can also be recognized as property obtained by criminal means.

Despite some differences in the language of legislation in various countries of the ACN, in the majority of them, it is possible to point out at least two conditions required to confiscate the property acquired through, or as the result of commission of, a corruption crime and transferred to third parties formally or de facto:

Objective criterion – confiscation is allowed, if the property has been transferred to third persons free of charge or suspiciously cheap – for an amount that does not correspond to the actual /market/ value, or, if the property has been formally transferred at the market price, but to affiliated persons and without the actual payment; and

Subjective criterion – third person knew or ought to have known that the property had been acquired through or as the result of a crime, or knew that the purpose of the transfer was to avoid confiscation.

The confiscation of the proceeds and property of corruption offences, which have been formally transferred from suspected, accused persons to the nominal owners – informed third persons (usually relatives and affiliates, both natural and legal persons), with the purpose to avoid tracing, seizure and subsequent confiscation, is an important instrument in effective fight against corruption and money laundering. However, the questionnaire data demonstrates that the majority of ACN countries rarely practice such measures, while sustainable judiciary practice on applying these measures does not exist.

According to the questionnaire, in a number of ACN countries, for example, in **Armenia**, the legislation does not provide for such instrument at all, and the possibility to apply it is not acknowledged by judiciary practice either. In **Turkey**, confiscation of property is possible only if it is owned by the accused person. Extending the confiscation regime to third party property, subject to adherence to the respective clear-cut grounds and guarantees, would allow these countries to fill the gaps in the national legislation and block the yet available opportunities for persons, who committed corruption offences, to avoid confiscation of criminally obtained proceeds with assistance from the informed third persons. A number of EU countries are classified as such countries, including **Ireland, Malta, Slovakia, Spain**<sup>21</sup>.

## G. Property of legal persons

Proceeds and property of legal persons are objects of confiscation, in one way or another, in all of the ACN countries that filled out the questionnaire. Specifically, for example, in accordance with the Criminal Code of **Azerbaijan**, special confiscation (of instrumentalities used to commit and proceeds derived from offences) may be applied with respect to both natural and legal persons (Article 99-1.2). However, legal persons, in the context of confiscation of their property, may have a twofold role: 1) as the nominal owners, if they are intentionally used as third parties, and 2) if they are the corruption offence subjects themselves, whereupon their property may be subjected to confiscation as the liability of legal persons specifically. That said, the aforementioned 2014/42/EU Directive, which specifies that the rules on third party confiscation should extend to both natural and legal persons, refers to the first case, clearly. Proceeding from Article 99-5 of the Criminal Code of Azerbaijan, the special confiscation is one of the criminal measures with respect to legal persons.

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<sup>21</sup> See Disposal of confiscated assets in the EU Member States. Laws and Practices. Centre for the study of democracy. 2014, page 18.

As per Articles 96-3, 96-6 and 96-8 of the Criminal Code of **Ukraine**, the property of a legal person may be subjected to confiscation, if an authorised representative thereof commits a corruption offence (active bribery, undue influence, money laundering) on behalf or in the interest of this legal person.

Finally, for legal person's participation in legalisation (laundering) the criminal proceeds or in corruption offences, the legislation of **Kyrgyzstan** entails an administrative fine with confiscation of the items appeared as the instrumentalities of commission or immediate objects of such offence (Article 505-22 of the Code of Administrative Responsibility of Kyrgyz Republic). At the same time, the definition, provided in paragraph 2 of Part I of Article 52 of the Criminal Code of Kyrgyzstan, for the object of confiscation measures (the property of accused person, which was transferred to another person, if the latter knew or ought to have known that it had been acquired through criminal activity) merely allows, in practice, to effectively confiscate proceeds and property of corruption offences, which formally belong to natural persons, for example, when the property had been registered immediately in the name of such persons and had not been under the formal ownership of the accused person.

Nonetheless, intelligently combining these two instruments in the legislation paves the way for a more complete coverage of the objects of confiscations measures, and, as the result, to a more efficient anti-corruption within and outside the territory of a state.

For example, Article 77 of the Criminal Code of **Slovenia** envisages that any property gained by a legal person through or owing to the committing of a criminal offence shall be confiscated. A property benefit or property equivalent to the property benefit shall also be confiscated from legal persons, when the perpetrator or recipient have transferred this property to the legal person free of charge or for a sum of money that does not correspond to its actual value.

In some countries, there are limitations and restrictions to apply confiscation in respect to the property of particular legal persons. For instance, the legislation of **Romania** makes an exception for the property of companies with a public form of ownership (Constitutional requirement) and restricts to apply the special confiscation of mass media as the instrumentalities used to commit a crime (Article 112 of the Criminal Code).

Article 72 of the Criminal Code of **Lithuania** may represent a good example for a comprehensive coverage of the third person (natural, legal) property as an object of confiscation measures. In accordance with this Article, the property belonging to other natural or legal persons shall be confiscated regardless of whether or not those persons are subject to criminal liability, where:

- 1) when disposing of the property, they were aware, or ought to have been aware and could have been aware that this property will be used for the purpose of commission of the criminal act;
- 2) when they have acquired this property from a fictitious agreement;
- 3) when they have acquired this property as a family member or close relative;
- 4) when they have acquired this property as a legal person, in which the perpetrator, his/her family members or close relatives held the positions of director, governing body member or participant holding at least 50% of interest (shares and so on);
- 5) when acquiring the property, they or persons holding the senior positions in a legal person and possessing the right to represent the legal person, make decisions on its behalf, control its obligations, were aware, or ought to have been aware and could have been aware that this property had been used as an instrument or mean to commit a crime or had been the outcome of a criminal act.

## H. Third-party rights

In accordance with paragraph 9 of Article 31 (Freezing, seizure and confiscation) of the UN Convention against corruption dated 2003, the provisions of this article shall not be so construed as to prejudice the rights of **bona fide third parties**.

According to Article 8 of the Warsaw Convention, Each Party shall adopt such legislative and other measures as may be necessary to ensure that interested parties affected by respective measures (freezing, seizure, confiscation, etc.), shall have effective legal remedies in order to preserve their rights.

The aforementioned Directive 2014/42/EU lays a special emphasis on the confiscation of third party assets and safeguarding their rights in the light of potential confiscation. In particular, according to paragraph 24 of the Preamble, the practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread. Acquisition by a third party refers to situations where, for example, property has been acquired, directly or indirectly (for example, through an intermediary), by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit, and when an accused person does not have property that can be confiscated. Such confiscation should be possible at least in cases where third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value. The rules on third party confiscation should extend to both natural and legal persons. In any event the rights of bona fide third parties should not be prejudiced. Therefore, Article 6 of the Directive (Confiscation from a third party) provides that Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties **knew or ought to have known** that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

In accordance with paragraph 33 of the Preamble, this Directive substantially affects the rights of persons, not only of suspected or accused persons, but also of third parties who are not being prosecuted. It is therefore necessary to provide for specific safeguards and judicial remedies in order to guarantee the preservation of their fundamental rights in the implementation of this Directive. This includes the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they have other property rights ('real rights', 'ius in re'), such as the right of usufruct. The freezing order should be communicated to the affected person as soon as possible after its execution. Nevertheless, the competent authorities may postpone communicating such orders to the affected person due to the needs of the investigation. As per paragraph 33 of the Preamble, the purpose of communicating the freezing order is, inter alia, to allow the affected person to challenge the order. Therefore, such communication should indicate, at least briefly, the reason or reasons for the order concerned.

Article 8 of the Directive (Safeguards) specifies relevant safeguards for suspected, accused persons as well as for third party whose rights may be affected by the measures of confiscation. Thus, Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights. This includes the right for legal remedy and the right to be informed of that right (paragraph 7 of Article 8). Third parties shall be entitled to claim title of ownership or other property rights, including in the cases on third party confiscation referred to in Article 6 of the Directive (paragraph 9 of Article 8).

Analysis of the legislation of the ACN countries indicates that almost all countries of the network envisage, in one or another, safeguards for third parties – bona fide purchasers, at whose hands the property of corruption offence had ended up.



Detailed safeguards for such cases are provided in the legislation of **Montenegro**, for example. According to paragraph 5 of Article 113 of the Criminal Code of Montenegro, criminal proceeds may be confiscated from a third person only if these proceeds have been transferred to such person free of charge or if such person knew, could or should have known that this pecuniary gain has been acquired through a criminal offence. When the property rights of bona fide third persons are affected in the process of criminal proceedings, the Criminal Procedure Code of Montenegro provides such persons, whose property has been subjected to measures of confiscation, with the right to request for retrial regarding the decision on the confiscation, or to file an appeal against such decision (Articles 483 and 484 of the Criminal Procedure Code).

Similar provision is framed in paragraph 3 of Article 75 of the Criminal Code of **Slovenia**, but, nonetheless, the ‘free of charge transfer of property’ criterion is supplemented by the criterion of ‘transfer of property for a sum of money that does not correspond to its actual value’, while the responsibility ‘to know about criminal origin of property’ is excluded from the subjective part (basis – third person knew or ought to have known). This means that the property acquired by a third person is not subject to confiscation, unless this third person is proved mala fide. That said, the prosecution bears the burden of proving the mala fide

The Criminal Code of **Croatia** is less comprehensive in this aspect, as it envisages only that the proceeds of price shall be confiscated from the third person, who received these proceeds, subject to such proceeds being acquired mala fide (paragraph 1 of Article 77 of the Criminal Code). The lack of precise criteria of ‘bona fide’ in the law may engender problems in practical application of this norm both in terms of effective confiscation of property from third persons and in terms of respect for their rights.

As per paragraph 4 of Article 96-2 of the Criminal Code of **Ukraine**, the property is subject to confiscation from a third party, if this third party has acquired such property from a suspected, accused or other person free of charge, at the market value or for an amount significantly higher or lower than the market value, and knew, should or could have known that such property had been an instrumentality to commit or the proceed of a crime. The mentioned information must be ascertained, in respect of a third person, in a judicial proceeding based on a sufficient evidence. The special confiscation may not be applied to the property owned by a bona fide purchaser. Using this language allows the objective criterion to preserve its content, as it covers the acquiring of property free of charge or at any value.

In **Estonia**, criminal proceeds may be confiscated from a third party, subject to the following two conditions: 1) if such proceeds have been acquired, in full or in the essential part, on account of the offender, as a present or in any other manner for a price which is considerably lower than the normal market price; 2) if the third party knew that the assets were transferred to the person in order to avoid confiscation.

The Criminal Code of **Lithuania** stipulates that the property may not be confiscated from a third person, if this person was not aware and could not have been aware that such property represented the instrumentalities or proceeds of crime, if it was not acquired through a fictitious transaction or by certain categories of persons (paragraph 4 of Article 72), which does not fully correspond to the minimum standards specified in Article 6 of the Directive 2014/42/EU. The legislation of **Romania** contains a similar approach and only with respect to instrumentalities used to commit a crime; applied criterion – if third party ‘was not aware of the purpose of use’ (paragraph 3 of Article 112 of the Criminal Code of Romania).

Standards to protect the fights of bona fide third party are yet to be implemented into the legislation of **Latvia**. Third party rights are specified in Article 360 of the Criminal Procedure Code, and, according to this Article, if criminally acquired property has been found on a third person, such property shall be returned, on the basis of ownership, to the owner or lawful possessor thereof, and, if criminally acquired property has been returned to the owner or lawful possessor thereof, the third person who acquired such property, or pledge, in good faith has the right to submit a claim, in accordance with civil procedures, regarding compensation for the loss, including against an accused or convicted person. Hence, essentially, such third

parties are not in the position to exercise their rights in the criminal procedure, provided that the ‘good faith’ conditions, clearly defined by the law, are adhered to.

In **Georgia** and **Kyrgyzstan**, safeguards for the bona fide third party rights are provided for in the civil law. In accordance with the criminal law of **Kazakhstan**, the money and other property, which the convicted person has transferred into the ownership of other persons, is subject to confiscation (paragraph 5 of Part II of Article 48 of the Criminal Code) without any substantiation of the relation of other persons to this fact and the circumstances of such transfer, which may engender serious problems in applying this principle from the standpoint of the right to possession property.

It should be noted that the legislation of some countries of the ACN does not envisage, totally or precisely, the safeguards for ‘innocent owners’, whose property has been used by participants of a criminal act as the instrumentality to commit this act (for example, when a person provides his country house to his friend who used the house to discuss a corruption transaction), without them knowing about the criminal purpose for which their property has been used (such countries as Latvia, Azerbaijan, Kyrgyzstan, and others).

Consequently, in order to ensure a proper respect to the rights of bona fide third parties in the course of confiscation of property, it is necessary that the safeguards against abuse: (a) cover, in terms of volume, the confiscation of both the criminal proceeds and the instrumentalities of crime, (b) are based the material criteria clearly specified in the law or formed by judicial practice (both objective and subjective – they are provided in the introduction of the ‘Objects of confiscation measures’ section), and (c) include the procedural rights (being communicated about the measures taken in regard to property, participation in the process, the right to be heard, adduce arguments for its own benefit, the right to appeal the confiscation decision).

## VII. CORRUPTION OFFENCES THAT TRIGGER CONFISCATION

In accordance with provision of the UN Convention against Corruption, each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of proceeds of crime derived from **offences established in accordance with this Convention** (Article 31). The list of actions, which each State Party has undertaken to recognize as offences, is as follows:

Act subject to criminalisation	Provision of the UN Convention
Bribery of national and foreign public officials, officials of public international organizations (active and passive)	Articles 15-16
Embezzlement, misappropriation or other diversion of property by a public official	Article 17
Abuse of functions	Article 19
Trading in influence	Article 18
Illicit enrichment	Article 20
Bribery and embezzlement in the private sector	Articles 21-22
Laundering of proceeds of crime	Article 23
Obstruction of justice	Article 25
Concealment of property acquitted through any of such actions	Article 24
Liability of legal persons for participation in such actions	Article 26

The Council of Europe Criminal Law Convention on Corruption dated 1999 stipulates, in particular through paragraph 3 of Article 19, that Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds **of criminal offences established in accordance with this Convention**, or property the value of which corresponds to such proceeds. The Convention classifies the following offences as the ones that entail a confiscation, for instance: bribery of domestic and foreign public officials, bribery of members of domestic and foreign public assemblies, bribery of officials of international organisations, bribery of members of international parliamentary assemblies, bribery of judges and officials of international courts, bribery in the private sector (Articles 2-11), trading in influence (Article 12), money laundering of proceeds from corruption offences (Article 13) and account offences, intended at committing, concealing or disguising the offences mentioned above (except for laundering) (Article 14).

The 2005 Warsaw Convention lists the corruption and bribery as the offences that must entail measures of confiscation (Article 3 of and paragraph 8 of the Annex to Convention), as also the legalisation of criminal proceeds. However, paragraph 2 of Article 3 of the Convention enables Parties, at the time of ratification, declare that such actions are only limited to the offences punishable by deprivation of liberty or a detention order for a maximum of more than one year, or only to a list of specified offences.

Lastly, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions envisages that the bribe and the proceeds of the bribery of a foreign public official are subject to confiscation (paragraph 3 of Article 3 of the Convention).

In the Directive 2014/42/EU, the notion of ‘criminal offence’ is interpreted only in the context of Article 5 (extended confiscation). Paragraph 2 of Article 5 of the Directive, hence, provides that extended confiscation is entailed by, at least, the following corruption offences: active and passive corruption in the private sector, active and passive corruption involving officials of institutions of the Union or of the Member States, as well as participation in a criminal organisation in cases where the offence has led to economic benefit.

The replies to the questionnaire showed that the legislation of almost all the ACN countries does not include a definition of ‘corruption offences’. In several countries the law does include a list of criminal offences that are considered corruption (for example, Kazakhstan, Ukraine), while in some countries such offences are determined as corruption in the bylaws or doctrine.

Attempts to delineate the definition have been taken by Azerbaijan, Kazakhstan, and Ukraine. Instead of the definition, the Law of **Azerbaijan** on Combating Corruption provides a list of such offences in Article 9 – corruption offences themselves (paragraph 9.2) and offences conducive to corruption (paragraph 9.3), reserving that other offences related to corruption may be determined by legislative acts governing the activity or status of officials.

Article 1 of the Law of **Ukraine** on Prevention of Corruption (definitions) contains the notions of ‘corruption offence’ and ‘offences conducive to corruption’. That said, corruption offence is defined as the act, which involves signs of corruption and is committed by persons listed in paragraph 1 of Article 3 of the Law, entailing criminal, disciplinary, and/or civil liability. While the offence conducive to corruption is defined as the act, which is free of signs of corruption, but violates the requirements, bans and restrictions established by this Law, committed by persons listed in paragraph 1 of Article 3 of the Law, entailing criminal, disciplinary, and/or civil liability. Also, the Criminal Code of Ukraine contains a list of corruption offences (see the table below).

The Law of the Republic of **Kazakhstan** on Countering of Corruption (Article 1) defines the corruption offence as having signs of corruption, illegal guilty act (action or inaction), for which the law established administrative or criminal liability. That said, corruption is defined as the unlawful use of persons occupying a responsible public office, persons authorised to perform state functions, persons equated to persons authorised to perform public functions, officials of its officers (official) authority and the related opportunities in order to obtain or extraction directly or indirectly proprietary (non-proprietary) benefits and advantages for themselves or third parties, as well as bribery of such persons through the provision of benefits and advantages. Also, the Criminal Code of Kazakhstan contains a list of corruption offences (see the table below).

**Lithuanian** law ‘On the Prevention of Corruption’ only provides a list of offenses related to corruption that includes, in particular, bribery, trading in influence, other criminal offences committed in the public sector or during the provision of public services for personal gain or benefits for third parties: abuse of office or misuse of authority, abuse of power, forgery, fraud, theft of property, embezzlement, divulging of official or commercial secret, providing false information on income and assets, laundering of money or property, interference in the activities of a public official or a person performing public functions, or other offenses, the commission of which is aimed at obtaining or extorting a bribe, or concealing or covering up a bribe.

In **Moldova**, the draft Law on Incorruptibility has been adopted at the first reading. Paragraph 1 of Article 44 of the Law provides definitions for acts of corruption (criminal and administrative offences committed in public and private sectors, which are sanctioned as per the Criminal Code and the Offences Code), whereas paragraph 2 – a full list of such criminal and administrative corruption offences.

Different countries of the ACN deal differently with classifying particular offences (crimes) as corruption ones. In some countries, offences refer to the corruption offences through the legislation, in some through the law enforcement, namely, judicial practice, in others through the law doctrine (the results are given in the table below).

**TABLE 1. Corruption offences in the ACN countries**

Country	Corruption offence	Source
Azerbaijan	Abusing official powers, excess of official powers, assignment of power of the official, trading in influence, service forgery, abusing land resources of the state and the permissions for constructions.	Chapter 33 of the Criminal Code
Armenia	67 offences specified by the Criminal Code of Armenia.	Order of the Prosecutor General No.3 dated 19.01.2017
Georgia	Bribery of voters, embezzlement or misuse of funds, bribery in areas of professional sport and commercial entertainment contests, abuse of powers in the private sector, commercial bribery, abuse of powers in the public sector, active and passive bribery, trading in influence, accepting the presents prohibited by the law, excess of power, forgery, failure to file the declaration of property, or filing incomplete or untrue information therein	Law doctrine
Kazakhstan	<p>Appropriation or embezzlement of entrusted another's property; fraud; commission of actions on invoicing without actual performance of works, rendering of services, shipment of goods; creation and management of financial (investment) pyramid; legalization (laundering) of money and (or) other property, received by criminal way; economic smuggling; corporate raiding; organization of illegal gambling business - actions are deemed corruption, if they are committed by person, authorised to performance of the state functions, or by person equated to him (her), or by person, holding responsible state position, personally or by authorised person, if they are associated with the use of official position. Also, the followings are corruption offences: abuse of official authorities; excess of powers or official authorities; illegal participation in the entrepreneurial activity; acceptance of a bribe; giving bribe; mediation in bribery; forgery by an official; inaction on service.</p> <p>In addition to that, the Criminal Code of Kazakhstan has a separate chapter, the Chapter 9. Criminal infraction against the interests of service in commercial and other organizations, which consists of five articles: Article 250. Abuse of power; Article 251. Abuse of powers by private notaries, appraisers, private officers of justice, mediators and auditors, working as part of the audit organization; Article 252. Excess of powers by servants of private security service; Article 253. Commercial bribery; Article 254. Unconscientious attitude to the obligations. The majority of the mentioned offences, basically, do criminalise the corruption in the private sector, but are not classified as 'corruption offences'. The components of crime in Article 247. Obtain illegal remuneration is not classified either.</p>	Article 3 of the Criminal Code
Kyrgyzstan	Corruption, abuse of power, conducting illegal audit by a public supervisory official, excess of power, violation of land legislation, awarding or executing a state procurement contrary to the state interests, illegal use of official position in privatization, tax, customs, licensing, illegal use of public funds, active or passive bribery, mediation in bribery, extortion, forgery, illicit enrichment, and other articles of the Criminal Code.	Law doctrine and the Order of the Prosecutor General No. №46-n dated 13.04.2012
Latvia	Embezzlement or misuse of funds, abuse of authority and official powers, excess of power, wrongful preference, intentional inactivity in office, active or passive bribery, mediation in bribery, assignment of bribery, illegal participation in property deals, trading in influence, violation of restrictions for public officials, forgery, bribery in the private sector and others.	Law doctrine
Lithuania	Bribery, trading in influence, other criminal offences committed in the public sector or during the provision of public services for personal gain or benefits for third parties: abuse of office or misuse of authority,	Law on Prevention of Corruption

	abuse of power, forgery, fraud, theft of property, embezzlement, divulging of official or commercial secret, providing false information on income and assets, laundering of money or property, interference in the activities of a public official or a person performing public functions, or other offenses, the commission of which is aimed at obtaining or extorting a bribe, or concealing or covering up a bribe.	
Moldova	<p><i>Criminal</i> corruption offences: giving and accepting bribe, active and passive corruption, bribery of voters, trading in influence, stealing national property, improper use of domestic loans and foreign funds, embezzlement of foreign funds, fixed betting, conflict of interest, illegal gratification for performing works related to servicing people, event manipulation, illicit enrichment, concealment of property and personal interest, illegal funding of political parties and election campaigns, violation of procedures on managing the financial resources of parties and electoral fund.</p> <p><i>Administrative</i> corruption offences: accepting illegal gratification or pecuniary gains, favouritism, improper use of public resources (material and financial), domestic loans and committed appropriations of foreign funds, use of undeclared, inappropriate and outside funds to finance parties.</p>	Article 44 of draft Law on Incorruptibility
Romania	Trading in influence and buying influence, accepting and giving bribe, illicit acts by members of the courts – judges, illicit acts by foreign public officials, corruption in the private sector, offences that are equivalent to corruption.	Articles 289-294 of the Criminal Code, Articles 10-13 of Law 78/2000 “On the Prevention, Detection and Punishment of Corruption Offenses”
Serbia	Accepting and giving bribes in connection with the voting, accepting, extortion and giving bribe, abuse of official position, abuse of economic position, abuse of monopoly position, disclosure of service secret, abuse of power in public procurement, trading in influence, assistance in abuse of rights in asylum in another state, official duties fraud, violations by a judge, prosecutor, deputy prosecutor, illegal release from military service, disclosure of military secret.	Law doctrine
Slovenia	Resistance to voting rights, abuse of voting rights, illegally accepting or giving presents, accepting or giving bribes, accepting benefits for illegal mediation, giving presents for illegal interference.	Law doctrine
Ukraine	Breach of the legislation on budget system, bribery of a worker of a company, enterprise, or organisation, abuse of authority or official position, abuse of powers by a legal person official of private law, abuse of powers by persons providing public services, active and passive bribery of an official, persons providing public services and a legal person official of private law, improper influence, illicit enrichment, as well as offences, if they have been committed by abuse of powers: acquisition of weapons, drugs, and the equipment to produce them, documents, stamps, seals, and infringement of rules on drugs circulation.	Note to Article 45 of the Criminal Code
Croatia	Abuse of authority or official position, illegal favouritism, accepting and giving bribe, trading in influence, bribery for trading in influence, accepting and giving bribe in business operations.	Law doctrine
Montenegro	Abuse of official position, official duties fraud, active and passive bribery, solicitation to trading in influence, abuse of power in economy, abuse of power in business.	Law on Special State Prosecution Office
Estonia	Misuse of funds and fraud by a public official, active and passive bribery and mediation therein, improper influence, bribery in private sector, breach of procedural restrictions	Practice

Bosnia and Herzegovina	Criminal offences of Corruption and Criminal Offences against official duties or other responsible duties: accepting gifts and other forms of benefit, giving gifts and other forms of benefit, accepting reward or other forms of benefit for trading in influence, giving reward or other forms of benefit for trading in influence, abuse of office or official authority, embezzlement in office, fraud in office, using property of the office, lack of commitment in office, forging official documents, illegal collection and disbursement, unlawful release of a detainee, unlawful appropriation of objects during search or enforcement procedure.	Chapter 19 of the Criminal Code
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From the abovementioned table, it can be seen that, quite often in the ACN countries, the offences not related to corruption are regarded as corruption offences. For example, criminal offences, such as the excess of power (Azerbaijan, Latvia), forgery (Azerbaijan, Kyrgyzstan, Lithuania, Latvia), abuse of monopoly position (Serbia), disclosure of official or commercial (Lithuania), service or military (Serbia) secret, breach of the legislation on budget system, and infringement of rules on drugs circulation (Ukraine), are not always associated with the purpose of acquiring an improper benefit, which is a distinctive feature of the corruption offence.

Some of the offences, listed as corruption offences, rather belong to the so-called offences conducive to corruption: violation of restrictions for public officials (Latvia), furnishing untrue information on income and assets (Lithuania), concealment of property and personal interest (Moldova), breach of procedural restrictions (Estonia) and etc. As shown in the table, the list of corruption offences is extensively long in countries like Armenia, Kazakhstan, Kyrgyzstan, and Ukraine.

At the same time, the quality of wording used to frame certain legislative provisions leaves much to be desired. For instance, the constituent elements of the offence of ‘corruption’, currently existing in Kyrgyzstan, have been repeatedly criticized, in particular, within the framework of the OECD monitoring, due to the blur language used and the breach of the principle of legal certainty. Nonetheless, such wording has been included, almost without modifications, into the new edition of the Criminal Code of Kyrgyzstan (to take effect as of 1 January 2019)<sup>22</sup>. The definition for the bribe does not meet international standards neither in the existing, nor in the new edition of the Criminal Code of Kyrgyzstan; requesting, offering, or promising bribe are not criminalised in the existing Criminal Code of Kyrgyzstan.

A part of corruption offences, which ought to be criminalised by parties to the UN Convention against corruption, are yet to be classified as corruption crimes in some countries of the ACN. Among the countries of the ACN that filled out the questionnaire, Kyrgyzstan, Moldova, and Ukraine reported about criminalisation of the illicit enrichment. In the Czech Republic, where bribery of foreign public officials is criminalised, no example of application of the confiscation with respect to such cases has been provided, despite recommendations by the OECD Working Group on Bribery<sup>23</sup>. Trading in (abuse of) influence is not a criminal offence in Armenia, Kazakhstan, and Kyrgyzstan (neither in existing, nor in new CC). The bribery in the private sector has been criminalised in most but not all countries of the ACN. The constituent elements of the offences rarely meet the international long-standing standards in this field. In Ukraine, the unlawful influence on the results of the official sporting competitions is criminalised, but not listed as a corruption offence, although it clearly has signs thereof.

In turn, the absence of a number of crimes in the legislation of the ACN countries, or non-conformity of the constituent elements of corruption offences with the international standards, does not allow to extend the confiscation regime, in full, to the instrumentalities, proceeds of crime and incomes derived therefrom.

<sup>22</sup> See Analysis on the Criminal Code and Criminal Procedure Code of the Kyrgyz Republic (the versions approved at the second reading) insofar as it refers to the criminalisation of the corruption, 11 November 2016, OECD ACN, page 14.

<sup>23</sup> See OECD/WGB (2017), Phase 4 report on Czech Republic, page 33, <https://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>.

The analysis of questionnaire also showed that, in the majority countries of the ACN, the commission of a corruption offence entails confiscation of one kind or another and in one form or another.

Thus, in accordance with the legislation of **Georgia**, the instrumentalities and proceeds of all intentional crimes, including any corruption crimes, as well as income therefrom, are subject to confiscation in criminal procedure (Article 52 of the Criminal Code of Georgia). If the corruption crimes in the public sector are in question, then criminal conviction procedure may be followed by the confiscation in civil procedure. In such cases, a complaint is lodged against the unlawful and unjustified property of a civil servant and their affiliates.

In accordance with the legislation of **Ukraine**, the civil forfeiture of the unjustified assets may be applied, exclusively, after the judgment of conviction enters into force in respect of public officials for committing corruption crimes or laundering of the money obtained by criminal means (Chapter 9 of the Civil Procedure Code of Ukraine).

According to the legislation of **Slovenia**, the civil forfeiture of unjustified assets does not directly depend on conviction of a person, and is applied with respect to corruption offences, such as giving and accepting bribes, accepting benefits for illegal mediation, giving presents for illegal interference, other intentional crime that entails imprisonment up to 5 years or more, if such crime gave rise to the property of suspicious origin, and subject to the person being suspected of owning the assets of suspicious origin to the amount exceeding EUR 50 000 (Forfeiture of Assets of Illegal Origins Act - FAIOA).

All corruption crimes entail the special confiscation, in other words, the confiscation of instrumentalities and proceeds of crime in criminal law in countries of the ACN, such as Lithuania (Article 72 of the Criminal Code), Estonia (Articles 83 and 83-1 of the Criminal Code), Moldova (Article 106 of the Criminal Code), Ukraine (Articles 96-1, 96-1 of the Criminal Code, applicable for intentional crimes, which entail the primary punishment of imprisonment or penalty exceeding a certain amount, and for crimes in the extended list of Part I of Article 96-1 of the Criminal Code of Ukraine), Romania (Article 112 of the Criminal Code), Montenegro (Article 113 of the Criminal Code), Croatia (Articles 77 and 79 of the Criminal Code), Serbia (Articles 87 and 91 of the Criminal Code), Slovenia (Articles 73 and 74 of the Criminal Code), Azerbaijan (Article 99-1 of the Criminal Code), Armenia (Article 103.1 of the Criminal Code), Kyrgyzstan (Article 52 of the Criminal Code), Bosnia and Herzegovina (Article 74 of the Criminal Code).

The commission of all or particular corruption crimes may entail the extended confiscation (applied to the property belonging to the person brought to justice and/or informed third person, the value of which clearly does not match the legal income of such person) in criminal law in some of the following countries: Lithuania (Article 72-3 of the Criminal Code), Estonia (Article 83-2 of the Criminal Code), Moldova (Article 106-1 of the Criminal Code), Romania (Article 112-1 of the Criminal Code), Montenegro (Law on Seizure and Confiscation of Pecuniary Gains from Criminal Activity), Croatia (Article 78 of the Criminal Code), Serbia (Law on Seizure and Confiscation of the Proceed from Crime), Bosnia and Herzegovina (Article 110a of the Criminal Code).

At the same time in **Lithuania**, the extended confiscation is applied to less serious, serious or grave premeditated crime, which resulted or could have resulted in a pecuniary gain. In **Estonia**, the extended confiscation used to be applied, in the event of conviction of a person for imprisonment for at least 1 year, until 10.01.2017, when that limitation was lifted. However, as is it seen from the Criminal Code of Estonia, the application of this type of confiscation required the option thereof to be envisaged by the sanction of an article of the Criminal Code (thereby, the application of the extended confiscation is applicable to corruption crimes, such as accepting and giving bribe, bribery in the private sector (active and passive), misuse of funds and fraud by a public official).

In **Moldova**, the extended confiscation covers the crimes, enlisted extensively in paragraph 1 of Article 106-1 of the Criminal Code, committed out of self-interest (all of the corruption cases are included in that list).



In **Romania**, only those corruption crimes fall under the extended confiscation crimes (Article 112-1 of the Criminal Code) that could have yielded a pecuniary gain and that entail the imprisonment up to 4 years and more by the law for commission thereof (including bribery and money laundering).

In **Bosnia and Herzegovina**, the extended confiscation of proceeds of crime, according to Article 110a of the Criminal Code, covers the criminal proceedings which involve the criminal offences set forth under Chapters XVII, XVIII, XIX, XXI, XXI A and XXII of the Code. The court may issue a decision under Article 110, paragraph 2, and confiscate the property gain, income, profit or other benefits resulting from the proceeds of crime for which the prosecutor provided sufficient evidence to reasonably believe that such property gain was acquired by the perpetration of these criminal offences, while the perpetrator failed to prove that the gain was acquired in a lawful manner. In addition, in the event that during the course of the criminal proceedings no requirements set by law have been met for confiscation of the property gain, income, profit or other benefits resulting from the proceeds of crime, the proceeds of crime confiscation request may be filed during civil proceedings.

The legislation of **Montenegro** provides that extended confiscation may be applied only with respect to the corruption offences included into the exhaustive list of the Law on Seizure and Confiscation of Pecuniary Gains from Criminal Activity (Article 2). In **Croatia**, this type of confiscation is extended to the corruption offences that pertain to the competence of the Office for the Prevention of the Corruption and Organised Crime, subject to the pecuniary gain such offences resulted in. In **Serbia**, the extended confiscation covers the corruption offences listed in the Law on Seizure and Confiscation of the Proceed from Crime (notably, with aggravated elements prevailing), if the instrumentalities or the material gain acquired from crime exceeds the amount of one million five hundred thousand dinars (Article 2).

The extended confiscation is not applied (with respect to corruption offences and in general) in the criminal procedure in such countries of the ACN as Azerbaijan, Armenia, Georgia, Slovenia, Ukraine, Kyrgyzstan. That said, countries like Georgia, Slovenia, and Ukraine apply the confiscation in the civil procedure.

In some countries of the ACN (Armenia, Latvia, Kyrgyzstan, Ukraine), corruption offences do not come under the confiscation regime as sanctions, which raises doubts both in terms of proportionality and efficiency. For instance, many of the corruption offences, which come under this regime, entail confiscation only when their aggravated elements have been committed (under aggravating circumstances), they refer to the offences of a particular gravity or envisage an alternative sanction (with or without assets confiscation), which may entail additional corruption risks. For example, giving bribe (Article 323 of the Criminal Code of Latvia) entails a confiscation under paragraphs 2 and 3 of this Article (aggravated elements of giving bribe) and, in each case, as an alternative (with or without property confiscation).

The questionnaire showed that the laundering of corruption proceeds entails a confiscation merely to the same extent and terms as described above in respect of corruption offences.

The laundering of corruption proceeds entails a compulsory confiscation in such countries as Georgia, Estonia, Lithuania, Moldova, Romania, Montenegro, Croatia, Slovenia, Serbia (special and, depending on the country, extended or civil forfeiture; subject to aforementioned conditions). Such laundering will entail the special confiscation in Azerbaijan, whereas in Ukraine – the property confiscation as a sanction. In Armenia, Kyrgyzstan, and Latvia, the legislation provides a punishment in form of the confiscation of property for laundering of corruption proceeds, but such punishment either refers to aggravated elements (Article 190 of the Criminal Code of Armenia, Article 183 of the Criminal Code of Kyrgyzstan) or represents an alternative option (Article 195 of the Criminal Code of Latvia). **Latvia** additionally clarified that, since 1 August 2017, Article 70-11 of the Criminal Code defines ‘laundered property’ or ‘property obtained in a criminal way’ and that such property is subject to mandatory confiscation based on this provision. It covers both property that came into the ownership or possession of a person directly or indirectly as a result of a crime and (in the case of crimes that involved obtaining financial or other benefit) property the value of which does not correspond to the legitimate income of the person, whereas the person cannot prove that it

was acquired legally. In **Czech Republic**, for money laundering, the confiscation of property may be ordered by the court as an alternative primary punishment options for aggravated elements of such crime (paragraph 3 and 4 of Article 216 of the Criminal Code)<sup>24</sup>.

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<sup>24</sup> See OECD/WGB (2013), Phase 3 report on Czech Republic, page 60, <https://www.oecd.org/daf/anti-bribery/CzechRepublicphase3reportEN.pdf>.

## VIII. TYPOLOGY OF CONFISCATION MEASURES

Analysis of the results of questionnaire survey and analysis of legislation of ACN member countries allows for the conclusion that different confiscation regimes and their combinations exist, which can be roughly divided into three main types:

- **Criminal confiscation** (criminal confiscation as a sanction for committing crime; criminal confiscation of instrumentalities and proceeds of crime (special confiscation); extended criminal confiscation; conviction and non-conviction based one; confiscation resulted from satisfaction of civil suit in a criminal trial; confiscation arising from plea bargaining; confiscation arising out of the trial *in absentia*);
- **Civil forfeiture** (conviction or non-conviction-based confiscation under criminal proceeding; extended confiscation under civil proceeding);
- **Administrative forfeiture** (conviction or non-conviction-based confiscation under criminal proceeding; administrative forfeiture as a sanction or administrative confiscation of instrumentalities and proceeds of corruption offences; extended confiscation).

Within the European Union, for example, all member countries apply criminal confiscation in one or the other way. Confiscation of proceeds of crimes is possible outside the criminal proceedings as well only in its seven countries (Bulgaria, Greece, Ireland, Italy, Romania, Slovakia, Slovenia and the United Kingdom). Regimes of civil forfeiture in EU countries differ from each other substantially by scope. Non-criminal confiscation systems in such countries as Bulgaria, Italy, Ireland and the United Kingdom, have broader sphere of application covering a wide range of serious crimes.

Regimes of criminal confiscation (or confiscation in the course of criminal proceedings) in EU countries are usually based on criminal conviction (Belgium, Czech Republic, Estonia, France, Ireland, Italy, Luxembourg, Malta, Portugal, Slovenia, Sweden and the United Kingdom). Legislation of nearly half of EU countries does not provide for prior conviction as an obligatory condition for asset confiscation in criminal proceedings (for example, Latvia, Lithuania, Poland, Romania, Croatia, Montenegro and other), however, mainly on very limited grounds (for example, if the convicted person dies or absconds during the trial).

Majority of EU countries provide for extended confiscation, which allows confiscation of other proceeds of crimes, not related to crime, the person had been convicted for, usually based on specific strictly limited grounds (for example, under several crimes committed by criminal organisation). EU countries that still do not provide for extended confiscation are Czech Republic, Luxembourg and Malta. In Poland, it had been introduced starting from April 27, 2017. All EU countries provide for both asset forfeiture and value-based confiscation<sup>25</sup>.

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<sup>25</sup>See Disposal of Confiscated Assets in the EU Member States: Laws and Practices. Center for the Study of Democracy. 2014, page 18.

For today, the legislation of the ACN countries that filled out questionnaires stipulates the following types of confiscation measures:

**TABLE 2. Types of confiscation measures in the ACN countries**

Types of confiscation	ACN country
Criminal confiscation as a sanction	Armenia, Kazakhstan, Kyrgyzstan, Latvia, Ukraine
Criminal confiscation of instrumentalities and proceeds (special confiscation)	Azerbaijan, Armenia, Bosnia and Herzegovina, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Romania, Serbia, Slovenia, Ukraine, Croatia, Montenegro, Estonia
Extended criminal confiscation	Bosnia and Herzegovina, Latvia (since 2017), Lithuania, Moldova, Poland, Romania, Serbia, Croatia, Montenegro, Estonia
Civil forfeiture, conviction based	Georgia, Ukraine
Civil forfeiture, non-conviction based	Albania <sup>26</sup> , Slovenia
Administrative forfeiture	Azerbaijan, Bulgaria, Kyrgyzstan, Romania, Estonia

Confiscation resulting from satisfaction of a civil claim under a criminal proceeding is possible under the legislation of Armenia, Kyrgyzstan, Serbia, Montenegro and Ukraine. Confiscation arising from plea bargaining under the criminal proceedings in given cases is possible under the legislation of Georgia, Serbia, Croatia, Montenegro, Estonia and Ukraine, and confiscation resulting from criminal trial *in absentia* (conviction) is possible in Azerbaijan, Kazakhstan, Kyrgyzstan, Georgia, Lithuania, Romania, Serbia, Slovenia, Montenegro, Estonia and Ukraine.

As shown in the table above, the most popular types of confiscation in the ACN countries for today are criminal confiscation of instrumentalities and proceeds of crime (so called special confiscation), and extended criminal confiscation in essence certainly complements special confiscation. Criminal confiscation as a sanction has become obsolete and is maintained in few countries, post-Soviet Union countries usually, whilst the new type of confiscation such as civil forfeiture is not yet widely spread: only three countries announced stipulation of such instrument by the legislation, and it is only in Slovenia and Albania that civil forfeiture is not based on criminal trial *in absentia*. However, in several countries similar procedures are stipulated by administrative forfeiture. Mentioned types of confiscation and conditions of its application in ACN member countries are described in more detail below.

### **A. Criminal confiscation as a sanction**

As it has been already mentioned, in some countries, confiscation yet continues discharging a punitive function, since subject to confiscation are not only the instrumentalities and proceeds of corruption offences, but, in principle, **all property** of a convicted person, including the one that has been acquired on a legal basis and from legitimate sources. Such ACN countries include, in particular, Armenia, Kazakhstan, Kyrgyzstan, Latvia and Ukraine (from a number of countries that filled out corresponding questionnaires). Moreover, criminal confiscation as a sanction still remains in such countries as Belarus, Tajikistan and Turkmenistan as well.

In accordance with the legislation of **Ukraine**, confiscation is a type of punishment and refers to the additional penalties, i.e. is applied additionally to the main punishment upon conviction of a person by court (Articles 51-52 of the Criminal Code of Ukraine). Article 59 of the Criminal Code of Ukraine provides definition, according to which penalty involving confiscation of assets is mandatory uncompensated appropriation by the state of the entire or part of the property owned by a convicted person. If part of the

<sup>26</sup> See Technical paper on Comparative analysis between the provisions on forfeiture in the Albanian criminal code and the new Albanian Anti-Mafia Law provisions on civil forfeiture, and their applicability with regard to offences of money laundering and the financing of terrorism, Project against corruption in Albania (PACA), ECD/04/2010.

property is confiscated, then the court is to define which particular part is subject to confiscation and provide a list of confiscation items. With that, the criminal law of Ukraine does not make the confiscation of assets as a type of a punishment dependent on the grounds and conditions of acquiring such property by the convicted person, including the one that has been acquired legally and from legitimate sources. Confiscation as a type of punishment can be imposed only in case, when it is stipulated as a sanction of the Special Section Article of the Criminal Code of Ukraine for a crime the person is convicted for in court. Analysis of the Special Section of the Criminal Code of Ukraine allows for the conclusion that more than 90 norms on offences (main and qualified) stipulate such confiscations in their sanctions. Similar approach is applied in Article 61 of the Criminal Code of Belarus, Article 52 of the Criminal Code of Kyrgyzstan, Article 57 of the Criminal Code of Tajikistan as well. The remaining number of countries, applying confiscation as a punishment, provide for more severe conditions of its application to be described further below.

Generally, all countries applying criminal confiscation as a punishment have criminal law limiting list of offences it can be imposed under. Thus, in almost all of these countries such confiscation is subject to stipulation as a sanction by the article providing for liability for corresponding crime. Moreover, in Ukraine, its application is limited by enormous and particular serious acquisitive offences, as well as by crimes against the basics of national security of Ukraine and public security regardless of severity of the offence (Article 59, Part 2, the Criminal Code), and in **Armenia, Belarus, Kyrgyzstan and Tajikistan** – by categories of enormous and particularly serious crimes, committed for material gains (paragraph 3 of Article 55 of the Criminal Code of Armenia, paragraph 2 of Article 61 of the Criminal Code of Belarus, paragraph 4 of Article 52 of the Criminal Code of Kyrgyzstan, paragraph 3 of Article 57 of the Criminal Code of Tajikistan), in **Turkmenistan**, this list is added by medium-gravity crimes, committed for material gains (paragraph 2 of Article 52 of the Criminal Code).

Legislation of the corresponding countries can also stipulate for exceptions, when criminal confiscation as a sanction cannot be imposed on any assets or is limited in other ways by a scope of assets subject to confiscation. For example, in accordance with paragraph 3 of Article 55 of the Criminal Code of **Armenia**, scope of property subject to confiscation is determined by the court taking into account the extent of material harm caused by the offence, as well as scope of property acquired through criminal activity. The amount of confiscation may not exceed the amount of material damage caused by the offence or the amount of proceeds acquired through criminal activity. Paragraph 1 of Article 52 of the Criminal Code of **Turkmenistan** allows uncompensated appropriation by the state related only to the property of a convicted person, which has been ‘acquired through criminal activity’. In the Criminal Code of **Kazakhstan**, such punishment as confiscation of the property is stipulated by many articles of the Criminal Code, however, paragraph 1 of Article 48 of the Criminal Code (Property Confiscation) describes removal and forfeiture to the state of the property only owned by a convicted person, acquired through criminal activity or with funds acquired through criminal activity, as well as instruments or assets of criminal offence.

Confiscation as a penalty can stipulate partial confiscation of assets of a person, who has convicted for committing crime, without specified grounds of application of such particular partial confiscation leaving decision making for this issue to the court. For example, such partial confiscation without clear criteria of application is possible under the legislation of **Armenia** (paragraph 1 of Article 55 of the Criminal Code), **Belarus** (paragraph 1 of Article 61 of the Criminal Code), **Kyrgyzstan** (part 3 of Article 52 of the Criminal Code) and **Ukraine** (part 1 of Article 59 of the Criminal Code). In a similar way, in many of the mentioned countries, sanctions under corresponding articles stipulating possibility of confiscation as a punishment can be formulated as an option (with property confiscation or without one) relying on discretion of a judge in this case as well. This kind of approach is also reflected in the criminal codes of **Armenia, Belarus, Kazakhstan, Kyrgyzstan, Latvia, Tajikistan, Turkmenistan and Ukraine**. For example, accepting bribe on an especially large scale entails a punishment in form of imprisonment for a term from seven to twelve years **with confiscation of the property or without one** under paragraph 4 of Article 311 of the Criminal Code of Armenia. In our view, such approach in formulation of sanctions in a form of confiscation with provision of unlimited discretion of a judge is most probably a factor that can enable corruption, rather than something allowing effective punishment upon sentencing for committing corruption-related offences.

At last, legislation of those countries, where criminal confiscation remains as a sanction, in one form or another still contains list of the property of a convicted person, which cannot be confiscated from the person or convicted person's dependents by a court sentence (Armenia, Belarus, Kazakhstan, Latvia, Tajikistan, Turkmenistan, Ukraine). Mentioned list is formulated usually typically in all mentioned countries as an attachment to the Criminal or Criminal Procedure Code or in the legislation on the enforcement of sentences or court decisions.

For example, in accordance with Annex to the Law of **Ukraine** on Enforcement Proceedings dated 2016, foreclosing on the basis of enforcement documents cannot be done on the property that is owned by the debtor [convicted person] – natural person based on the right of ownership, or is a share in jointly owned property required for the debtor, members of debtor's family or depending persons (except for the objects of art, collectibles and antiques, precious metals and stones): objects of daily household private use (dishware, bed clothing, hygiene products, clothes, footwear, children's items); pharmaceutical products or other medical products; furniture (by one bed and chair per person, one table and wardrobe per family), one refrigerator, one TV set, personal computer per family, one mobile phone per person; stock of water and foodstuffs necessary for private consumption by a person, family members and depending persons –on the basis of 3-months period or the amount of 3 minimum wage rates per each person; property required for religious worship, professional work if it is the only source of income, instruments of household and handicraft labor, books; fuel for daily cooking and domestic space heating; for persons, residing in rural area and engaged in agriculture – cattle, rabbit, poultry (in law defined quantity), feeding-stuffs for them, seeds for the next crop, farm equipment; free or subsidized granted car for disabled drivers; awards, national prizes, memorial signs of a debtor.

Annex No. 1 to the Criminal Procedure Code of **Latvia** contains a shorter list of property not subject to confiscation; while the amount of money that may not be confiscated does not exceed one minimum monthly salary established by law. Annex No. 4 to the Law of Latvia on the procedure of enactment and application of the criminal law adds to the traditional list of such property not subject to confiscation from convicts also wedding ring, pets and property without material value, confiscation of which may harm the state.<sup>27</sup>

Full confiscation of the property as a type of punishment is not applied or has been repealed in most European countries by a reason that it does not have clear limits and does not correspond to the principle of legal certainty and proportionality of measures of criminal prosecution.

## **B. Criminal confiscation of instrumentalities and proceeds of crime (special confiscation)**

Criminal confiscation of instrumentalities and proceeds (special confiscation) is the most common type of confiscation in ACN member countries.

Special confiscation, unlike criminal confiscation as a sanction, is not applied to all property of a convicted person, irrespective of the nature of such property, but to specific objects directly relating to committing offence – **instrumentalities and proceeds** of crimes, as well as **profits** from them. Responsibility of the states to take measures for confiscation of such types of objects related to corruption offences and laundering is stipulated in almost all specialised international instruments.

Thus, in accordance with Article 31 of the UN Convention against corruption, each Member State takes maximum possible measures to provide confiscation of the **proceeds** of offences, recognized to be such in accordance with the Convention, or the property, value of which corresponds to the value of such proceeds, as well as **property, equipment and other assets** used and purposed for use upon mentioned offences. If such proceeds of crime have been transformed or converted, partially or fully, into other property, then measures to confiscate are to be taken towards such property as well. If such proceeds of crime have been

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<sup>27</sup> See the Questionnaire on the 'Confiscation of instrumentalities and proceeds of corruption offenses' thematic study, filled out by the relevant authorities of Latvia; answer to question No. 30.

intermingled with property acquired from legitimate sources, then the part of property, which corresponds to the appraised value of the intermingled proceeds, is subject to confiscation. Such measures for confiscation in a similar way and at such very extent as in relation to the proceeds of crime are to be taken towards profits and other benefits, which have been received as a result of such proceeds of crime, from the property they had been transformed or converted into (paragraphs 1, 4, 5, 6 of Article 31 of the Convention).

In accordance with paragraph 1 of Article 3 of the Warsaw Convention, the Parties adopt legislative and other required measures providing for confiscation of instruments, legalized assets and proceeds of crime or the property, value of which corresponds to such proceeds. Rule of similar content is set forth in paragraph 3 of Article 19 of the Council of Europe Criminal Law Convention on Corruption of 1999.

Article 4 of the Directive 2014/42/EU of the European Parliament and of the EU Council, dated 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union directly binds member states to take necessary measures for confiscation (fully or partially) of the instrumentalities and proceeds or the property, value of which corresponds to the value of such instrumentalities or proceeds arising from final conviction for criminal offence, *in absentia* including. In the event such confiscation (arising from conviction) cannot take place, and as a minimum in those events, when confiscation cannot be carried out due to illness or escape of a person suspected or accused of a crime, member states are to take necessary measures for confiscation of instrumentalities and proceeds in cases, under which criminal proceeding related to crime which could result, directly or indirectly, in material benefit and could lead to criminal conviction, if the suspected or accused person would be brought before the trial court.

Moreover, Article 6 of the Directive of the EU sets forth such obligation for confiscation of the property of third persons, subject to certain conditions. Thus, in accordance with this rule, member states are to take necessary measures in order to ensure the possibility of confiscation of the proceeds and other property, value of which corresponds to these proceeds, directly or indirectly transferred by the suspect or the accused to third persons, or acquired by third persons from the suspects or the accused persons, at least in those events, when these third persons were aware or must have been aware that a purpose of such transfer or acquisition was evasion from confiscation based on the concrete facts and under the circumstances, such as transfer or acquisition without payment or in exchange of an amount, which is considerably lower than the market value.

Among the ACN countries criminal confiscation of instrumentalities and proceeds of crime (special confiscation) is envisaged to date in such countries as Azerbaijan, Armenia, Bosnia and Herzegovina, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Romania, Serbia, Slovenia, Ukraine, Croatia, Montenegro, Estonia and other countries.

Thus, in accordance with Article 83 of the Criminal Code of **Estonia**, the following objects are subject to confiscation by court: object used or intended for use upon committing an intentional offence; property or any other object, which appeared to be an explicit object of committing of intentional offence, or the property or object used upon preparation to crime. Article 83-1 of the Criminal Code further describes confiscation of the property acquired as a result of committed offence, both directly and indirectly, i.e. something acquired through such assets. At that, mentioned property is subject to confiscation in the event the offender owns it to the date of a judgment or court decision with respect thereof. Court can decline to confiscate in the event it would be 'unreasonably burdensome' or if the value of the assets is disproportionately small compared to the costs of confiscation<sup>28</sup>.

In accordance with the Criminal Code of Estonia, the instrumentalities of crime may be confiscated from a third person, if such person: (1) at least by negligence, assisted in the commission of or preparation to a

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<sup>28</sup> See OECD/WGB (2008), Phase 2 report on Estonia, page 48, <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/40953976.pdf>.

crime; (2) acquired objects or property fully or mostly at the expense of the offender as a gift or any other way at a price, which was substantially lower than standard market value; or (3) was aware that the objects or property were transferred with a purpose of evasion from confiscation. In turn, the assets that had been received as a result of committing of intentional offence could be confiscated from a third person under these only conditions: 1) they have been acquired fully or mostly at the expense of the offender as a gift or any other way at a price substantially lower than the standard market value, or 2) the third party was aware that assets had been transferred with a purpose of evasion from confiscation (Article 83, 83-1 of the Criminal Code of Estonia).

In the Criminal Code of **Lithuania**, Article 72 regulates issues of confiscation of the instrumentalities and proceeds of crime. In accordance with this rule, confiscation is subject to application only with respect to the property used as an instrument or means of crime, or appearing to be a result of crime. Property in any form acquired directly or indirectly as a result of criminal offence is considered as a result of crime (paragraph 2 of Article 72 of the Criminal Code). Mentioned property owned by the offender is confiscated in any case. If the property belongs to other natural or legal persons, it is subject to confiscation irrespective of whether they have been convicted of a crime committed in the events explicitly listed in paragraph 4 of Article 72 of the Criminal Code (described in detail in Section 3. Objects of confiscation).

In accordance with paragraph 5 of Article 72 of the Criminal Code of Lithuania, if subject to confiscation assets have been concealed, exhausted or belong to third persons or cannot be confiscated by other reasons, then the court is to recover the amount of funds equivalent to the value of assets subject to confiscation from the offender, offender's accomplices or other persons as specified in paragraph 4 of Article 72. When imposing confiscation, the court is to provide detailed list of items subject to confiscation or amount of the property subject to confiscation (paragraph 6 of Article 72 of the Criminal Code).

The institute of special confiscation in **Latvian** legislation underwent significant changes in the new legislation, which entered into force on 1 August 2017. Under Article 70-12 of the Criminal Code, the objects of a criminal offense, that is instrumentalities used or intended to be used for the commission of a crime, are subject to confiscation. Additionally, according to Article 70-11 of the Criminal Code, the property to be confiscated is also property obtained through criminal means, that is property that came into ownership or possession of the person, directly or indirectly, as a result of a crime. According to this Article, the proceeds from the disposal of the property obtained by criminal means and the profit from the use of such property (part 4 of Article 70-11 of the Criminal Code) are also to be confiscated.

In accordance with the legislation of **Bosnia and Herzegovina**, the property gain, income, profit or other benefits resulting from the proceeds of crime shall be confiscated by court's decision, finding that the criminal offence has been perpetrated (Article 110 of the Criminal Code). According to Article 111 of the Criminal Code (paragraphs 1,2 and 3), all money, valuable instrumentalities and other proceeds of crime shall be confiscated from the perpetrator, and in case the confiscation is not feasible - the perpetrator shall pay an amount of money corresponding to the acquired property gain. The proceeds of crime shall be confiscated from persons to whom they have been transferred without compensation or with a compensation that does not correspond to the real value, if the persons knew or had reason to know that the property gain had been acquired by the perpetration of a criminal offence. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall be liable to confiscation not exceeding the estimated value of the intermingled proceeds of crime. Income or other benefits derived from the proceeds of crime, or from property into which the proceeds of crime have been converted, or from property with which the proceeds of crime have been intermingled, shall also be liable to the measures referred to in this Article, in the same manner and to the same extent as the proceeds of crime.

In accordance with the legislation of **Croatia**, the proceeds derived from and the instrumentalities used to commit a crime are subject to criminal confiscation. According to Article 77 of the Criminal Code of Croatia, proceeds of crime are confiscated based on a court decision establishing the fact of unlawful acts both from the offender and persons the proceeds have been transferred to, unless the person acquired them in good



faith. If confiscation is not possible in full or in part of the assets and rights acquired through criminal activity, the court is to oblige the offender to pay corresponding amount in money terms, and, thereat, the court can permit payment of this amount by instalments.

According to Article 79 of the Criminal Code of Croatia, assets and means, which appeared as results of crime are also subject to confiscation. Assets and means intended to be used or have been used for crime are subject to confiscation, if there is a risk that they again will be used for crime and it is required to ensure public safety, public order or for reasons of morality. If the said conditions are met, the court may confiscate assets and means in the events when perpetrator of unlawful act is not found guilty.

Similar approach to confiscation of instrumentalities and proceeds of crime is stipulated in Articles 75 and 112 of the Criminal Code of **Montenegro** (with slight differences) and in Article 73 (Chapter 6. Safety Measures, confiscation of instruments and assets) and Articles 74, 75 (Chapter 7. Confiscation of Property Gain, confiscation of proceeds of crime) of the Criminal Code of **Slovenia** (with more detailed regulation in part of confiscation of the proceeds of crime).

Thus, according to Article 75 of the Criminal Code of Slovenia, money, valuables and any other property gains, which have been received through and as a result of crime, are subject to confiscation from the offender or their recipient, and if they cannot be confiscated, then assets equivalent in value to such property gains are subject to confiscation. If property gains or their equivalent value assets cannot be confiscated from the offender or other recipient, the offender is obliged to pay the amount of money equivalent to such gain. In the event when it is justified, court may permit payment of such amount of money by instalments, however period of payment shall not exceed two years.

Such property gain, acquired through or as a result of crime, may be confiscated from persons it has been transferred to free of charge or for an amount of money not corresponding to its real value, if such persons knew or ought to have been known that property had been acquired through or as a result of crime. If it has been transferred to close relatives of a person who committed the crime, or when, with a purpose of evasion from confiscation, any other property has been transferred to such persons, that property is subject to confiscation from them, except for the cases, when they are in a position to demonstrate that they made the actual payment for the value of the property.

If proceeds of crime have been received by several persons acting jointly, corresponding proportions of their proceeds are subject to confiscation, and if they cannot be clearly identified, then such proportions are to be determined by court based on examination of all circumstances of the case.

Article 77 of the Criminal Code of Slovenia stipulates confiscation of property from a legal person, if the person acquired it through or as a result of crime. Property gain or its equivalent property of a legal person is also subject to confiscation, if the offender or the recipient transferred such property to the legal person free of charge or amount of money that does not correspond to its real value. Moreover, Article 77b of the Criminal Code of Slovenia separately stipulates that confiscation applies to property, which the offender or other persons, whose property is confiscated, use solely or primarily for their own benefit with the consent of the persons owning such property, if these persons knew or ought to have known that it has been acquired through crime or that it had been used for preparation, commitment or concealing of crime, or that it has been acquired with an intention to be used for crime (as a property acquired through crime or related to crime).

In accordance with paragraph 1 of Article 112 of the Criminal Code of **Romania**, the following property is subject to special confiscation:

- a) assets produced by perpetrating any offence stipulated by the criminal law,

- b) assets that were used in any way, or intended to be used to perpetrate an offence set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use,
- c) assets used immediately after the offence perpetration to ensure the perpetrator's escape or the retention of use or product obtained, if they belong to the offender or to another person who knew the purpose of their use,
- d) assets given to bring about the perpetration of an offence set forth by the criminal law or to reward the perpetrator,
- e) assets acquired by perpetrating any offence stipulated by the criminal law, unless returned to the aggrieved party and to the extent they are not used to indemnify the aggrieved party,
- f) assets the possession of which is prohibited by the criminal law.

According to paragraph 2 of Article 112 of the Criminal Code of Romania, in cases mentioned in sub-items b) and c) of paragraph 1 thereof, if the value of assets subject to confiscation is manifestly disproportionate to the nature and severity of the offense, confiscation will be performed only in part, by monetary equivalent, by taking into account the result produced or that could have been produced and assets contribution to it. If the assets were produced, modified or adapted in order to perpetrate the offence set forth by the criminal law, they shall be entirely confiscated. If the assets cannot be subject to confiscation, as they do not belong to the offender, and the person owning them was not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the provisions of paragraph 2. According to paragraph 5 of Article 112 of the Criminal Code, if the assets subject to confiscation pursuant to sub-items b) – e) of paragraph 1 were not to be found, money and other assets shall be confiscated instead, up to the value thereof. According to paragraph 6 of the said Article, special confiscation is to be applied to the assets and money acquired as a result of using the property subject to confiscation, as well as the property produced with its assistance, except for those stipulated in sub-items b) and c) of paragraph 1 of Article 112 of the Criminal Code of Romania.

Special confiscation is established by Article 106 of the Criminal Code of **Moldova** and is applied to such property as:

- a) Property used or intended for crime;
- b) Property acquired through crimes, and any proceeds from using such property;
- c) Assets transferred with a purpose to induce to commit a crime or for a reward to a perpetrator;
- d) Property owned despite the legal grounds;
- e) Assets partially or fully converted or rearranged from the property acquired as a result of crime or through the proceeds from such property;
- f) Property, which is object of the crime of money laundering or financing of terrorism (paragraph 2 of Article 106 of the Criminal Code).

If such property does not exist any longer, it has not been found or cannot be restored, then an amount of money equal to its value is to be confiscated (paragraph 1 Article 106 of the Criminal Code). If property acquired through crime or the proceeds of crime have been intermingled with property legally acquired, then the part of property or its value, which corresponds to the value of intermingled property and the proceeds, is subject to confiscation (paragraph 2-1 of Article 106 of the Criminal Code).

If property, mentioned in items a) and b) of paragraph 2 of Article 106 of the Criminal Code, belongs or on a compensatory basis has been transferred to a person, who was not aware and did not have to be aware of a purpose of use or origin of property, monetary amount equal to its value is subject to confiscation. If such property has been transferred free of charge to a person, who has not been aware and did not have to be aware of a purpose of use or origin of property, it is to be confiscated (paragraph 3 of Article 106 of the Criminal Code). Special confiscation may also be applied in the event, when criminal sanctions are not imposed on a perpetrator (paragraph 4 of Article 106 of the Criminal Code).

Under the laws of Moldova, special confiscation is not imposed in the event of crimes committed through press or any other media (paragraph 5 of Article 106 of the Criminal Code). Similar ban is established by criminal law of **Romania** (the ban concerns confiscation of property that was used or was intended to be used to commit the crime).

According to the legislation of **Ukraine**, special confiscation is to be imposed on money, valuables and other property acquired through crime and/or is the proceeds from such assets; intended (used) to incite a person to commit a crime, finance and/or financially support a crime or as a reward for crime; which were objects of crime, except for those items that had to be returned to the owner (lawful possessor); which were found, produced, adjusted and used as instruments or means of crime, except for those assets to be returned to the owner (lawful possessor), who was not aware or could not be aware of unlawful use of such property (part 1 of Article 96-2 of the Criminal Code of Ukraine).

According to part 2 of Article 96-2 of the Criminal Code of Ukraine, in the event when such property had been fully or partially converted to other property, the converted property is subject to special confiscation fully or partially. If the confiscation is not possible to be carried out on the date of the decision on special confiscation due to impossibility of its withdrawal from legitimately acquired property, court makes a decision on confiscation of money amount corresponding to the value of such property. Special confiscation cannot be imposed on property of bona fide purchaser, as well as money, valuables and other property, which are subject to return to the owner (lawful possessor) according to the law or are meant for compensation for damage resulting from a crime (parts 4,5 of Article 96-2 of the Criminal Code of Ukraine).

In addition to the traditional remedies, the Criminal Code of **Poland** to date establishes such remedy as special confiscation of an enterprise. Upon conviction for an offence, when the offender received substantial financial benefits, even if indirectly, the court may decide for a confiscation of his or her owned enterprise or equivalent value of the enterprise, if it has been used for commission of a crime or concealment of benefits acquired as a result of such crime. At that, premises of the enterprise and proceeds exceeding the amount of around EUR 50000 are subject to confiscation. Such confiscation is not applied in the events when it is not proportionate to the severity of a crime, person's guilt, motives and behaviour of the owner of the enterprise, when damage caused by the offence or value of concealed benefit is insignificant comparing with the business of the enterprise, or when such confiscation would cause disproportionate damage to the business owner. Moreover, the court may confiscate an enterprise that does not belong to the offender him/herself, but to other natural person, or its equivalent value, if it has been used for crime or concealment of benefits acquired as a result of such crime, and the owner wanted to use it for those purposes or, considering such possibility, agreed for that (Article 44 of the Criminal Code of Poland).

According to Article 52 of the Criminal Code of **Georgia**, objects and/or instrumentalities of crime, objects that were intended to be used for crime and/or property acquired through crime, including any profits received from such property or property of equivalent value, are subject to criminal confiscation. At that it involves property owned by a convicted person, which narrows application of special confiscation. According to Georgian comments, this shortcoming is eliminated by judicial practice, which broadens the application of special confiscation also to property registered to nominal owners. According to the legislation of **Azerbaijan**, special confiscation can be applied both to natural and legal persons, however reference to criminally acquired money or property by a convicted person particularly can hinder effective application of this standard (Article 99-1 of the Criminal Code of Azerbaijan).

List of objects of special confiscation is rather limited under the legislation of **Kyrgyzstan**, as it consists of convicted person's property and (or) proceeds from it, equipment, instruments and other means used or intended to be used in any way upon crime; property of a convicted person transferred to other person, if that person knew or ought to have known that the property has been acquired as a result of criminal actions; proceeds of crime or any benefits of criminal proceeds received as a result of legalisation (laundering) of the proceeds of crime (Article 52 of the Criminal Code of Kyrgyzstan). Such definition does not include, for example, those cases, when property is controlled, but yet owned by the convicted person, and proceeds of crime are not received from legalisation (laundering) of the proceeds of crime.

Some ACN countries do not legislatively limit the list of crimes, upon which special confiscation may be applied extending the application to any crime prohibited by criminal law (Slovenia, Croatia, Montenegro, Romania, Lithuania and other); a number of other ACN countries permit application of special confiscation only in the events of **premeditated** offences (Georgia, Estonia and other).

In some countries, the conditions for application of special confiscation may yet be complicated. For example, in **Ukraine** special confiscation is applied only to premeditated crimes punishable by imprisonment or penalty in the amount exceeding 3000 tax-free minimum wages of citizens, or for crimes vastly listed in part 1 of Article 96-2 of the Criminal Code, however, all corruption offences and money laundering are subject to such confiscation.

Under the criminal law of **Kyrgyzstan**, special confiscation is applied only to serious and particularly serious crimes, and therefore part of corruption offences does not fall within the scope of special confiscation regime.

In **Serbia**, the Law on Seizure and Confiscation of Proceeds from Crime expands the scope of confiscation to the list of crimes stipulated in Article 2 thereof, which includes some corruption offences, and only provided for the value of instruments and means or the proceeds from them to be more than 1.5 million dinars (Article 2). Under the law of **Latvia** special confiscation of the proceeds of crimes (but not the instrumentalities of crimes) was, until 1 August 2017, applied based on Chapter 27 of the Criminal Procedure Code of Latvia and only in relation to the crimes, the list of which is established by Article 355 of the Criminal Procedure Code, which does not separately include corruption offences and money laundering. Proceeds from corruption and money laundering can therefore be confiscated based on the rules of Chapter 27 of the Criminal Procedure Code only in the event if they fall within the scope of certain other categories of crimes, for example, organized crime. Such approach considerably reduced the efficiency of application of special confiscation under the legislation of Latvia. The special confiscation instrument was significantly improved in Latvia with the entry into force of the new provisions in the Criminal Code and the Criminal Procedure Code.

In most cases, special criminal confiscation is based on person's conviction upon the results of criminal proceedings. Accordingly, decision, based on which such confiscation can be applied, is a final court's decision on the results of the proceeding legally entered into force; for ACN countries, where special confiscation is based only on the conviction – court's judgment of conviction or similar decision on application of certain sanctions (for example, compulsory treatment or educational measures). Such countries include, for example, Azerbaijan, Georgia, Serbia, Kyrgyzstan and other. However, there are exceptions to the rule to be covered separately.

### ***Criminal special non-conviction-based confiscation***

In accordance with Article 54 of the UN Convention against Corruption, states should consider taking such measures as may be necessary to allow confiscation of property acquired through or involved in the commission of a corruption offence without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Financial Action Task Force on Money Laundering (FATF) in ‘Forty Recommendations’ dated 20 June 2003, in particular, mentions that countries can take such actions that would enable confiscation of instrumentalities and proceeds of crime without criminal conviction of an offender, if such requirement does not contradict the principles of their domestic law (Recommendation No. 3).

European Union Directive 2014/42/UE in paragraph 2 of Article 4 (confiscation) establishes that in the events if confiscation of instrumentalities and proceeds of crime because of the conviction cannot be enabled, and as minimum in the events when impossibility of confiscation is caused by illness or escape of the person suspected or accused of crime, member states are to take necessary actions to enable confiscation of instrumentalities and proceeds under the cases, when criminal proceeding related to crime, which could result in, directly or indirectly, pecuniary gain and could cause conviction, if suspected or accused person could be brought before a court.

In many ACN countries law stipulates criminal confiscation of the instrumentalities or proceeds of crimes, without conviction primarily on very restricted grounds.

Thus, legislation of **Ukraine** permits special confiscation based on the court’s ruling to exempt from criminal responsibility, which does not lead to conviction, and when it comes to property, which has been seized – in the same way based on the court’s ruling to close criminal proceeding by reasons other than exemption of a person from criminal responsibility, or based on the court’s ruling pursuant to part 9 of Article 100 of the Criminal Procedure Code of Ukraine, if criminal proceeding is closed by an investigator or a prosecutor and at their request (part 2 of Article 96-1 of Ukraine).

According to Article 498 of the Criminal Procedure Code of **Slovenia**, objects that man be confiscated, or are subject to confiscation, in accordance with the criminal legislation, are to be confiscated even when criminal proceeding is not ending in a conviction, in the events when there is a threat of their use for crime, and if it is required for the reasons of public security and moral duty. Court is to decide on confiscation of such objects even when there are no provisions for such in court verdict. Moreover, according to Article 498a of the Criminal Code of Slovenia, except for the cases where criminal proceeding results in conviction under a court verdict, money or property of illegitimate origin (Article 252 of the Criminal Code) and items of illegal active and passive bribery (Articles 162, 168, 247, 248, 267, 268, 269 and 269a of the Criminal Code) are also subject to confiscation, if the elements of these crimes indicating the illicit origin of money or property or the fact of giving or receiving a reward, gift, bribe or any other pecuniary gain, are proven. With this respect, the court hands down special definition based on the reasoned request of the prosecutor, and prior to that the investigating judge based on a court’s request is to collect data and investigate all circumstances vital for establishing these facts.

Recent amendments introduced to the criminal legislation of **Poland** (came into force on 27 April 2017) considerably extended grounds for special confiscation. Thus, according to Article 43a of the Criminal Code of Poland, if evidence that confiscation could be applied in case of conviction is introduced, the court can apply it also in the event of the death of the offender, dismissal of proceeding against him or her or suspension of proceeding, if the offender cannot be found or cannot appear in the criminal proceeding because of mental or other serious illness.

Articles 101 and 102 of the Criminal Code of **Czech Republic** establish certain possibilities for confiscation of the proceeds of crimes upon absence of criminal conviction (for example, if the offender cannot be prosecuted or convicted if such proceeds are in hands of third parties)<sup>29</sup>.

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<sup>29</sup> See OECD/WGB (2013), Phase 3 Report on Czech Republic, page 23, <https://www.oecd.org/daf/anti-bribery/CzechRepublicphase3reportEN.pdf>.

In accordance with paragraph 4 of Article 106 of the Criminal Code of **Moldova**, special confiscation can be also applied in the event when perpetrator is not sentenced to criminal punishment.

Procedure for the special non-conviction-based confiscation in **Montenegro** and **Croatia** is not established by the Criminal Code or Criminal Procedure Code, but by special law regulating matters of confiscation of the proceeds of crime by court's decision, which is made according to the rules of criminal proceeding. According to Article 10 of the Law of Montenegro on Seizure and Confiscation of Proceeds from Crime (non-conviction-based confiscation), there are two grounds for special non-conviction based confiscation: 1) if a person, who is the subject of a criminal proceeding, dies before the date of completion of the criminal proceeding, or 2) if the proceeding cannot be continued due to the circumstances hindering criminal prosecution for long. At that, the proceeds of crime can be confiscated provided for a probability based on the evidence, which constitutes the basis of the case, that criminal proceeding would result in conviction, if the person would be alive (property is confiscated from inheritors as well) and there would be no circumstances hindering criminal prosecution (property is confiscated from a person criminal prosecution cannot be continued against). It should be noted that provisions of the Law apply only to the crimes listed in Article 2 thereof, which however include both corruption offences and corruption money laundering (legalisation).

According to Article 2 of the Act of Croatia on the Proceedings for the Confiscation of Pecuniary Benefit Resulting from Criminal Offences and Misdemeanours, if criminal proceeding cannot be started due to offender's death or other circumstances excluding a possibility of criminal prosecution, then at the proposal of a prosecutor, victim and civil plaintiff, the court is obliged to take measures in accordance with Article 6 of the Law, if the amount of probable pecuniary gain resulting from corresponding crime makes not less than 5 000.00 Croatian kunas (around EUR 670). Decision on instituting criminal proceedings in such case shall be made by a judge of the court that would have an authority to hear criminal proceedings on their merits. According to Article 6 of the said Act, after the judge brings the proceedings, the court is to hold hearing, when adversary is to be examined and other evidence is to be presented.

In the event of establishing the commission of a crime by a person and obtaining of pecuniary gain as a result thereof, the court is to issue an indictment that the person has committed crime; that as a result of such crime, a pecuniary gain has been obtained; what particular property or rights form this pecuniary gain from crime or its money equivalent; then holds that property or the rights are to be transferred to and become the property of the state, or holds that the adversary is to transfer particular property or rights to the state, or make payment of their money equivalent within 15 days from the effective date of the court ruling. Both decision to commence the proceedings and decision for confiscation can be appealed.

Legislation of **Kazakhstan** and **Latvia** has separate chapters in the Criminal Procedure Code dedicated to the issues of special criminal confiscation prior to conviction or non-conviction based one. Thus, Chapter 71 of the Criminal Procedure Code of Kazakhstan (entered into force on 1 January 2018) regulates a procedure of confiscation of the property illegally obtained prior to conviction. Such confiscation is possible in the events when a person is put on the international wanted list or criminal prosecution has been terminated on such grounds as death of the person, amnesty and expiry of the period of limitation for bringing to criminal responsibility. At that, crime investigator initiates pre-trial procedure of confiscation to prove ownership of the suspected, accused person or third person; connection of the property with crime serving as a ground for application of confiscation; circumstances of acquiring of the property by third person or those serving as a ground to assume that it has been acquired as a result of offence. After establishing sufficient evidence that property has been illegally acquired, the prosecution submits a request to the court to enable confiscation.

At the same time, Article 670 of the Criminal Procedure Code of Kazakhstan, upon description of the issues subject to be settled by the court during the proceeding for confiscation prior to conviction, refers to Article 48 of the Criminal Code of Kazakhstan. However, paragraph 1 of Article 48 of the Criminal Code describes forfeiture and conversion to state property of only the property owned by a convicted person, acquired through crime or with funds obtained through criminal activity, as well as instruments and means of crime,

and although paragraph 2 of Article 48 of the Criminal Code also contains reference to the property transferred by a convicted person for possession by other persons, it is yet considered to be insufficient for the efficient functioning of Article 71 of the Criminal Procedure Code of Kazakhstan upon effect of the existing wording of Article 48 of the Criminal Code, which, as it is deemed, requires further improvement.

In **Latvia**, Articles 70-11 to 70-14 of the Criminal Code and Article 27 of the Criminal Procedure Code regulate issues of confiscation of property acquired through crime. However, such special confiscation covers instrumentalities intended or used for the commission of a crime, as well as property obtained directly or indirectly as a result of a crime, proceeds from the disposal of and profits from the use of the property (Articles 70-11, 70-12 of the Criminal Code). The procedure consists of two phases: 1) recognition that the property has been acquired criminally; and 2) confiscation or recovery of the property. In accordance with Article 356 of the Criminal Procedure Code of Latvia, Property may be recognised as criminally acquired by a court adjudication that has entered into effect, or by a decision of a public prosecutor regarding the termination of criminal proceedings.

At the stage of pre-trial investigation, property can also be recognized as such by a decision of district (city) court, if the person performing the proceeding has enough evidence, which does not raise any doubts with respect to criminal nature of property (its connection with the crime), or by a decision of a person performing the proceeding, if during the investigation property was found or seized from suspected, accused person or third party, and with this respect property owner or lawful possessor before that informed on loss of such property, and after it had been found, he or she proved ownership of such property assuaging any reasonable doubt.

According to Article 358 of the Criminal Procedure Code of Latvia, property acquired through crime is subject to confiscation based on a court decision, if there is no requirement of further maintenance of such property for the purpose of criminal proceeding, and if there is no need to return it to the owner (lawful possessor), and received financial resources are subject to transfer to a state budget. If such property had been taken, destroyed, hidden or concealed, and therefore its confiscation is not possible, other property and financial resources in value equivalent of the property can be confiscated. If the accused person does not have property that can be confiscated in accordance with this Article, then the following assets can be confiscated: 1) property transferred by the accused person to a third person after the crime without related payment; 2) property of a spouse of the accused person if separate property ownership has not been conditioned minimum a year prior to perpetration of a criminal act; 3) property of other person, if the accused person had a joint (undivided) household with such person.

According to Article 70-14 of the Criminal Code of Latvia, if the object of the crime belongs to a third person, its value must be confiscated. If the property obtained by criminal means has been disposed of, destroyed, disguised or hidden, due to which confiscation became impossible, its corresponding value is subject to confiscation. When confiscation of property is applied, the property subject to confiscation can be replaced by financial means equivalent to the value of the property. Property that has historical, artistic or scientific value, however, cannot be replaced. If the property obtained by criminal means cannot be confiscated because it was alienated, destroyed, hidden or disguised, and the offender has no other property that can be recovered, the following property can be confiscated: 1) property that was alienated by the perpetrator after the commission of the crime for free or for a price significantly lower than the market price; 2) the property in the joint ownership of the offender and his/her spouse, unless the spouses have a documented agreement on property separation concluded at least one year prior to the commission of the crime; 3) property belongs to another person with whom the offender shared a joint household, if the property was acquired after the commission of the criminal activity.

### ***Confiscation arising out of a trial in absentia***

The Directive 2014/42/EU in its paragraph 1 of Article 4 (Confiscation) allows confiscation of instrumentalities and proceeds of crime based on a final conviction of a person as a result of a trial *in*

*absentia*. According to paragraphs 15 and 16 of the Preamble of the Directive, in cases, when confiscation on the basis of a final conviction is not possible, under certain circumstances however, there should be a possibility to confiscate instrumentalities and proceeds of crime at least in the events of illness or escape of the suspect or accused person. At that, in the mentioned events of illness or escape, trial *in absentia* in EU member countries is sufficient to fulfil the obligation.

When suspected or accused person flees from justice, EU member countries are to take all reasonably possible measures to officially invite corresponding person to competent authorities or inform on confiscation proceedings. At that, illness in a context of the Directive is to mean inability of the suspected or accused person to participate in a criminal proceeding over an extended period resulting in inability of the proceeding to progress normally. At that, suspected or accused person can be obliged to confirm his or her illness, for example, by medical certificate that the court may not take into account if deems the document to be unsatisfactory. Right to legal representation of such person shall apply.

Legislation of the most ACN countries establishes the possibility of a trial *in absentia* and conviction for corruption offences and money laundering, in the process of which confiscation of instrumentalities and proceeds of such crime as minimum is also possible.

Thus, under the legislation of **Georgia**, both special criminal confiscation and civil confiscation can be applied as a result of criminal trial *in absentia* at the same extent as if they would be applied upon conviction of a person as a result of ordinary criminal proceeding both upon trial on the merits and on the basis of procedural agreement. Similar situation will be taking place under legislation of **Ukraine** as well with the only difference that possibility of a trial *in absentia* and conviction are stipulated for some corruption cases, exhaustive list of which is provided in the note to Article 45 of the Criminal Code of Ukraine.

The Criminal Procedure Code of **Montenegro** also allows possibility of holding trial *in absentia*, conviction of a person under such trial *in absentia*, as well as application of various types of confiscation (special and extended) upon the results thereof. According to Article 324 of the Criminal Procedure Code of Montenegro, trial *in absentia* against the accused person in his or her absence can be applied only in case if he or she escaped or by other reasons is out of reach by competent authorities, and there are particular strong reasons for conducting the proceeding in a specified order. Decision on a trial *in absentia* is made by court based on the request of a prosecutor.

Similar grounds for a trial *in absentia* are established by Article 402 of the Criminal Procedure Code of **Croatia**, according to which trial can be held against the accused person in his or her absentia only on the basis of particular strong reasons for bringing him or her to trial, and if it is impossible to bring person to trial overseas or extradite, or if the person absconds or is out of reach by state authorities.

In **Slovenia**, criminal confiscation of assets is possible in a context of a procedure stipulated by Articles 498 and 498a, which is described in the section above, and could be described more as a trial *in absentia* without conviction of the person. According to the legislation of **Serbia**, for a trial *in absentia*, it is important for the notices to be sent, and for a person to be informed of the fact of such proceeding, and the notice shall include reservations that trial in case of absence will still be held even in his or her absentia.

Under the legislation of **Estonia**, court proceedings are allowed *in absentia* of the accused person, particularly, if his or her location is not identified, there are reasonable grounds to assume that he or she is outside the country and evading court proceeding, as well as reasonable efforts have been taken to identify his or her location and court trial in his or her absentia is possible (paragraph 2 of Article 269 of the Criminal Procedure Code). Such court proceeding is possible for corruption and money laundering cases as well with application of types of confiscation stipulated by law.

In accordance with Article 465 of the Criminal Procedure Code of **Latvia**, court can hold trial *in absentia* of a person accused in crime if he or she is located in other country, his or her location is not known or his or



her appearance before the court is not possible. Similar grounds are established in Article 246 of the Criminal Procedure Code of **Lithuania** according to the law from 19 October 2017 (accused person is outside the country and there is no possibility to contact him or the host country refuses to cooperate); such procedure can be applied for corruption offences and money laundering, if they caused significant damage. Criminal confiscation can also be applied upon trial *in absentia*, however, according to paragraph 2 of Article 437 of the Criminal Procedure Code of Lithuania, such sentence can be executed for the extent possible in absences of a convicted person prior to his or her arrest or extradition.

Legislation of **Romania** allows confiscation upon trial *in absentia* both for corruption cases and money laundering. In accordance with paragraphs 2 and 3 of Article 364 of the Criminal Procedure Code of Romania, court proceeding can be held in absence of the accused person, if the latter is not present, evading justice or changed his or her address without notice given to judicial authorities, and despite the attempts to find out his or her new address remains unknown, as well as in the events when he or she has been summoned to court in a lawful manner, however failed to appear without giving any justification.

Possibility of the trial *in absentia* particularly under the corruption cases and laundering of corruption assets with application of corresponding confiscation measures is also established by the legislation of Azerbaijan, Albania, Kyrgyzstan, Moldova and Russia. In aforementioned countries that allow trial *in absentia*, legal representation of the accused person under such cases is mandatory. Trial *in absentia* is not allowed under the legislation of Armenia, Bosnia and Herzegovina.

It should be noted that application of the confiscation measures upon absence of the accused person is possible both under a trial *in absentia* with confiscation and upon the results of confiscation procedure *in absentia* (under criminal special non-conviction-based confiscation that is described in the section above).

### ***Confiscation arising out of conclusion of an agreement in the criminal proceedings***

In accordance with the legislation of some ACN member countries, criminal proceeding can be ended by conclusion of a procedural agreement between the parties, which shall further be approved by court and arranged by a sentence with conviction of the accused person and can include application of property confiscation as one of the conditions thereof.

Confiscation of the property arising out of conclusion of an agreement in court proceeding is permitted particularly in Georgia, Moldova, Serbia, Ukraine, Croatia, Montenegro and Estonia.

Thus, in accordance with the legislation of **Moldova**, one of the forms of criminal proceeding is proceeding under plea agreement. According to Article 504 of the Criminal Procedure Code of Moldova, plea agreement is a deal between a prosecutor and the accused person or, depending on circumstances, defendant, who provided consent to admit guilt in exchange of reduction of penalty. The said agreement is prepared in writing provided for mandatory participation of the defender, accused person or defendant under the cases of minor offences, medium-gravity crimes and grave crimes. Thus, plea agreement under corruption offences and money laundering is possible only in the events such offences can relate to such categories of crime. In accordance with paragraph 5 of Article 509 of the Criminal Procedure Code, when imposing a sentence in case of plea agreement, the court is also to decide on the matters related to special confiscation.

Under the legislation of **Georgia**, procedural agreement between the prosecutor and the accused is to be considered by court. Based on certain criteria, court can accept procedural agreement, request parties to change or amend it, or can fully reject it. In case of approval of the agreement, the court decides on conviction and can at the same time apply special confiscation. Also, civil confiscation can be applied subsequently on the grounds of such criminal agreement-based conviction.

One of the mandatory elements of plea agreement made between the prosecutor and the accused person and settlement agreement made between the prosecutor and the accused person under criminal proceeding of

**Ukraine** is a negotiated punitive measure and consent of the parties for sentencing thereof. Considering that as a sanction, confiscation of property is the only punitive measure under the legislation of Ukraine, it can also be one of the conditions of procedural agreement. At the same time, possibility of application of special confiscation on the basis of such agreement causes doubt, because list of its elements set forth in Articles 471 and 472 of the Criminal Procedure Code of Ukraine is formed exhaustively and there is no reference to such measure.

The law of Ukraine strictly limits categories of crime the procedural agreement can be concluded under. For example, plea agreements can be concluded under the proceedings for: 1) misdemeanour offences, minor or medium-gravity offences, as well as grave offences; 2) particularly serious crimes, which fall under the competence of the National Anti-Corruption Bureau of Ukraine (NABU) provided for the suspect or the accused person to find out other person committing crime, which falls under the competence of NABU, if such information would be substantiated; 3) particularly serious crimes committed by a group of people in different form provided for such suspect or accused person to find out criminal actions of other members of the group, if such information is substantiated (part 4 of Article 469 of the Criminal Procedure Code). In the same way as in Georgia, conviction based on procedural agreement in Ukraine may further serve as a ground for application of civil conviction-based confiscation.

In accordance with Articles 245 and 248 of the Criminal Procedure Code of **Estonia**, the prosecutor, the accused person or his or her defender can reach and conclude procedural agreement that can include a clause on the assets subject to confiscation. Given that such agreement is subject to judicial control, it is further being submitted to the court that based thereon passes judgment on conviction of the accused person and imposing sanctions negotiated in the agreement, including the conditions of confiscation of property as well.

Article 314 of the Criminal Procedure Code of **Serbia** explicitly stipulates agreement between the prosecutor and the accused person on the proceeds of crime subject to confiscation from the accused person upon the results of conviction as one of the elements of a procedural agreement between them. Similar approach is applied in Article 360 of the Criminal Procedure Code of **Croatia** as well, according to which one of the elements of the procedural agreement is a statement of the accused person on his or her acceptance of the proposal of the prosecutor on imposing an enforcement measure and confiscation of the proceeds of crime.

Article 301 of the Criminal Procedure Code of **Montenegro** establishes that plea agreement is to contain also an obligation of the accused person to return the proceeds of crime over a certain period, as well as objects subject to confiscation in accordance with the Criminal Code of Montenegro.

The so called ‘Budva’ case, investigated in Montenegro, can serve as an example of successful application of the confiscation arising out of making an agreement in a criminal proceeding. Senior politician was held liable under this case due to giving instructions to a number of officials from the municipality of Budva Town to enter into a commercial agreement with a particular company. Subject of the agreement was construction of 7-storey building, as a result of which the municipality would receive certain area inside the building. The accused person instructed officials of the municipality to make sure that the company would pay fewer taxes and other payments, and in exchange he would receive a benefit of 2 floors of that building. Senior politician, officials from the municipality and the company have been charged with a criminal offence for corruption and involvement in organised crime. The politician and the legal entity entered into a plea agreement with conditions obliging to return material benefit to the total amount of 19 million euros. Decision of the court on approval of the agreement came to force and material benefit had been fully returned to the state.

### *Confiscation arising out of satisfaction of a civil claim in a criminal case*

In some ACN countries, confiscation can be applied with an aim to secure civil claim in a criminal proceeding and compensation of damage to such civil claimant or person the prosecutor ran the civil claim on behalf thereof. Such type of confiscation is applied in Azerbaijan, Armenia, Kyrgyzstan, Serbia,

Montenegro, Ukraine and a number of other countries. There is no such type of confiscation in Georgia, Latvia, Lithuania, Estonia and other countries.

In accordance with Article 163 of the Criminal Procedure Code of **Armenia**, the court makes decision under the civil claim in a criminal case only in its final judgment. Article 360 of the Criminal Procedure Code stipulates that, upon passing the judgment, the court is to decide whether the civil claim is to be satisfied, to whose benefit and to what extent. That said, the court, upon passing the judgment, checks whether it is proven that the property subject to confiscation has been acquired through crime, or use of such property, or that the property has been used or planned to be used as instrumentalities of crime, or it has been a subject of crime as stipulated in paragraph 7 of Article 215.1 of the Criminal Code of Armenia. The victim, bona fide third party or civil claimant may file a civil claim for the purpose of confiscation. The prosecutor may also run a civil claim for protection of interests and property of the state.

Legal system of **Montenegro** stipulates only property claim under Article 234 of the Criminal Procedure Code, according to which claim of property right may relate to compensation of damage, return of property or declaring certain legal fact invalid. It means that injured party can file a claim in a criminal proceeding even despite the subject relating to the matters of civil law. Such insured party has the right to initiate a claim under any criminal proceeding, including cases of corruption.

Legislation of **Serbia** stipulates similar rules of filing civil claim, which can be ran under criminal cases of corruption and money laundering as well. Confiscation of this type is limited by compensation to the victim party and bona fide owner. Thus, if under criminal proceeding the court accepts property claim of the victim party, the court is to seize pecuniary gain only in case it exceeds recognized by judicial judgment extent of property claim. Period of filing of such claim under criminal proceeding is 6 months from the date when the decision with reference to a possibility of such filing by the victim party became final. If civil claim has not been filed under the criminal proceeding, it can be filed under the civil proceeding during three months from the date the party got to know about the decision sentencing seizure of pecuniary gain, and in any case not later than within three years from the date when the decision on seizure of pecuniary gain became final. Victim party, however, is to claim its right for compensation out of seized pecuniary gain.

Filing of a civil claim under the criminal proceeding under the legislation of **Romania** is aimed at compensating the damage to the victim and is not deemed as one of the types of confiscation. However, it can have a similar effect if the other party to the civil case is the state or a local administration.

In accordance with Article 142 of the Criminal Procedure Code of **Kyrgyzstan** (Obligation to secure civil claim and property confiscation stipulated by law), provided that the sufficient data on property damage caused by crime is available, the investigator, prosecutor and the court are to take measures to secure filed and potential civil claim and confiscation. Such securing is done by attachment in accordance with an inventory of property attached to deposits, valuables, other property of the accused person, defendant and persons bearing pecuniary responsibility under the law for the actions of the accused person or defendant, as well as by seizure of property put in a distress. In case of satisfaction of the civil claim, the court has a right prior to entry of judgment into legal force to decide on adoption of measures for security of a claim, if they have not been adopted earlier. Both under the criminal cases of corruption offences and the money laundering, civil claim may be filed and property for its security may be confiscated. Similar provisions are set forth in Articles 180-187 of the Criminal Procedure Code of **Azerbaijan**.

In accordance with Article 128 of the Criminal Procedure Code of **Ukraine** (Civil claim in a criminal proceeding), the person, who is inflicted to property and/or moral damage by the crime, has the right to file civil claim against the suspect, accused person or natural or legal person, bearing civil responsibility for the actions of the offender under the law, during criminal proceeding or before the commencement of the trial. That said, the prosecutor has the right to run civil claim in a criminal proceeding on behalf of the state. One of the aims of seizure of property according to Article 170 of the Criminal Procedure Code is securing compensation of damage caused by crime (civil claim) or recovery of legal entity's improper benefit. Value

of property seized is to be proportionate to its cause (extent of damage under the civil claim or improper benefit).

### **C. Extended criminal confiscation**

As it has been mentioned above, special confiscation described above is applied to specific objects directly relating to crime (instrumentalities and proceeds of concrete crime(s), as well as profit from it (them)). At the same time, by no means always, the prosecution, which bears the burden of proof in case of special confiscation, succeeds in proving the relation of the property of the suspect, accused or convicted person with one or another particular crime, which in practice causes serious problems in combating various types of serious crimes that cause pecuniary gain, including corruption and money laundering. At the same time, criminal confiscation, as a sanction, is applied to all property of the convicted person irrespective of its origin, including the one that has been acquired on legitimate basis and using legal sources, which raises typical questions in terms of proportionality of such measure related to property rights of the person.

One of the solutions to the dilemma is the extended criminal confiscation, which, thus far, is established in such ACN countries as Bosnia and Herzegovina, Lithuania, Moldova, Poland, Romania, Serbia, Croatia, Montenegro and Estonia.

In accordance with paragraph 8 of Article 31 of the UN Convention against corruption, Member States can consider possibility of establishing the requirement for a person committing crime to prove legitimate origin of such alleged proceeds of crime or other property subject to confiscation at the extent the requirement corresponds to fundamental principles of domestic legislation and nature of court or other proceeding. Paragraph 3 of Recommendation No. 3 of 'Forty Recommendations' of the Financial Action Task Force on Money Laundering (FATF) dated 20 June 2003, is formulated in a similar way. Likewise, paragraph 4 of Article 3 of the Warsaw Convention dated 2005, too, establishes that every party takes legitimate and other necessary measures to guarantee obligation of a person convicted of grave crime or other crimes defined by national law to demonstrate source of origin of alleged proceeds, which are object of confiscation in the extent the said requirement does not contradict to the principles of the domestic legislation.

Special emphasis is placed on extended confiscation in a criminal proceeding in the Directive 2014/42/EU of the European Parliament and of the EU Council, dated 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Preamble to the Directive describes prerequisites to emergence of institution of extended criminal confiscation. Thus, the Directive specifies that criminal groups be involved in a wide range of criminal activity. For the purpose of efficient combating organised crime, it is possible that criminal conviction, whenever necessary, can be accompanied with confiscation of not only property related with certain crime, but additional equipment the court would deem as proceeds of other crimes as well. Such approach is called extended confiscation.

The Framework Decision 2005/212/JHA stipulates three different approaches (minimum requirements), member states can select among for application of extended confiscation. As a result, upon implementation of this Framework Decision, member states selected own different options that lead to widely varying between each other concepts of extended confiscation described in their national laws. These differences confuse cross-border cooperation under confiscation cases. Therefore, further harmonisation of norms on extended confiscation is required.

When determining whether the issue of pecuniary gain arises in respect of one or another crime, member states can consider the ways of committing crime, for example, crime committed in a context of organised crime or for a purpose of receiving regular proceeds of crime. However, the lack of such conditions does not, in general, have to exclude possibility of application of extended confiscation. In accordance with the Directive, the fact that property of a person does not correspond to his or her legitimate income may be one of the factors leading the court to a conclusion that property is acquired through criminal activities. Member states may also set requirements for a certain period of time the property may be considered as the one

acquired through criminal activities. It is to be noted that the Directive sets forth only minimum rules that does not impede exercise of wider powers in this sphere by member states (paragraphs 19-22 of the Preamble).

Based on such approaches, Article 5 of the Directive (Extended Confiscation) has been framed, which sets forth an obligation of member states to take all required measures to enable confiscation, fully or partially, of property owned by a person convicted of a crime, which directly or indirectly relates to obtaining of pecuniary gain, when the court, based on the circumstances of the case, including concrete facts and available proof, such as inconsistency between the value of the property and legitimate income of the convicted person, comes to a conclusion that disputed property has been obtained through crime activity.

At that, in accordance with wording of paragraph 2 of Article 5 of the Directive, the term ‘crime’ shall cover at least those crimes related to corruption and money laundering: active and passive corruption in private sector; active and passive corruption of public officials of the authorities of the EU and member states (stipulated in Articles 2 and 3 of the EU Convention on Combating Bribery involving public officials); participation in a criminal organization at the very least of cases, when crime lead to receiving pecuniary gain; offence that is punishable pursuant to the set forth in Article 3 of the Directive documents, such as the Convention developed based on Article K.3(2)(c) of the EU Convention on Combating Bribery involving officials, the Framework Decision 2001/413/JHA of May 28, 2001, on combating fraud and counterfeiting of non-cash means of payment, the Framework Decision 2001/500/JHA of June 26, 2001, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, the Framework Decision 2003/568/JHA of July 22, 2003, on combating corruption in the private sector, in the event the corresponding document does not contain punishment threshold according to the corresponding national legislation of imprisonment for a term of not less than 4 years.

Thus, among the ACN countries the EU Directive 2014/42/EU serves as mandatory for, there are, at least, 5 countries that have extended criminal confiscation provided for in their legislation –Lithuania, Poland, Romania, Croatia and Estonia. At the same time, it exists in Moldova, Serbia, Montenegro as well that are non-EU countries.

In accordance with Article 106-1 of the Criminal Code of **Moldova**, if the person convicted for one of the crimes listed therein, and if the offence is committed with mercenary motives, the subject to confiscation is property other than the one described in Article 106 of the Criminal Code as well (Article 106 describes special confiscation of instrumentalities and proceeds of crime). Such extended confiscation basically applies to all corruption offences (giving bribe, accepting bribe, passive corruption, active corruption, abuse of power or official position, receiving benefits from abuse of authority, illicit enrichment, fraudulent receipt of money from external funds, inappropriate and outside funds and other) and money laundering.

At the same time, for application of this instrument, Article 106-1 of the Criminal Code of Moldova requires combined presence of the following conditions: a) value of the property acquired by the convicted person during 5 years prior to the date of crime and period after committing crime till the sentencing date substantially exceeds income generated; and b) judicial body based on evidence produced in the case determined the origin of the corresponding property obtained through crime stipulated in the provisions of Article of the criminal law.

Upon application of extended confiscation, value of property transferred by a convicted person or third person to family member, legal persons, controlled by the convicted person, or other persons that knew or ought to have known of illegitimate origin of the property, is to be taken into consideration. Upon establishing a difference between legitimate income and value of acquired property, value of the property on the date of its acquisition and all expenses borne by the convicted, including by informed third persons, are to be taken into consideration.

If property subject to extended confiscation is not found and intermingled with legitimate property, money and property covering its value is subject to confiscation. At that, it is to be noted that property and money acquired as a result of use of such property, including the property, into which property obtained through crime has been transformed or converted, as well as the proceeds and benefits from such property are subject to confiscation. In accordance with Article 106-1 of the Criminal Code, confiscation cannot go out of the limits of the value of the property obtained within stipulated by law period making excess over legal income amount of the convicted person.

According to Article 2 of the Law of **Montenegro** on Seizure and Confiscation of Pecuniary gains Deriving from Criminal Activity, pecuniary gain may be confiscated from the offender provided for reasonable suspicion that it has been acquired through crime activity, and the offender cannot provide credible justification of the legitimate source of its origin (extended confiscation), and the offender had been convicted of one of the crimes specified therein (including crimes against property and official misconduct). Specified benefit is also subject to seizure and confiscation from the predecessors, transferees and family members of the offender, as well as from third persons.

If pecuniary gain is obtained through crime for other person, it is also subject to confiscation. If extended confiscation of pecuniary gain itself is not possible, value of the confiscated assets is to be equal to the value of pecuniary gain deriving from crime (confiscation of property of an equivalent value). After the sentences takes effect, under which the accused has been convicted for committing the crime stipulated in paragraph 1 of Article 2 of the Law, the prosecutor, not later than within a year from that date, is to apply to the court for confiscation of pecuniary gain that has been obtained through crime and from the owner that cannot provide proof of original document or in other way that the source of property is legitimate. Board of judges is to consider such application in accordance with the rules of criminal procedure and decide on the merits of such application. Application by the prosecutor shall in particular describe evidence of material gain from criminal activity or demonstrate explicit inconsistency between value of the property (amount free of paid debts and other payments) and legitimate income of property owner (Article 36 of the Law). Decision for confiscation or rejection of the application of the prosecutor may be appealed.

The Law of **Serbia** on Seizure and Confiscation of the Proceeds from Crime establishes similar procedure of extended confiscation under similar conditions of application. Thus, it is applied to all corruption offences specified in the Law (primarily aggravating circumstances thereof), and money laundering, if value of instrumentalities and proceeds of such crimes exceeds 1.5 million dinars (Article 2). It is also preceded by financial investigation held by the prosecutor, and mandatory condition for application is conviction of the accused. Peculiarity of the system of Serbia is that confiscation can be imposed both on a convicted person and assisting witness.

In **Bosnia and Hercegovina**, amendments of the Criminal Code of Bosnia and Herzegovina (published in the Official Gazzete of B-H No.8/10) added Article 110a ("Extended Confiscation of Proceeds of Crime") that provided that "where criminal proceedings involve the criminal offences set forth under Chapters XVII, XIX, XXI, XXI A and XXII of the Code, the court may issue a decision under Article 110 paragraph 2 and confiscate the property gain, income, profit or other benefits resulting from the proceeds of crime for which the prosecutor provided sufficient evidence to reasonably believe that such property gain was acquired by the perpetration of these criminal offences, while the perpetrator failed to prove that the gain was acquired in a lawful manner". In addition, the Law on confiscation of property illegally acquired by the perpetration of the criminal offence in the Federation of B-H (Official Gazzete of the Federation of Bosnia and Herzegovina, number 71/14 dated 3.09.2014), entered into force in March 2015, while at the national level the proposal of such Law is prepared, but not yet adopted.

In **Lithuania**, the extended confiscation was introduced in 2010 by amending the Criminal Code with Article 72-3. The law defines the extended confiscation as taking into the ownership of state of the assets or partial assets that are disproportionate to legal income of the offender provided for evidence that it derived from criminal activities.

Extended confiscation is imposed in Lithuania during the criminal proceeding provided that the following conditions are met:

- 1) The offender has been convicted of a less serious, serious or grave intentional crime (punishment by imprisonment of 3 years) from which he or she obtained, or could have obtained, pecuniary gain;
- 2) The offender holds the property acquired during the commission, after the commission of an act or within the period of five years prior to commission of the acts prohibited by the Criminal Code, value of which does not correspond to the legitimate income of the offender, and the difference is greater than 250 minimum living standards, or transfers such property to other persons within the period specified herein;
- 3) The offender fails, in the course of criminal proceedings, to provide proof of the legitimacy of acquisition of the property.

Moreover, it is to be noted that under the conditions described in paragraph 3 of Article 72-3 of the Criminal Code, property of informed third persons, both natural and legal, may also be subject to confiscation, namely if:

- 1) The property has been transferred under a fake transaction;
- 2) The property has been transferred to offender's family member or close relatives;
- 3) The property has been transferred to a legal person, and the offender, his family members or close relatives is/are the legal person's director, member of its governing body or participant holding at least 50% of interest (shares, etc.);
- 4) The person transferring the property or persons holding senior positions in the legal person and being entitled to represent it, to make decisions on behalf of the legal person or to control the activities of the legal person, were aware, or ought to have been aware and could have been aware that this property has been obtained through crime or with illicit funds of the offender.

Where the property or its part, which is subject to confiscation, has been concealed, consumed, belongs to third persons or for other reasons cannot be taken, or confiscation of this property would not be appropriate, the court shall recover from the offender or [informed] third persons the amount of money equivalent to the value of such property (paragraph 5 of Article 72-3 of the Criminal Code). When rendering a decision on imposing extended confiscation, the court is to specify the property subject to confiscation or the monetary equivalent of such property or its part (paragraph 6 of Article 72-3 of the Criminal Code).

The court rules on extended confiscation by a conviction, judgment to close criminal proceeding and an endorsement of release, or by an order on exemption of the convicted person from serving the sentence. A decision on confiscation may also be a part of ruling of the district court approving the decision of the Parole Board on application of such exemption from serving the sentence by the convicted person. Upon issuing a decision on confiscation in any form, the court shall send it to a bailiff for execution (paragraph 4 of Article 342 of the Criminal Procedure Code of Lithuania).

In accordance with Article 94 of the Criminal Procedure Code of Lithuania, the decision on confiscation is to be made by a prosecutor or pre-trial judge, who closes criminal investigation before the trial. Paragraph 3 of Article 94 specified that if the matter of imposing confiscation is to be considered upon closing of the criminal case before the trial, criminal investigation is closed by pre-trial judge, who approves the decision of the prosecutor on closing the investigation. When imposing of confiscation or extended confiscation is being decided, the court hearing is held attended by a prosecutor and a person whose property is confiscated.

Other people may also attend the hearing. In the end of the proceedings, the court rules on the confiscation of property or rejection of confiscation. The decision may be appealed.

In accordance with Article 83-2 of the Criminal Code of **Estonia**, when the court convicts a person for crime, it may, as stipulated by the Code, confiscate part or all assets of the convicted person, if they are owned by him or her on the date of ruling and if nature of crime, difference between legitimate income and financial situation, expenses and lifestyle of the person, or other fact, constitutes a ground to assume that the person acquired such assets through crime or by use of property acquired through crime (hereinafter to be referred to as criminal assets). Confiscation is not imposed on the assets person confirms that they have not been acquired through crime on.

Until 10 January 2017, extended confiscation in Estonia could have been applied only in case of conviction of a person for a crime for a term of not less than 1 year of imprisonment, however, such limitation is overruled as of today. Nevertheless, for application of such type of confiscation it is required for such possibility to be clearly stipulated in a sanction of the Criminal Code article itself (applied, in particular, to such offences as accepting, giving bribe, active and passive bribery in the private sector, misuse of funds or fraud by an official, as well as for money laundering).

If criminal assets are intermingled with other assets, such assets are considered the ones partially acquired through crime and are subject to confiscation in relative proportions. The court may confiscate the assets owned by a third person on the date of the decision if: 1) they have been acquired, fully or in their predominant part, through crime, as a gift or any other way at the value, which is considerably lower the market value; or 2) third person knew that they had been transferred in order to avoid confiscation.

Extended confiscation cannot be imposed on assets of third persons, which have been acquired: 1) earlier than 10 years from the date of a crime of the first degree; or 2) earlier than 5 years from the date of crime of the second degree. It is also to be noted that in case of conviction of a legal person for crime, the court may confiscate part or all assets of such legal person held on the date of decision, if nature of crime constitutes grounds to presume that main activity of the legal person is aimed at committing crimes and its assets have been acquired through crime<sup>30</sup>.

Extended confiscation was introduced in the **Latvian** legislation on 1 August 2017. According to Article 70-11 of the Criminal Code, the property that is obtained by criminal means is subject to confiscation. When committing a crime with the nature of obtaining financial or other benefit, property, the value of which does not correspond to the legitimate income of the person and the person cannot prove that it was acquired legally, can be considered as property obtained by criminal means. This also applies to the property of third persons in permanent family, economic or other relationship with the offender.

In **Romania**, Article 112-1 of the Criminal Code regulates matters of imposing extended criminal confiscation. Such confiscation is possible in case of conviction of a person for such corruption offences and money laundering that could bring pecuniary gain and for which the law stipulates punishment of imprisonment for 4 years or more.

Extended confiscation is ordered if the following conditions are cumulatively met: a) the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offence, until the issuance of the document initiating the proceedings, clearly exceeds the revenues obtained lawfully by the convict; b) the court is convinced that the relevant assets originate from criminal activities such as those provided in par. (1).

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<sup>30</sup> See OECD/WGB (2014), Phase 3 Report on Estonia, page 23, <https://www.oecd.org/daf/anti-bribery/EstoniaPhase3ReportEN.pdf>.



Upon determining the difference between legal income and value of acquired assets, their value on the date of acquisition and expenses borne by a convicted person and his or her family members are also to be considered. If the assets subject to extended confiscation have not been found, then money and other property within the limits of equivalent value thereof are subject to confiscation. Property and money acquired through use of such assets and it produced are also subject to confiscation. At the same time, according to paragraph 8 of Article 112-1 of the Criminal Code of Romania, confiscation shall not exceed the value of assets acquired during the period stipulated by law that are above lawfully obtained income of the convicted person.

In **Croatia**, extended confiscation is applied to corruption offences, which pertain to the competence of the Office for the Prevention of the Corruption and Organised Crime, provided for the offences resulted in pecuniary gain. In accordance with Article 78 of the Criminal Code of Croatia, if the person, who is accused of committing crimes enlisted in this Article, owns or previously owned a property, which does not correspond to legitimate incomes of that person, yet fails to plausibly explain the legitimacy of sources the property has been acquired from, it is presumed that such property constitutes the proceeds of crime. In accordance with paragraph 3 of Article 78 of the Criminal Code, if the pecuniary gain from crime has been intermingled with lawfully acquired property, all property is subject to confiscation within the appraised value of the pecuniary gain. The benefit received from property consisting of legally acquired property intermingled with the material gain from crime is also subject to confiscation in the same way and using the same method. In accordance with paragraphs 4 and 5 of Article 78 of the Criminal Code, such pecuniary gain is also subject to confiscation from family member, irrespective of legal ground he or she holds it under, and irrespective of whether he or she cohabits with the offender. It is subject to confiscation from any other person irrespective of legal ground he or she holds it under, unless such person provides plausible evidence that it had been acquired in good faith and at reasonable cost.

In accordance with the new legislation of **Poland** coming into force on 27 April 2017, in case of conviction for the crime, which resulted in, even if indirectly, pecuniary gain of considerable value, or pecuniary gain acquired or that could have been acquired, and leading to imprisonment for a term of not less than 5 years, if it has been committed in a context of organised criminal group or association aiming to commit the crimes, the property acquired by a convicted person or the convicted person was entitled to during a period from 5 years prior to committing crime and till the date of decision, is to be deemed as proceeds of crime, only if the offender or other person concerned does not provide evidence of an opposite (paragraph 2 of Article 45 of the Criminal Code of Poland).

Analysis of the legislation of eight ACN countries, which apply the extended criminal confiscation, allows to reduce the conditions of its application to followings:

- 1) It is applied primarily upon conviction of a person for committing corruption offences and money laundering of particular severity and/or resulting in pecuniary gain;
- 2) It is applied to the property of a convicted person and informed third persons;
- 3) It is applied in cases when value of the property is disproportionate to the legal income of a person (in some countries difference is to exceed the limit stipulated by law);
- 4) Property acquired within the time limits stipulated by law is considered;
- 5) A presumption of criminal origin of property is raised with reversal of the burden of proving the opposite upon the convicted person or third persons concerned;
- 6) All property is subject to confiscation unless it is proved that it has been acquired with use of a legal income of a person.

The main conditions for extended confiscation in ACN countries are outlined in the table below.

**TABLE 3. Conditions for application of extended confiscation in the ACN countries (in the context of corruption crimes and money laundering)**

Country	Regulation	Sphere of application	Time criteria	Criteria for excess
Lithuania	Article 72-3 of the Criminal Code	Less serious, serious or grave premeditated crime; possibility of obtaining a pecuniary gain	5 years before and after the crime is committed	250 monthly subsistence levels
Latvia	Article 70-11 of the Criminal Code	A crime the nature of which is obtaining financial or other benefits	No	Disproportionate difference
Estonia	Article 83-2 of the Criminal Code	This type of confiscation should be expressly specified in the sanction under the Article of the Criminal Code (giving and accepting bribe, active and passive bribery in the private sector, misuse of funds or fraud, if committed by an official, and money laundering)	10 years before the first degree crime* is committed 5 years – the second degree crime* * applicable to third parties only	Any difference
Romania	Article 112-1 of the Criminal Code	Corruption crimes and money laundering, which are potentially punishable by imprisonment of 4 years and more, and which could bring material benefits	5 years before and after the crime is committed, and before initiation of proceedings, if required	Flagrant excess
Moldova	Article 106-1 of the Criminal Code	The list of crimes is included in the Article itself (all corruption crimes and money laundering), the act should be motivated by greed	5 years, covering the period before and after the crime is committed, before the date of sentencing	Significant excess
Poland	Article 45 of the Criminal Code	A crime, which resulted or could have resulted in obtaining the pecuniary gains, or an organised crime, which is potentially punishable by imprisonment of 5 years and more	During the period of 5 years before the crime is committed and before sentencing	No
Serbia	The Special Law	Aggravated corruption crimes and money laundering + value of the proceeds of crime, exceeding 1.5 million Dinars	No	Flagrant excess
Croatia	Article 78 of the Criminal Code	Corruption crimes within the competence of the Office for the Suppression of Corruption and Organised Crime, if resulted in obtaining the pecuniary gains	No	Any difference
Montenegro	The Special Law  Criminal Code (General provisions)	Corruption crimes and money laundering, listed in the Article 2 of the Law, if resulted in obtaining the pecuniary gains  - crimes committed by a criminal organization  - money laundering  - criminal offences against payment operations and economic activity and criminal offences against official duty, which were committed out of greed, and which carry eight-year prison term or a more severe punishment.	The proceeds of the crime are liable to confiscation if they were obtained in the period before and/or after the commission of any of the criminal offences until the finality of judgment, and if the court establishes that the time when the proceeds were obtained and other circumstances of the case in question justify the confiscation of the proceeds	Flagrant excess
Bosnia and Herzegovina	Article 110a of the Criminal Code	Criminal Offences set forth under Chapters XVII, XVII, XIX, XXI, XXI A and XXII of the Criminal Code, for	No	Any difference

		which the prosecutor provided sufficient evidence to reasonably believe that such property gain was acquired by the perpetration of these criminal offences, while the perpetrator failed to prove that the gain was acquired in a lawful manner.		
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#### D. Civil forfeiture

Civil forfeiture may serve as an alternative to the criminal extended confiscation instrument to deprive the perpetrators of unjustified assets through simplified approach to prove the illegal nature of the relevant assets. It may be either based on the criminal conviction or occur independently from the prosecution of the specific crimes commitment. Sometimes it is also called as the extended confiscation, though it is applicable, unlike the criminal extended confiscation, specifically to civil proceedings, including all typical attributes.

The international legal basis for civil forfeiture of proceeds of corruption and money laundering are the international instruments, as mentioned above many times, in particular, the United Nations Convention against corruption adopted in 2003; in paragraph 8 of Article 31 thereof, the Member States are proposed to consider the possibility of establishment the requirement (to the extent of its compliance with the fundamental principles of their laws and the nature of judicial and other proceedings) that offender should demonstrate the lawful origin of alleged proceeds of crime or other assets, which are subject to confiscation. Similar provisions are contained in the FATF ‘Forty Recommendations’ (Recommendation No.3) and in paragraph 4 of Article 3 of the Warsaw Convention adopted in 2005. Provisions of the Directive 2014/42/EU of the European Parliament and of the EU Council, dated 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, as described above in detail in the Section 4(c), are applicable to civil (extended) forfeiture as well, considering the relevant specific features.

Civil forfeiture is commonly used mainly in the countries of Anglo-Saxon legal system, in particular in the USA, Canada, the UK, Ireland, Australia, Hong Kong, and South Africa. Besides these countries, non-criminal confiscation is provided in the legislation of Italy, Slovakia, and Greece, as well as in some of the ACN countries, in particular in Albania, Georgia, Slovenia, and Ukraine. However, the civil forfeiture in Georgia and Ukraine is based on the criminal conviction only, while in Albania and Slovenia it is relatively independent.

#### *Civil forfeiture based on the conviction*

Civil forfeiture in **Georgia** is regulated in the Chapter XLIV-1 of the Civil Procedure Code. In accordance with its provisions, the civil forfeiture is applicable, in particular to: the assets, acquired through racketeering; assets of illegal origin (acquired as a result of violation of the law), belonging to the public official, any of his family members, close relative or any other person associated with him; unjustified assets (the lawful origin of which the defendant cannot demonstrate to the court), if belong to the public official, any of his family members, close relative or any other person associated with him. In the last two cases, the assets belonging to the person convicted of money laundering are also subject to civil forfeiture.

The procedure of civil forfeiture shall be initiated on the basis of the prosecutor’s application to the court of civil jurisdiction requesting to confiscate the assets of illegal origin or unjustified assets, belonging to a person, convicted of corruption or money laundering, or any of his family members, close relative, or any other person associated with him. The prosecutor may bring such a civil suit over a period of 10 years from the date, on which the judgement of conviction of the person for the relevant crime had entered into force. In addition, the prosecutor may request the court to issue the order to freeze the assets, subject to confiscation, if there is information about possible concealment or assignment of such assets in any other form.

In accordance with Article 356-5 of the Civil Procedure Code of Georgia, in case the court confirmed that assets, belonging to the relevant persons, had illegal origin or found to be unjustified, then the specified assets, upon consideration and taking into account the lawful claims of third parties, should be transferred to their legitimate owners; if it is impossible to identify the owner – the assets should be transferred to the state ownership. If only a part of the assets has illegal origin or it is unjustified, such actions shall be applied only to that part of assets. If it is impossible to transfer the assets back to the legitimate owner or to the state in original condition, the defendant should pay the amount equal to the value of such assets. Civil forfeiture in accordance with Article 356-6 of the Civil Procedure Code of Georgia may be implemented following the trial *in absentia*.

The institution of civil forfeiture of corruption assets is successfully applied in practice in Georgia. One of the many examples of its application is the case of conviction of 5 citizens of Georgia for abusing the power and embezzlement of state property in large scale, committed by the public officials, who ensured that large-scale public contracts have been awarded to the companies, where they had the beneficial ownership. The defendants in this civil suit were: 5 convicted defendants, 9 members of their families and close relatives, and 5 persons associated with them. The prosecutor in the criminal case upon identification of the assets, subject to confiscation, transferred the case to the prosecutor for assets recovery; the prosecutor began his own investigation for all suspected assets, identified additional assets for confiscation, and obtained the order to freeze the assets. Subsequently, the prosecutor, responsible for assets recovery, applied for civil forfeiture based on the regulation of unjustified assets, referring to the fact that none of the defendants had a source of income to ensure acquisition of so many valuable assets within the period under consideration. In the meantime, the defendants failed to provide the evidence to deny the claim of the prosecutors' office. As a consequence, the court confiscated the unjustified assets, in accordance with civil law, to the total amount of Georgian Lari 14,500,000 (about USD 5.6 million), namely: money (Lari 700,000), 30 houses, 3 motor vehicles, 2 plots of land, 3 office premises, stocks, the restaurant, the plant, the filling station and the bank. Both the Court of Appeal and the Supreme Court upheld the judgement, which was successfully executed by the National Executive Bureau<sup>31</sup>.

The institution of civil forfeiture in **Ukraine** appeared in 2015, when the Civil Procedure Code was amended by the new Chapter 9 – ‘The Specific Features of Proceedings Related to Recognition of Assets as Unjustified and Their Recovery’, comprising of only three quite short Articles.

In accordance with Article 233-1 of the Civil Procedure Code, the claim to recognize the assets as unjustified and recover them from the persons, specified in this Article, shall be submitted by the Prosecutor for the benefit of the state over the general limitation period of [3 years] from the date, when the judgement of conviction against a person, authorised to perform the state functions or the local self-government functions (hereinafter referred to as the ‘Public Official’), came into legal force. Such claim may be brought against the public official, subject to the judgement of conviction, which came into force on convicting him of the corruption crime commitment or money laundering, or against the legal entity, associated with him, which owns (uses) the property, for which there are evidences that the reported public official had acquired this property, was using it or disposing (had disposed) of it.

However, it is neither provided by the Law to consider the individuals, which are informed third parties, to be the possible defendants in this case, nor any definition and clear criteria are given to recognize the legal entities as associated ones. Whereas, it is just provided in Article 233-2 of the Civil Procedure Code that the court may recognize the assets as unjustified in case it was not proven in the court, based on the provided evidences, that the assets or money, needed to acquire these assets, have been legally obtained.

In accordance with Article 233-3 of the Civil Procedure Code of Ukraine, in case of the recognition by court of the part of assets as unjustified, then only this part of the defendant's assets shall be recovered to the

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<sup>31</sup> See the Questionnaire on the 'Confiscation of instrumentalities and proceeds of corruption offenses' thematic study, filled out by the relevant authorities of Georgia; answer to question No. 73, including attachment thereto.

government revenue; in case this part is impossible to be separated, its cost would be recovered. In case the enforced collection of the assets, recognized as unjustified, is impossible, the defendant shall be obliged to pay out the cost of these assets. Considering imperfections of the institution of civil forfeiture as amended by the Chapter 9 of the Civil Procedure Code, there is no practice for application of its provisions in Ukraine, as of 2017.

### *Non-conviction based civil forfeiture*

The possibility of confiscation of assets in civil proceedings, which is not based on the conviction, is provided in the Law of **Albania** ‘On Prevention and Fight Against Organized Crime and Trafficking Through Preventive Measures Against Property’ (the so-called Anti-Mafia Law), which came in force from 2010. The Law provides for the possibility of confiscation of assets from the persons, who are reasonably suspected of committing serious crimes, listed in Article 3 of the Law, including corruption and money laundering. The senior public servants are subject to this Law, while investigation, seizure, and confiscation of assets under the Law may be applied not only to the suspected persons, but to their relatives, too.

During the court proceedings the civil procedure rules are applicable; and the competent court is the court of first instance for serious crimes (the court of criminal jurisdiction). The decision to arrest the assets is taken by the judge of this court at his own discretion, while the decision about confiscation is taken by a panel of three judges. Provisions of the Law are applicable to the assets of individuals and their close relatives (up to fourth-degree relatives), and the legal entities as well through the Law on the Criminal Responsibility of the Legal Entities.

In accordance with Article 5 of the Albanian Law, this procedure of confiscation is independent of the criminal proceedings against the persons, whose assets may be the subject to such confiscation. The procedures of confiscation under the Law may be applied only in cases of termination of the criminal proceedings or when the person found not guilty from the criminal point of view (Article 24 of the Law). The preliminary investigation may be initiated and conducted by the prosecutor and the judicial police (Article 8 of the Law) in cases, when there are reasons to believe that the assets have illegal origin (it is not clarified, whether it covers only proceeds or instrumentalities of the crimes, too).

Furthermore, according to Article 8 of the Law, the preliminary examination is limited by investigation of financial resources, the assets, economical, commercial, and professional activities, way of life and the income sources of the persons, subject to the Law; however, the procedure for such investigation has not been addressed in the Law in appropriate manner. The claim about confiscation of assets is brought to the court by the prosecutor including justification of the grounds for confiscation. Whereas, the burden of proof is reversed on the party, whose assets are intended for confiscation and who should prove the lawful source of earnings for their acquisition.

The court proceedings may be conducted irrespectively of whether a person is physically present in the territory of Albania or not (*in absentia*); nevertheless, the court may allow the relatives of defendant to give authorisation to the lawyer to represent the interest of the defendant. The overall length of the proceedings is 3 months, which may be extended up to one year, if the case is complicated (Article 23 of the Law).

In accordance with Article 24 of the Albanian Law against the mafia, the court will take a decision to confiscate the assets in cases, when the following criteria have been met: a) there are reasonable suspicions, which are based on the indication of the person’s participation in the criminal activity, as stipulated in Article 3 of the Law; b) when it was not proven that assets had the lawful origin, or the person did not prove that available assets or proceeds did not clearly correspond to the level of earnings, profits or declared legal types of activity and are justified; and c) when it was found out that assets are fully owned or partially owned by the person, directly or indirectly.

The court may also satisfy the claim about confiscation of assets in the following cases, when: a) the commenced criminal investigation against the person was terminated due to the lack of evidence, death of the person, or it is impossible to impose a liability upon this person or convict him; b) a person found non-guilty in terms of the criminal law due to the lack of evidence or commission of the crime by a person, who cannot be accused and convicted; c) the criminal proceedings have been commenced against a person for commission of the crime, which is included in the scope of this Law but was reclassified later, and a new crime fall outside the scope of this Law.

On one part, the Law against the mafia caused the significant growth of the quantity and value of confiscated assets in Albania<sup>32</sup>, though on the other part, it was criticised seriously many times for unsuitable overlap of procedural rules in the civil and criminal proceedings, bad quality of regulation of interference with human rights to own property, in particular, polemical criteria for application of assets confiscation and other aspects of violation of the concept of legal certainty as an important human rights issue<sup>33</sup>.

Civil forfeiture, which is not based on conviction, proved to be the most effective in Slovenia amongst the other ACN countries, which adopted the Law on forfeiture of assets of illegal origin (FAIOA or ZOPNI) in 2011, which remains in force till now as amended of 2014. The Law is aimed to prevent acquisition and use of the assets of illegal origin. This purpose can be achieved through confiscation of such assets from the persons, who had acquired them, or to whom the assets have been transferred for free or at prices, which did not correspond to the actual cost of the relevant assets, or through confiscation of assets of illegal origin directly from the owners of these assets.

Civil forfeiture of the assets of illegal origin in Slovenia does not depend on the conviction of the person and it is applicable to such corruption crimes, as giving and accepting bribe, gaining the benefits from illegal intermediation, giving presents for unlawful interference, and any other intended crime, which is punishable by imprisonment of 5 years or more, in case it was the origin of the property of doubtful provenance, and provided that the person is suspected of owning the assets of illegal origin to the amount exceeding EUR 50 thousand. The procedure, established by the Law, is directly against the assets, but not against a particular person, owning the assets (confiscation *in rem*).

In Article 4 of the abovementioned Law, the definition of a testator is given (a person, who died before or during the investigation of the court proceedings, however, there are reasons to suspect him of having committed the crime), and the definition of a successor, too (a person, who inherited the assets of illegal origin and was aware or supposed to be aware of such nature of the assets), an affiliated person (a closely related person, the immediate relative, or any other individual or legal entity, to whom the assets of illegal origin have been transferred free of charge or at prices, which did not correspond to the actual value, or to whom they have been transferred as fake or intermingled with their assets), as well as a close affiliate and the immediate relative. The close affiliate is the legal entity, in which the suspected, the accused, the convicted person, the testator or the successor has the equity participation, or the equity participation right in the amount of exceeding 25% of the total value of shares (contributions, interest), or the right to vote or decision making within the scope, or it holds a majority stake in the legal entity, based on the agreement, or holds a senior management position or senior position in the sphere of the legal entity's activity monitoring, or for whom the conditions for transfer [of the property] differ from those, established for non-related persons under the same or comparable circumstances. The immediate relative is the spouse, the civil partner, or the registered same-sex marriage partner, the first-degree relative, or the collateral relative up to third degree by blood or related by marriage up to second degree by blood, the step-parent, the foster parent, the person under care and other people with whom they have the common household.

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<sup>32</sup> See Naim Tota, Gledina Mecka, Confiscation as a Preventive Measure Against Trafficking as Part of the Organized Crime in Albania, *Mediterranean Journal of Social Sciences*, MCSER Publishing, Rome-Italy, Vol 5 No 27 December 2014, page 224.

<sup>33</sup> See Technical paper on Comparative analysis between the provisions on forfeiture in the Albanian criminal code and the new Albanian Anti-Mafia Law provisions on civil forfeiture, and their applicability with regard to offences of money laundering and the financing of terrorism, Project against corruption in Albania (PACA), ECD/04/2010, pages 12-14, 18-20.

In accordance with Article 5 of the Law of Slovenia, the assets shall be considered to have illegal origin unless it is demonstrated that these assets have been acquired from legitimate sources, which is to say as legally acquired. With respect to the assets, it is presumed that they have been acquired from illegitimate sources (illegally acquired), if the apparent discrepancy is found between the total value of assets and income net of taxes and tax-related expenses, which have been paid by the persons, against whom the proceedings have been commenced in accordance with the Law, during the period of the assets acquisition. During the assessment of such discrepancy it is necessary to take into account the total value of all assets, which are owned by, or are being possessed of, or belong to, or are used, held or transferred to the affiliated persons or are being intermingled with their assets or are being transferred to their successors. Moreover, in accordance with Article 6 of the Law, it is presumed that the assets of illegal origin are being transferred free of charge or at prices, which do not correspond to the actual value, in such cases, when transferred to the close affiliate or the immediate relative.

The procedure of civil forfeiture in Slovenia includes a financial investigation, a provisional arrest of the property, civil court proceedings, and confiscation itself. The financial investigation is conducted by the prosecutor, who is competent to commence the pre-trial or trial proceedings of the relevant crimes, in cooperation with the competent prosecutor of the Specialised State Prosecutor's Office of Slovenia (SDT RS). The latter shall act as a claimant in the proceedings for civil forfeiture. Such civil claims on the merits shall be heard in the Regional Court of Ljubljana city.

The prosecutor should commence the financial investigation, provided the following conditions are met: 1) during the criminal pre-trial or trial proceedings there were the reasonable grounds to suspect that a suspected person, accused person, or successor have committed one of the crimes as listed in the Law; 2) these persons have, possess, use or own the assets, for which there are grounds to suspect that they have illegal origin or that they are being held or have been transferred to the successors of such persons, or they have been transferred to the persons associated with them, or they have been mixed up with the assets of such persons; this data should be reflected in the information for the police; and 3) such assets are not treated as the proceeds of crimes or proceeds, related to crimes (Article 10 of the Law).

In the process of financial investigation, the prosecutor can direct activities of the police, the fiscal service, the financial intelligence, and other bodies through giving instructions, which are binding upon them. Upon completion of the financial investigation, the Team Leader shall prepare a written report to include detailed information and evidence in relation to the assets, for which there are grounds to suspect that they have illegal origin, about transfer of such assets to affiliated persons, about the assets of affiliated persons, and about the grounds for application of temporary provisional measures of protection of such assets. As a general rule, the duration of the financial investigation cannot exceed one year; however, it may be extended, pursuant to the objective criteria, for maximum 6 months, based on the decision of the competent prosecutor.

The civil forfeiture proceedings in the Court of Slovenia shall start with the claim to be filed by the prosecutor against the owner of the assets as defendant, and will be conducted under the civil procedure rules. The report on financial investigation and court decisions about provisional measures of protection should be attached to the claim. Article 27 of the Law implies that, during such proceedings, the plaintiff must provide the facts and evidence, raising the suspicion of illegal origin of the assets of the defendant. If the assets of illegal origin have been transferred to the affiliated person, the plaintiff must provide facts and evidence that such transfer has been carried out free of charge or for a price that does not correspond to the actual value of assets, whereas, in case of a transfer to a close affiliate or intermediate family member – facts and evidence that bring forth the presumption of unjustified transfer of assets. The defendant may dispose the presumption of illegal origin of assets if he proves the lawful origin of assets; he may also dispose the presumption of their unjustified acquisition if he proves that he paid for the actual value of those assets. The final decision on the claim satisfaction and confiscation or the claim dismissal shall be made in the civil proceedings court.

The legislation of Slovenia on civil forfeiture (the Law as amended of 2014) got the positive feedback from the OECD experts during the 3rd round of Slovenia evaluation in June 2014 as part of mutual evaluation of the OECD Working Group on combating bribery of foreign public officials<sup>34</sup>.

## E. Administrative forfeiture

A few countries of the ACN, such as Azerbaijan, Kyrgyzstan, Romania, and Estonia have declared about existence of legislation on administrative forfeiture of assets in the investigation of corruption cases and money laundering in their countries.

Whereas, the administrative forfeiture in **Azerbaijan** is possible only in the administrative offences proceedings. In accordance with Article 22 of the Code of Administrative Offences, one of the types of administrative punishment is confiscation of the object, which served as the instrument or tool for the administrative offence commission or it was the particular subject of the relevant infringement. In accordance with Article 26 of this Code, the confiscation of the object, which is individually owned by a person, found guilty in the administrative offence commission, and which is the instrument, the tool or the subject of infringement, involves the compulsory forfeiture and transfer of this object to the state ownership, without any compensation. Such confiscation is applied by the court. However, it should be noted that application of such type of confiscation to the corruption offences and money laundering, committed by individuals, raises some doubts, since these acts should be criminalised according to international standards, and it is unlikely that they will be included in the legislation on administrative offences.

In accordance with Article 505-22 of the Administrative Liability Code of **Kyrgyzstan**, in case of the legal entity participation in corruption crimes or money laundering, the punishment may be imposed on it in the form of penalty including confiscation of the objects, which have been the instrument or the particular subject of the administrative offence. The legal entity may incur the administrative liability, provided that money laundering had been committed through the legal entity by an individual, holding the top position in this legal entity, which was based on: his right of representation; authority to make decisions on its behalf; authority to exercise control or management in this legal entity. The liability is applied to the legal entity in case the legal entity was found to participate in money laundering, confirmed by the court decision which came into force under the criminal proceedings. The liability shall be imposed to the legal entity without prejudice to any criminal liability of the individual, who had committed money laundering.

Administrative forfeiture in **Estonia** is not as much significant as the criminal confiscation, and it is limited only by the sphere of application of anti-money laundering legislation, and in the event only, when the owner of the property was not identified. For example, in paragraph 7 of the Article 40 of the Law on Prevention of Money Laundering and Terrorist Financing, it is provided that, if the owner of the assets or of the property has not been identified within one year after applying the limitations for disposal of these assets, the financial intelligence unit or the Prosecutor's Office may apply to the administrative court for permission of transfer of these assets or the property in the state ownership. The administrative court during the court proceedings shall decide on granting or refusing to grant such permission. The assets and the property shall be sold by the enforcement agency, following the permission granted, according to the standard procedure; the property owner may claim the state in future to refund him the appropriate amount of the cost of assets or the property, within 3 years from the date of their transfer to the state budget.

The legislation of Romania provides for administrative forfeiture in cases investigated by the National Integrity Agency. In accordance with the Law No. 176 of 1 September 2010, the National Integrity Agency shall notify the Commission of inquiry on unjust enrichment, if the significant changes were found in the financial well-being of persons, who are legally bound to declare their property status. Such 'significant change' shall be the growth for more than EUR 10,000 or its equivalent in Romanian Leu. The Commission

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<sup>34</sup> See OECD/WGB (2014), Phase 3 report on Slovenia, page 25, <https://www.oecd.org/daf/anti-bribery/SloveniaPhase3ReportEN.pdf>.



consists of two Appellate Court judges, appointed by the Chairman of the Court, and one prosecutor from the Prosecutor's Office under the Appellate Court, appointed by the Chief Prosecutor.

In the Government of **Romania** Ordinance No. 2 adopted in 2001 with respect to conditions of (administrative) violation of law, the issues of confiscation are settled, when such violations are found. Thus, according to Article 24 of the Ordinance, the person who has the duty to apply the sanction will confiscate the assets intended for, used in or resulted from contraventions. In all the cases, the agent will describe in a record the assets under confiscation and will take the conservation measures provided by the law, mentioning them in the record. If the assets cannot be found, the offender will pay their money equivalent. The agent has the obligation to find the owner of the confiscated assets and if the owner is different than the offender, the identification data of the owner will be mentioned in the record or the reasons why he/she could not be identified. The administrative forfeiture by the National Integrity Agency shall be applied in cases, when the Agency has found the unjustified possessions or the part thereof. The source of such earnings may be or may not be unlawful, but it is very important that it is unjustified.

Non-criminal confiscation in **Bulgaria** is essentially the mixture of administrative procedures and the civil court proceedings. Therefore, it might as well be treated as the civil forfeiture. This type of confiscation is regulated by the Law on Confiscation of Illegal Assets, which came into force in October 2012. The procedure for such confiscation is independent of the criminal proceedings and does not depend on the results of such proceedings, and time limits for the court proceedings have been reduced. This type of confiscation is against the property itself, but not against the person, which makes possible to confiscate the proceeds of crime, irrespectively of the actual owner of these proceeds.

The Law of Bulgaria provides for the establishment of Commission on Illegal Assets Forfeiture (CIAF), whose jurisdiction includes the assets verification, the preventive measures initiating and application to the court for injunctions, aimed to secure the consequent claim to the regional court about the confiscation of unlawfully gained assets. The Commission is the independent specialised state body, consisting of five members and staff members of the Head office in Sofia and five regional Directorates. Nevertheless, there are still some issues, which are related to the transparency of procedures and criteria for appointment of members of the Commission<sup>35</sup>.

The Law provides for two alternative grounds to initiate the verification: commission of the crime or the administrative offence. The Article 22 of the Law contains the comprehensive list of crimes, for which such grounds are provided for, which includes, but not limited to, both the corruption crimes and money laundering, too. The additional grounds for verification are provided by the Law – the Commission should find the discrepancy in the amount of Bulgarian Lev 250,000 (about EUR 125,000) or more between the assets of the person and his incomes. This threshold is important for initiating the verification only, and the civil court is not bound by it when considering the matter of confiscation of the assets.

The verification shall start immediately after the person have been charged with any crime, which is listed in the Law of Bulgaria, however, there are exceptions, when the verification may be started without the prosecution, in the event, when the defender had been identified, but the criminal proceedings against him cannot be initiated, or the criminal prosecution was terminated or suspended (amnesty, limitation, death, or transfer of the criminal prosecution; the whereabouts of the person cannot be traced). The second reason to start the verification and the procedure of confiscation is the administrative offence that resulted in receiving the profits, exceeding Bulgarian Lev 150,000 (about EUR 75,000). The time limit for verification, established by Law, is 10 years before its commencement. Under these grounds, the Commission on Illegal Assets Forfeiture shall initiate the court proceedings and take participation as a Party in the civil proceedings.

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<sup>35</sup> See Forfeiture of Illegal Assets: Challenges and Perspectives of the Bulgarian Approach. National Report for Bulgaria. Executive summary, Transparency International Bulgaria, 2014, page 6.

In accordance with the Law of Bulgaria, the following illegal assets are subject to confiscation: the assets acquired as a result of unlawful activities and if the lawful origin of these assets cannot be reasonably justified, including proceeds, received from the use of those unlawful assets. The Law shall also allow confiscating the transformed assets or assets, which have been transferred to third parties, who knew about the illegal origin of those assets. The shortcoming of the Law is that only individuals can be subject to verification, whereas the legal entities are not included in the list of objects for verification.

## IX. EVIDENTIARY THRESHOLDS AND BURDEN OF PROOF, DEFENCES

International instruments do not give much attention to the issue of providing evidence in the process of confiscation of the instrumentalities used to commit and the proceeds derived from corruption and money laundering, focusing, mainly, on the possibility to reverse the burden of proof within confiscation procedure under specific conditions.

Paragraph 8 of Article 31 of the UN Convention against corruption envisages that States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings. The Technical Guide to the Convention further explains that, in addition to the *sui generis* procedures that accept non-criminal standards of evidence after the conviction is reached, a number of jurisdictions have also adopted civil procedures of confiscation that operate *in rem* and are governed by a standard of the preponderance of evidence.

In accordance with paragraph 3 of Article 3 of the Warsaw Convention, each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law. The Explanatory Report to the Convention specified that this paragraph provides the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. This provision must be equally applied to the proceeds intermingled with the property acquired from legitimate sources, or otherwise transformed or converted.

The Recommendation No.3 of the ‘Forty Recommendations’, adopted by the Financial Action Task Force (FAFT) on 20 June 2003, contains the similar provision for the possibility for the burden of proof to be reversed upon the offender regarding the lawful origin.

The Directive 2014/42/EU of the European Parliament and of the EU Council, dated 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union envisages, in paragraph 21 of the Preamble, that extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.

In countries of the ACN, the standards and burden of proof depend, to a large extent, on the type of confiscation applied in a particular case. If the confiscation appears as a sanction, it is applied, usually, in addition to conviction of a person who committed the crime that entails such confiscation, whereas the prosecution is to prove the guilt of the person in committing such crime ‘beyond the reasonable doubt’. The special confiscation, i.e. the confiscation, in criminal procedure, of the instrumentalities used to commit and the proceeds derived from a crime, envisages, usually, the prosecution also bears the burden of proving that there has been a relation with the precise criminal act. Whenever the extended criminal confiscation or the civil forfeiture is at stake, the burden of proof, predominantly in the majority of cases, is split between the

parties, and the simplified standards of evidence are to be applied: preponderance of evidence, balance of probabilities, high probability or alternative thereof.

In such countries of the ACN as Azerbaijan, Armenia, Kazakhstan, Kyrgyzstan, and Latvia, where the legal frameworks apply neither extended criminal confiscation, nor civil forfeiture, it is the obligation of the prosecution to solely bear the burden of proof in the confiscation procedure. In order to apply the confiscation as a sanction, the guilt of a person in committing a crime must be proven 'beyond the reasonable doubt'.

In applying the special confiscation in the aforementioned countries, the relation between the instrumentalities and proceeds and the particular crime is subject to proof by the prosecutor. For example, in **Azerbaijan**, this is done based on the 'beyond the reasonable doubt' standard, too. Even in **Latvia**, where the special confiscation is possible, and in Kazakhstan, where it will be possible (from 1 January 2018) without or before conviction, this does not change anything, essentially. For example, paragraph 2 of Article 668 of the Criminal Procedure Code of Kazakhstan specifies that, in the pre-trial proceedings for the confiscation of property, subject to proof are both the property belonging to suspected or accused and the relationship of the property with the offence, which is a basis for the confiscation. At the same time, paragraph 6 of Article 668 of the Criminal Procedure Code of Kazakhstan binds the prosecutor to include a list of evidence, which confirm these facts, into the request for confiscation. According to paragraph 2 of Article 670 of the Criminal Procedure Code, these issues are to be resolved by the court.

In the criminal proceedings of **Georgia**, the prosecutor has to prove, beyond the reasonable doubt, the precise property to be confiscated. Thereby, the burden of proof lies with the prosecutor entirely, whereas the defence has no obligation to prove the legality and origin of the presumed proceeds of crime, including corruption and money laundering. However, unlike in the criminal proceedings, the burden of proof in civil (or, as it is named in Georgia, extended) confiscation procedure lies with the opposite party – the defendant. In such procedure, it is the defendant who is under an obligation to prove the legitimate source of the property in question. The extended confiscation procedure of Georgia enables to use the standard of prove, which is based on the 'balance of probabilities'. In accordance with this standard, the court weighs the evidence and renders a decision in favour of the party whose version is most likely to be true<sup>36</sup>.

The Legislation of **Ukraine** on the civil forfeiture is not framed well enough to divide the obligation to prove between the parties to the proceedings. Article 233-2 of the Civil Procedure Code establishes only an obligation for the court to recognise the assets as unjustified in cases, if, based on the provided evidence, the court establishes that the assets (or money to purchase them), which are claimed to be recognised as unjustified, have been acquired legitimately. At the same time, in the criminal confiscation procedure of Ukraine, the burden of proof is born by the prosecution, entirely.

In criminal procedure in **Romania**, the burden of proof, including the one with respect to property, lies with the prosecutor. It is interesting to note that the Constitution of Romania (Article 44(8)) contains a provision for legality of acquirement shall be presumed. The Constitutional Court of Romania, through Decision no. 799/20112, confirmed this presumption, but reserved that it does not prevent the interested party from proving the unlawfulness of the wealth to apply confiscation. Thus, in the Decision, the Court emphasized that 'the regulation of this presumption does not prevent the investigation of unlawful acquirement of wealth, but in this case the burden of proof lies with the person making such allegation. Insofar the interested party proves that some assets, part of the wealth or the entire wealth of a person was acquired unlawfully, those unlawful assets or wealth can be confiscated subject to the law'<sup>37</sup>.

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<sup>36</sup> See the Questionnaire on the 'Confiscation of instrumentalities and proceeds of corruption offenses' thematic study, filled out by the relevant authorities of Georgia; answer to question No. 59.

<sup>37</sup> See Marieta Safta, Ph. D., Presumption of lawful acquirement of property and confiscation of unlawfully acquired property in the case-law of the Romanian Constitutional Court. The reference constitutional framework for regulating of the extended confiscation. Juridical Tribune, Volume 2, Issue 1, June 2012, page 139.

According to Article 112-1 of the Criminal Code of Romania, extended confiscation for the crimes specified by the law is ordered if the following conditions are met: a) the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offense, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the convict; b) the court is convinced that the relevant assets originate from criminal activities such as those provided in this Article. Considering the constitutional presumption of legality of acquirement property and the position of the Constitutional Court to that effect, it seems that the burden of proof, in the extended confiscation procedure in Romania, also lies with the prosecution; however, the submitted questionnaire indicates that the burden of proof with split between the prosecution and defence<sup>38</sup>. There is also a view, in the doctrinal interpretation, that with the extended confiscation, the burden of proof on the side of the prosecution is ‘eased’.

In accordance with Article 106-1 of the Criminal Code of **Moldova**, the extended confiscation is applied in case the value of property, which has been acquired by the convicted person within the period between 5 years prior to commission of crime and the date of conviction, considerably exceeds the amount of legitimate incomes, as well as in case the judicial instance, based on the provided evidence, finds that this property has originated from a criminal activity specified by the criminal law provisions set forth in this Article.

In accordance with the criminal law of **Lithuania**, the prosecutor bears the burden of proof in the confiscation procedure. In February 2010, in its No. ABV-32-1 compilation of judicial practice on applying the confiscation under Article 72 of the Criminal Code of Lithuania, the Supreme Court of Lithuania noted that the courts shall motivate the source of origin of a property to be confiscated. The fact that an offender derived a benefit from committing a crime, as well as the amount such benefit, are circumstances to be prove. Since the Criminal Procedure Law of Lithuania does not contain the special standards of proving for the purposes of criminal confiscation, the circumstances thereof are to be established based on the common rules of proving (testimony of witnesses and accused, expert examination, and so on). The evidence to support the benefit of crime must be procured lawfully and considered in a court judgment (judgement of the Supreme Court on the case No. 2K-459/2004). In the process of special confiscation, the following is subject to prove: 1) existence of the property that served as the instrumentality of a crime or the result therefrom; 2) relation between the property and the crime (if such property is the instrumentality of crime, it should be proven that the commission of crime would have been impossible or much harder without such instrumentality); 3) possibility of confiscation of the property when it is transferred to other persons. The burden of proof may be shifted in part in the process of extended criminal confiscation. Thus, as per Article 72-3 of the Criminal Code of Lithuania, one of the conditions for applying the extended confiscation is the failure of an offender, in the process of criminal procedure, to substantiate the legitimacy of acquired property.

In **Estonia**, the burden of proof in the process of special confiscation lies with the prosecution, with the criminal procedure standards of proving being applied. Thus, the prosecutor must provide evidence that a particular property has been used or intended to be used as an instrumentality of crime, or has been the object of encroachment, or has been acquired through a crime. No evidence has a predetermined force. In the cases on extended criminal confiscation, within Article 83-2 of the Criminal Code of Estonia, the burden of proof may be transferred. In accordance with this provision, upon conviction of a person for a crime, the court, to the extent set forth by this Code, is in the position to confiscate a part or all of the assets of convicted person, if such assets belonged to convicted person at the time of conviction and if the nature of crime, difference between legitimate incomes and financial situation, expenses and lifestyle of the person, or any other fact may suggest the person acquired such assets through committing a crime or on account of criminally obtained property. The confiscation is not applied to the assets, which the person proved not to have been derived criminally. Within the administrative confiscation, the burden of proof largely lies with the authorities in Estonia.

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<sup>38</sup> See the Questionnaire on the 'Confiscation of instrumentalities and proceeds of corruption offenses' thematic study, filled out by the relevant authorities of Romania; answer to question No. 53.

In the criminal procedure in **Montenegro** and **Croatia**, the burden of proof is born by the prosecutor who has an obligation to prove an accused person guilty. The prosecutor must also prove the pecuniary gain has been acquired following this particular crime, the amount of pecuniary gain, and the fact a particular instrumentality has been used in commission of crime. Whereas, in applying the extended criminal confiscation in these countries, the burden of proof is shifted to a person who is subjected to this procedure. For example, in Montenegro, the pecuniary gain may be confiscated from perpetrator, when there are reasons to suspect that such pecuniary gain has been acquired following a criminal activity, whereas the perpetrator fails to plausibly explain its legitimate source of origin.

In accordance with Article 78 of the Criminal Code of Croatia, if the person, who is accused of committing crimes enlisted in this Article, owns or previously owned a property, which does not correspond to legitimate incomes of that person, yet fails to plausibly explain the legitimacy of sources the property has been acquired from, it is presumed that such property constitutes the proceeds of crime.

In the civil forfeiture, which is not based on conviction, applied in **Slovenia**, the burden of proof lies with the prosecutor, who has an obligation to provide facts and evidence raising suspicion of illegitimacy of origin of the assets belonging to defendant, or, in other words, has to provide facts and evidence of a clear nonconformity between the value of assets and the income, net of taxes and expenses born by the defendant, at the time when such assets have been acquired. In assessing the nonconformity, a due consideration should be given to the value of all assets, which belong to affiliated persons based on the ownership title and which are owned, possessed, used, kept by or transferred to the affiliated persons, or intermingled with their assets and transferred to the successors.

If the assets of illegitimate origin have been transferred to an affiliated person, the plaintiff must provide facts and evidence that such transfer has been carried out free of charge or for a price that does not correspond to the actual value of assets, whereas, in case of a transfer to a close affiliate or intermediate family member – facts and evidence that bring forth the presumption of unjustified transfer of assets. Once the prosecutor provides the mentioned facts and evidence, the burden of proof shifts on to the defendant. That said, the defendant has to dispose a number of presumptions in a court of civil proceedings. For example, with respect to assets, the law presumes that assets have been acquired through an illegitimate source (by criminal means), if there is a clear nonconformity found between the value of assets and the income, net of taxes and expenses born by the defendant, at the time when such assets have been acquired.

Moreover, it is presumed that the assets of illegitimate origin are transferred free of charge or for a price that does not correspond to the actual value of assets, when they are transferred to a close affiliate or immediate family member. Thus, the defender may dispose the presumption of illegitimate origin of assets, subject to proving the legitimacy thereof; whereas the presumption of unjustified acquirement is denied by proving the actual payment for the value of such assets.

As per the civil forfeiture procedure, which is based on the provisions of the aforementioned Anti-Mafia Law of **Albania** effective since 2010, the burden of proof lies with the party of defence, and this party in particular has an obligation to prove the legitimacy of sources of the property originates from (Article 21 of the Law). That said, it is unclear whether the prosecutor must exhaustingly prove that the legitimate source of origin has not been found, or put forward the assumption thereof before court<sup>39</sup>. In the latter case, the burden of proof will be reversed upon the defendant, which can be viewed as violation of the fairness of the process.

It should be specifically noted that among all of the ACN countries, which submitted the questionnaire, only the legislation of Georgia envisages the application of the ‘balance of probabilities’ standard of evidence in

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<sup>39</sup> See Technical paper on Comparative analysis between the provisions on forfeiture in the Albanian criminal code and the new Albanian Anti-Mafia Law provisions on civil forfeiture, and their applicability with regard to offences of money laundering and the financing of terrorism, Project against corruption in Albania (PACA), ECD/04/2010, page 18.

the civil forfeiture procedure. Elements similar to this standard can be found in the extended criminal confiscation procedures of Estonia, Croatia, and Montenegro.

With respect to legal remedies in the process of confiscation of corruption assets, the majority of ACN countries referred to common rules of the criminal procedure that specify the rights of trial participants (Azerbaijan, Armenia, Kyrgyzstan, Latvia, Moldova), the right of accused person for a defence (Lithuania, Montenegro), the right to adduce their arguments and evidence, and the adversary character of the judicial process in general (Lithuania, Serbia, Slovenia, Estonia), the right to appeal the court's decision with regard to unjustified confiscation (Lithuania, Ukraine).

These legal remedies must consist of safeguards, such as the right for legal counsel, the right to be informed about the measures on freezing and confiscation of property, as well as the right to appeal such measures in court, the right for procedural remedy identical to that of adversary party, the right for personal attendance at the time of confiscation and the right to represent oneself in such procedure by adducing arguments and evidence, the right for a justified decision on confiscation by the court (all property arguments of the party must be responded to, the right to appeal the decision on confiscation in appeal proceedings, the right to recover damage in case of violation of the rights of a person in the confiscation procedure.

The Directive 2014/42/EU puts a special emphasis on the legal remedies and safeguards for participants of confiscation procedure, as Article 8 (Safeguards) of the Directive addresses these issues in full. For example, the Article speaks about the legal remedy and fair trial for such participants, including a proper communication on the measures on freezing of the assets and the grounds to postpone such communication (more details about the context of third parties in Section 3. Objects of confiscation measures and subsection f. Third party rights).

The freezing order shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation. Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law. Frozen property which is not subsequently confiscated shall be returned immediately. The conditions or procedural rules under which such property is returned shall be determined by national law.

Member States shall take the necessary measures to ensure that reasons are given for any confiscation order and that the order is communicated to the person affected. Member States shall provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court. Persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights. The persons concerned shall be informed of that right. In proceedings referred to extended confiscation, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

According to paragraph 9 of Article 8 of the Directive, third parties shall be entitled to claim title of ownership or other property rights, including in the cases of confiscation from a third party referred to in Article 6.

As noted previously, there should be at least two conditions to confiscate the property acquired through or as the result of a corruption crime, or money laundering, and transferred to third parties formally or de facto:

Objective criterion – the property has been transferred to third persons free of charge or suspiciously cheap – for an amount that does not correspond to the actual /market/ value, or, if the property has been formally transferred at the market price, but to affiliated persons and without the actual payment; and

Subjective criterion – third person knew or ought to have known that the property had been acquired through or as the result of a crime, or knew that the purpose of the transfer was to avoid confiscation.

Exactly such conditions (with due account for regulatory considerations in each individual country) must be proven by the prosecutor in the criminal confiscation procedure and by the plaintiff in the civil forfeiture procedure, while third persons may avoid confiscation, if they dispose such conditions are present in the confiscation procedure.

Section 3. Objects of confiscation measures and subsection f. Third party rights have more detailed information about confiscation of property from third persons and their legal remedy therewith.



## X. THE PRACTICE OF CONFISCATION MEASURES ENFORCEMENT IN THE REGION

The analysis of the results of questionnaire in the ACN countries shows the different level of efficiency of confiscation measures application in the region. A number of countries of the Network demonstrate the significant progress in the situation of confiscation of corruption assets and gains through laundering the proceeds of corruption, whereas the situation involving the application of such measures is far from ideal.

The countries should pay a special attention to the issues of regular collection, from their law enforcement agencies and courts, of statistics on measures for confiscation of corruption assets and proceeds of money laundering and maintaining the collected data as updated (including breakdown by years, types of crimes, types of confiscation, objects for confiscation measures and indicating the estimated value of the confiscated property for each category). A minimum number of the ACN countries have provided the qualitative data about the confiscation measures, which have been applied by their national confiscation bodies in corruption cases and in cases of laundering the proceeds of corruption.

In the meantime, there is a separate provision in the Directive of the European Parliament 2014/42/EU, which is the Article 11, dealing with the statistical data; in accordance with this Article, the Member States shall regularly collect, from their relevant authorities, and maintain the comprehensive statistics on the confiscation measures, including the number of freezing orders and confiscation orders executed, information about estimated value of the property frozen and property recovered as a consequence of measures on confiscation, and confiscation orders execution in another Member State. It should be noted that the Directive specifies only minimum obligations under this section, while the EU member countries may have more comprehensive statistics to allow drawing conclusions on the actual efficiency of the application of any given confiscation measures and procedures.

The most detailed statistics amongst the ACN countries was provided by Georgia, Romania, and Estonia.

Thus, in **Estonia** the number of the court decisions on corruption cases, which have entered into force, was the following: in 2013 – 14 cases, in 2014 – 3 cases, in 2015 – 9 cases; for money laundering: in 2013 – 6 cases, in 2014 – 8 cases, in 2015 – 8 cases. The total value of confiscated assets for all types of criminal confiscation, including extended confiscation and assets of third parties: in 2013 – EUR 3 087 822; in 2014 – EUR 2 454 144; in 2015 – EUR 22 321 970 (including cash, the value of assets, the request to replace the confiscation with the payment of equivalent amount in cash, and the object of crime in accordance with Article 83 of the Criminal Code; in 2015, out of the total abovementioned amount, the amount of EUR 19.3 million was confiscated with regard to one criminal case). The results of application of the special confiscation of instrumentalities of crime, and proceeds of corruption crimes or the equivalent of their cost are as follows: in 2013 – EUR 71 093; in 2014 – EUR 57 043; in 2015 – EUR 85 893. In 2013 confiscation was applied with regard to 174 cases; 142 cases of them resulted in the agreements, based on which the amount of EUR 2 038 933 was confiscated, in 2014 – the number of cases was 172/147, respectively, and the amount was EUR 2 300 515; in 2015 – the number of cases was 221/184, respectively, and the amount was EUR 1 873 244. The total amount of criminal assets, confiscated from third parties, was: in 2013 – EUR 221 963; in 2014 – EUR 930 146; in 2015 – EUR 946 161. With regard to the objects of confiscation measures, the following data was provided about the amount of confiscation of the subjects of infringement (the Article 83 of the Criminal Code of Estonia): in 2013 – EUR 7 928; in 2014 – EUR 87 045 (plus GBP 98 500.69, which was about EUR 140 537), in 2015 – EUR 166 896. The actual value of the confiscated proceeds of crime was: in 2013 – EUR 780 254; in 2014 – EUR 1 415 104; and in 2015 – EUR 1 792 961 (cash and cash deposits in the bank).

The competent bodies of **Georgia**, in 2014, froze the assets on corruption cases to the amount of EUR 6 170 000; and confiscated the assets to the amount of EUR 345 800; on the money laundering cases the assets were to the amount of EUR 13 813 306 and was confiscated to the amount of EUR 644 334. In 2015 these

amounts were, respectively, EUR 6 890 200 and EUR 5 390 000 on corruption cases, as well as EUR 53 663 519 and EUR 1 475 900 – on money laundering cases. Therefore, in 2014-2015 the total amount of confiscation was about EUR 7,900,000 on corruption and money laundering cases. Part of those assets was not in form of monetary assets and was evaluated in fair value. Totally, for the period of 2005-2016, the assets of about Georgian Lari 56 million were confiscated by using the mechanisms of extended (civil) confiscation.

In **Romania**, as of today, there is no separate statistical data available on confiscation with regard to criminal cases on corruption and money laundering, there is only a general statistic on confiscation of the property with regard to all criminal cases, and according to the statistics, in 2013 the assets were confiscated to the amount of Leu 7 620 436; in 2014 – to the amount of Leu 26 364 472; and in 2015 (as of September) – Leu 171 292 042<sup>40</sup>. The National Anticorruption Directorate (DNA) collects the separate statistics, but it should be noted that this data is related only to the corruption cases, which are under investigation of this body. According to the statistics of the Directorate, in 81 cases out of 163 criminal cases with conviction for corruption the confiscation was applied to the total amount of EUR 4.7 million in 2013, in 109 cases out of 210 cases the confiscation was applied to the total amount of EUR 31.6 million in 2014, in 99 cases out of 241 cases the confiscation was applied to the total amount of EUR 29.7 million in 2015, and in 106 cases out of 204 cases the confiscation was applied to the amount of EUR 36.7 million in 2016. The courts of Romania have been applying the extended confiscation in practice since 2013, and as of today, two apartments (1 case in 2013) and monetary assets in the amount of EUR 40 000 (1 case in 2016) have been confiscated under this procedure.

Based on the data available in the OECD, in the **Czech Republic**, the amount of forfeiture of proceeds of money laundering in 2011 reached EUR 18 253 968 (for 93 cases), in 2012 – EUR 32 287 157 (for 171 cases), in 2013 – EUR 33 982 684 (for 122 cases), and in 2014 – EUR 31 673 882 (for 186 cases); the amount of forfeiture of proceeds of bribery crimes was in 2011 – EUR 12 157 287; in 2012 – EUR 74 386 724; in 2013 – EUR 68 795 094; and in 2014 – it reached the maximum from 2011 – EUR 110 678 211<sup>41</sup>.

**Slovenia** provided the statistical data on the persons, convicted of corruption, on the annual basis (in 2013 – 39 persons, in 2014 – 84 persons, in 2015 – 37 persons, and in 2016 – 90 persons), and of money laundering (in 2013 – 20 persons, in 2014 – 30 persons, in 2015 – 32 persons, and in 2016 – 52 persons). There is no statistical data available on the objects of confiscation. As for the civil forfeiture, which is not based on conviction in Slovenia, during the period from 2013 to 2016 the assets have been confiscated to the total amount of about EUR 1 998 169.

In **Croatia**, the Office for the Suppression of Corruption and Organized Crime (USKOK) maintains its own statistics, though it deals with cases under jurisdiction of this Office only and excludes only the amount of the confiscated assets of corruption out of the total amount of confiscation. Thus, in 2013 the amount of the assets, confiscated by courts during the criminal proceedings on corruption cases under jurisdiction of the Office was Croatian Kuna 44 391 342 (around EUR 6 million), in 2014 – Croatian Kuna 58 989 065 (around EUR 8 million), in 2015 – Croatian Kuna 3 779 603 (around EUR 510,000), and in 2016 – Croatian Kuna 13 927 712 (around EUR 1 882 123). There is no separate statistic on the results of the application of extended confiscation, by types of confiscation and the confiscation measures.

Based on the statistics of **Montenegro**, the following number of cases led to the final conviction of corruption: 51 cases – in 2014, 35 cases – in 2015, and 39 cases – in 2016. There is no separate record-keeping for the confiscated material benefits from corruption, though two samples were given of cases, which led to confiscation of benefits of corruption – the case “Luka Bar” (confiscation of the assets to the amount of EUR 420 000), which was the case with extended criminal confiscation of 92 sq.m. area apartment and

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<sup>40</sup> 1 Leu equals about EUR 0.21.

<sup>41</sup> See OECD/ACN (2015), Czech Republic: follow-up to the phase 3 report & recommendations, page 13, <https://www.oecd.org/daf/anti-bribery/Czech-Republic-Phase-3-Written-Follow-Up-Report-ENG.pdf>.

the plot of land of 2200 sq.m. area, having no estimated value; and the case “Budva” with the damage, caused to the amount of 1 million euro, and the confiscated assets. On money laundering, in the period of 2013-2016 in Montenegro only 2 cases led to the conviction (in 2013), the value of confiscated assets was EUR 376 386. There is not statistics on the amount of confiscation in **Serbia**, too, which provided only the statistical data on the number of convictions for corruption crimes and money laundering by years (corruption in 2014 – 1 208 convictions, in 2015 – 1,246 convictions, in 2016 – 1 119 convictions; money laundering in 2014 – 20 convictions, in 2015 – 3 convictions, and in 2016 – 18 convictions).

The implementation of the Law against the mafia in **Albania** resulted in 2.1 times increase of the amount of confiscated assets in 2011, if compared to 2010. Throughout 2013, the verifications were conducted against 2 056 persons (and their relatives), the assets have been confiscated to the amount of about EUR 571 355<sup>42</sup>.

In **Lithuania**, there is also no statistical data available it terms of amount of confiscation depending on the type of crimes, types of confiscation, and objects of confiscation measures. The data was provided to substantiate the total amount of confiscated assets for all criminal cases on an annual basis (in million EUR), in particular, in 2011 – 0.4 mln; in 2012 – 0.62 mln; in 2013 – 1.24 mln; in 2014 – 3.18 mln; and in 2015 – 2,42 mln. The number of cases on money laundering, which led to conviction (by years) – 4 cases (in 2013), 4 cases (in 2014), 15 cases (in 2015) and 9 cases (in 2016). Whereas, with regard to cases on money laundering, the value of the assets confiscated through judicial proceedings was: in 2013 – EUR 2 317; in 2014 – EUR 0, in 2015 – EUR 2 722; and in 2016 – EUR 21 953. The statistic, provided by **Latvia**, does not allow to define the amount of confiscated assets on corruption and/or money laundering cases.

As reported by **Moldova**, in this country, in the period of 2013-2015, the assets were confiscated to the amount of Moldovan Leu 5 132 842 (about EUR 244 421), based on 314 judgments of conviction for corruption crimes by applying the confiscation measures. The statistical reporting system in Ukraine does not allow to define the amount of confiscated assets in criminal cases on corruption and money laundering, in practice the amounts were minimum in 2013 – 2015.

**Armenia** provided the statistics only for money laundering cases during the period of 2013 – 2014, which showed that during this period the assets were confiscated on three criminal cases to the total amount of about EUR 46 600 (including EUR 45 246 on one criminal case).

In **Kyrgyzstan**, there is no record-keeping on the amounts of confiscated assets from corruption and money laundering at all. **Azerbaijan** referred to the value of damages from corruption in the criminal cases, and percentage of compensation for damages thereof during the investigation process, as well as the value of the property, arrested during the investigation, though without indicating the value of assets, confiscated by courts as the result of proceedings. It should be also noted that in all these countries there is no comprehensive statistical record-keeping by types and objects of confiscation either.

Only Georgia and Romania, amongst all countries of the ACN, have provided the samples of **extended confiscation** of unjustified amount of assets, Montenegro – has provided an overview, and Slovenia – provided the statistics on confiscation of assets in such cases. The example of Georgia is described in detail in the Section 4 ‘Typology of Confiscation Measures’ (‘d’ – Civil Forfeiture.)

In **Romania**, the court applied the criminal extended confiscation to two objects of the property (apartments), which have been acquired by a person convicted of trading in influence. In particular, the court concluded that the legal earnings of the accused person would not allow him paying off the bank loans, which the person got for those two apartments. In addition, the detailed records of the phone calls demonstrated that he took other actions similar to those he was convicted of. Concerning the possibility of confiscation of the mortgage property, the court noted that the mortgage should follow the assets, irrespectively of its owner. As a

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<sup>42</sup> See Naim Tota, Gledina Mecka, Confiscation as a Preventive Measure Against Trafficking as Part of the Organized Crime in Albania, Mediterranean Journal of Social Sciences, MCSER Publishing, Rome-Italy, Vol 5 No. 27 December 2014, page 224.

consequence, the seizure of the assets (which suggests the transfer of ownership to the state) shall not affect the rights of the party in the civil proceedings, since it shall not have any impact on the bank's rights in relation to the assets (the Decision of the Supreme Court of Appeals and Justice dated 5 June 2013 – No.1922).

Examples of confiscation in practice of **derivative (indirect) proceeds** and property of corruption and money laundering were provided by Lithuania and Serbia only. Thus, confiscation of indirect proceeds of corruption had been applied by the Decision of the Kaunas District Court in the criminal case, when a person has given a bribe in the amount of Lithuanian Litas 700 to the customs officer for passage of contraband cigarettes. The accused person admitted that he gained Litas 3 900 as a result of this crime, which became the object for confiscation by the court's decision. Serbia referred to some cases of confiscation in criminal cases on corruption related to securities and the ownership stake in the legal entity, which were the derivative proceeds of corruption; however, it was informed that no court decisions were available with the reference to those cases.

Examples of confiscation of the property from the **nominal owners** were provided by **Lithuania, Georgia, and Croatia** (example of Croatia is described below as part of the effective practices).

Thus, in the Lithuanian case, a person, who received money as a result of corruption crime – abuse of official position, transferred it to the legal entity allegedly for the purchase of furniture. This money was transferred further to another legal entity for services, which have not been provided. The person's daughter was the director of this legal entity. The Kaunas District Court decided, in its judgment of 9 March 2015, to confiscate the above property from the nominal owners, since it might be the object for confiscation and it was found that this property was acquired by the nominal owners as a result of fictitious transaction, and they have acquired the property as a legal entity, in which the offender, his family member or his close relative was holding the position of director, member of the governing body or the shareholder, holding more than 50% of the interest (shares, etc.).

A criminal case in Georgia dealt with fraud and money laundering. In 2013-2014, four persons fraudulently got into possession of USD 550 000 belonging to a person living abroad. Proceeds of fraud have been gradually transferred to different account in the banks of Georgia, then structured and transferred to different bank accounts abroad. Finally, some part of these funds has been transferred back to the bank accounts in Georgia. One of the persons involved in this case has purchased a vehicle by using this money and has registered it in the name of his friend. In July 2016, the Tbilisi Municipal Court convicted all four persons of fraud and money laundering and sentenced them to 11 years of imprisonment and applied the confiscation of the property, in particular, the high-priced car formally owned by the third person. The court noted in the judgement that, despite the registration of the ownership for criminal proceeds (in this case – the vehicle) was made in the name of third person, the defendant was the actual owner of them; therefore, they were subject to confiscation.

Examples of **effective practices** on confiscation of the corruption assets and proceeds of money laundering have been provided by such countries as Azerbaijan, Lithuania, Latvia, Romania, Serbia, Slovenia, Croatia, and Montenegro.

In March of 2014, in **Azerbaijan**, the criminal case was initiated against the Chairman of the Board of the Bank 'Birlikbank' – A., who was suspected of embezzlement in 2006-2008, by abusing his official position, of Manat 3 918 000 (approximately the same amount in EURO at that time) from the National Agency for Entrepreneurship Support under the Ministry of Economy. After the money had been transferred to the bank, it was transferred to fictitious companies, controlled by A., as the loans to support the entrepreneurship activities. The similar scheme was applied by A. to get into possession of the loan funds of the Bank 'Texnikabank' to the amount of Manat 40 150 000 during the period of 2007-2010. In addition, in 2006-2010 he misappropriated Manat 899 479 that was paid by 53 different debtors of the Agency through the accounts of the Bank 'Birlikbank', but which was not transferred to the Agency. All this money was legalised

through the Business Center 'Amay', which was under the effective control of A; this money was shown as the earnings from his commercial activity. It was used for the purchase of the company 'Garadagh Construction', vehicles and other property. Finally, A. was convicted by court of fraud and money embezzlement in the amount of Manat 48 473 241 and for abuse of official position and money laundering, whereas the construction company, vehicles and other property was confiscated under the judgment, which allowed recovering Manat 43 547 000 for the actual damages.

Besides, in March of 2014, the criminal case was initiated on corruption involving the officials of the company 'Meridian' company. The investigation found that the founder and director of this company – K. through several fictitious companies under his control, which were registered in the name of persons close to him, got into possession of the loan funds of 'Bank Technique' to the total amount of Manat 25 756 547 through loan agreements, secured by the shares of the hotel, belonging to him, to the amount of Manat 1 706 072 and which were already under arrest by the court's decision. By using the obtained funds, K. purchased apartments, plots of land and other property. By the court judgment, K. was convicted of fraud, embezzlement, tax evasion, abuse of official position and forgery; he was sentenced to 13 years of imprisonment. As a result of conviction, 853 036 shares of the hotel, 11 apartments, 6 other property objects, and plots of land were confiscated in accordance with the procedure of the special criminal confiscation.

Under the criminal case No.2K-387-677/2015, examined in the courts of **Lithuania**, V.M. was convicted of bribery. Being a public official, namely, the school principal, he provided special conditions for the company UAB 'V.', which, as a consequence, was awarded a contract for renovation of the school. V.M. received a bribe for this wrongful act; in particular, he received construction services and construction materials from director of UAB 'V.' free of any charge, to the total amount of EUR 21 476.69. During the investigation, a temporary restriction was imposed on the property of V.M. (money and a motorcycle). In accordance with paragraphs 2 and 3 of Article 72 of the Criminal Code of Lithuania, the property to the amount of EUR 21 476.69 was confiscated from V.M. The Director of the company UAB 'V.' was convicted of giving a bribe. In the Court of Appeals and in the Court of Cassation, the convicted V.M. claimed that he reimbursed to the company UAB "V." for all expenses for construction services and materials for renovation of his house, therefore, this part of the property could not be confiscated. The Supreme Court of Lithuania, by decision of 29 September 2015, rejected these arguments and noted that those assets, acquired as a result of crime were the pecuniary gains obtained by the offender after committing the crime or gains from crime. Such crime may include both the acquisition of the property of any kind and the evasion of property liabilities as well, or cancellation of such liability (cost saving). A bribe – is an unjustified remuneration, obtained or intended to be obtained illegally; it may be in the form of the assets of any type, including, but not limited to, the tangible services like free repair of the vehicle or of the house, issuance of interest-free loans, reducing the amount of taxes to be paid, etc.

Under another criminal case (No.1-157-99/09 in the court of first instance), which also took place in Lithuania, V.S. was convicted of abusing power. While working as an enforcement agent, for the purpose of gaining the pecuniary gains from money as part of the enforcement proceedings under his control in the amount of EUR 954 970, he, instead of safe-keeping of this money in accordance with Law, transferred it to his personal bank account, signed the fixed-term deposit agreement, and based on this agreement, he benefited EUR 68 170 as the interest on savings. During the investigation the prosecutor put a lien on money of V.S. in the bank account. The court of first instance, in its decision of 27 January 2009, came to the conclusion that V.S. acquired EUR 68 170 as the interest on savings as the result of crime, following which he declared this income and paid the income tax of 15% (which is EUR 10 225), therefore the remaining amount (which is EUR 57 945) should be confiscated as money obtained from crime. This decision was upheld by the Court of appeals on 25 March 2009 and became final.

The most well-known and effective case on confiscation of corruption assets in Latvia is the case against the company 'Latvenergo', the officials of this company have been convicted of abusing of official position from 2006 to June of 2010 for the purpose of embezzlement of the property, receiving bribes and laundering the proceeds of crimes on a large scale and as part of organised criminal group (17 persons were held liable

on this case). Suspicions of bribery included accepting bribes by officials of 'Latvenergo' on the Projects implemented by this company for reconstruction of Pļaviņas HES and TEC-2. The collected evidence suggested that the participants of the organised criminal group received bribes to ensure that decisions on the public procurements and construction works for the company 'Latvenergo' should be made in favor of the companies registered in Spain, Turkey, and Sweden. The evidence proved that bribes were transferred to the staff of 'Latvenergo' through the consulting agreements, which were signed between the intermediary companies of the persons suspected of bribery and the foreign companies that submitted tender documentation. The staff of 'Latvenergo' and the owner of the consulting company jointly, with the purpose of hiding the illegal sources of assets, laundered the proceeds of those crimes through different transactions and real estate operations and investments in the companies owned by them.

During the pre-trial investigation, the proceeds of crime were arrested and confiscated to the following amount: on 14.07.2011 – EUR 77 500; on 22.02.2012 – USD 299 965; on 09.03.2012 – USD 427 185 and USD 15 000 (in the accounts of the foreign companies involved in money laundering), on 17.09.2012 – EUR 545 244.33 and EUR 122 263.95 (in the accounts of the foreign companies involved in money laundering, but without confiscation in foreign jurisdiction yet). After the case has been referred to the court, the following criminal assets were arrested and confiscated by the court in this case: on 21.05.2015 – EUR 595.68 and Estonian Kroon 36 359.27 (in the accounts of the foreign company, which was used for money laundering); on 26.05.2015 – EUR 157 209.13 and USD 123 093.11 (in the account of the Latvian company, which was used for money laundering); on 04.06.2015 – the apartment costing EUR 328 685 that was registered in the name of the Latvian company, which was used for money laundering; on 08.06.2015 – EUR 197 752.89 (in the accounts of the Latvian company, which was used for money laundering); on 07.09.2015 – EUR 8 247.29 (in the accounts of the foreign company, which was used for money laundering); on 14.09.2015 – the real estate property in Latvia costing EUR 571 000 that was registered in the name of the foreign company, used for money laundering. The case on corruption in 'Latvenergo' was referred to the court in June 2017 against 12 defendants; the judgment on this case has not been rendered yet.

The following case may serve as an example of effective special confiscation of corruption assets in **Romania**: the case of the convicted WS; while serving as a Personal Adviser to the Mayor of Bucharest, during the period from May 2012 to May 2015, the person demanded money in the amount of EUR 230 000 on some occasions and, finally, got the money in few instalments to the amount of EUR 179 000 from the witness-whistleblower for influencing the officials of municipality and Members of the General Council in Bucharest, who were expected, under his control, to initiate and take decisions, which were required for the construction of three hypermarkets in the district of the Municipality of Bucharest. During the criminal investigation the Prosecutors arrested all movable and immovable property of the suspected person. During the court proceedings the court upheld the order of the Prosecutor's Office for arrest of the followings assets: 1 apartment, one half interests in the property – 2 commercial premises and 1 apartment, and 2 vehicles. After assessment of the evidence, and based on the paragraph d) of the Article 112 of the Criminal Code, whereby the special confiscation should be applied to money and assets, provided to induce a person to commit a particular crime or for the purpose of making payment to the perpetrator, the court decided to confiscate money in the amount of EUR 154 000, which was received by the accused person when a crime was committed in the form of trading in influence (the decision of the Bucharest Court of Appeal No.185 of 2016).

In **Slovenia**, the case was heard on conviction of the judge for bribery. The judge, directly himself and through the intermediary, contacted the accused person in the criminal case that was referred for hearing to the district court, where he used to work. He promised to the accused person to give assistance in his criminal case, including appointing himself as the Chief Judge in the case, providing the documents, relating to the case to him, etc. For this assistance, he and the intermediary requested from the accused person the amount of EUR 50 000; EUR 8 000 of which were received by the judge. In the result of covert search activities there were ascertained the time and amount of received money, which the judge deposited in the bank account. By that time the cash funds were taken out. The court ordered to confiscate money from the accused judge to the amount of EUR 12 000.

A number of interesting cases in the context of confiscation of corruption assets have been heard in **Croatia**. One of those cases was a case on corruption in the Tax Administration. In April 2009, after the investigation was completed, the USKOK forwarded the indictment to the County Court of Zagreb against the Person 1 convicted of accepting a bribe and against the Person 2 and Person 3 convicted of aiding bribery. The defendants, who had been the officials of the Ministry of Finance, were accused of extortion and receiving the bribe, under conspiracy, from director of the company in November-December of 2008 in Zagreb. They requested EUR 50,000 for the following action: Person 1, being the Head of the Tax Administration Office in Zagreb, shall not identify the violations in the commercial operations of this company during conducting the tax control, which was within the scope of his powers. The Person 2 sent the request about this to director of the company. Later on, the Person 2 and Person 3 a few times extorted the requested amount of money from him. On 11 February 2009, the director of the company handed over EUR 35,000 to the Person 2, who shared the above amount with the Person 1 in such a way that each of them received the amount of EUR 17,500. In March of 2009, the court, based on the application of the Prosecutor's Office, applied temporary measures against the accused Person 1, his mother, one more person and the accused Person 2, resulted in prohibition of disposal and encumbrance of their real estate (apartments, land, and pastures).

The Court of Zagreb convicted the accused Person 1 of receiving a bribe, and the accused Person 2 and Person 3 of aiding bribery. In accordance with paragraph 1 of Article 80 of the Criminal Code, the Court applied confiscation of the target of crime: EUR 17,500 was confiscated from both Person 1 and Person 2. Moreover, in accordance with paragraphs 1,2 and 5 of Article 82 of the Criminal Code, and based on the application of Articles 559 and 560 of the Criminal Procedure Code, the pecuniary gain in the amount of Croatian Kuna 9 481 was confiscated from the accused Person 1. According to paragraphs 1,2,3, and 5 of Article 82 of the Criminal Code, and based on the application of Articles 559 and 560 of the Criminal Procedure Code, the pecuniary gain in the amount of Croatian Kuna 1,063,609.87 was confiscated from mother of the accused Person 1. In the abovementioned judgment, the Court explained in details its decision on confiscation of the proceeds of crime, and noted in the conclusion that the assets of the Person 1 (the public official of the Tax Administration) were recovered proportionally, moreover, the assets owned by his wife, mother and father, were compared with their incomes, personal expenses and interest rates on loans; as a result, the significant discrepancy in the amount of Croatian Kuna 1,433,765.87 was found.

Since the Person 1 provided evidence to prove more likely his previous savings in the amount of Deutsche Marks 100,000, the equivalent of this amount in Kuna was deducted from the settlement amount. Besides, after some analysis, the court found that the discrepancy was the result of the criminal model of behaviour of the accused Person 1. The court noted that, during decision-making on the extended confiscation of the proceeds of crime, the court assumed, at the initial stage of this case, that all assets owned by the Person 1 and his parents were acquired through the criminal activity. During the proceedings, the Person 1 convinced the court about probability of acquisition of the part of assets legally from his savings and savings of his wife. Taking this fact into consideration, as well as the fact that it was impossible to determine for each real estate item owned by the Person 1 and his parents, whether they were acquired legally or illegally and in what proportion (so-called 'intermingled' property), the court applied the so-called 'extended confiscation of pecuniary gain', and, therefore, confiscated the amount of money, whereas the order for arrest of the property disposal was imposed as the preliminary injunction. In explanation of its decision, the court had emphasized that the purpose and idea of the extended confiscation of pecuniary gain as a special measure in the criminal law was the accurate implementation of the basic principle, based on which no one should gain profits from crime, which was the main general rule and the specific preventive measure, taking into account that, in particular, gaining such profits was the basic motive and incentive, which stands behind any planned intended or committed corruption crime.

There was one more case in Croatia related to corruption in football. In December 2010, on completion of investigation, the USKOK filed a charge in the County Court of Zagreb against 19 citizens of Croatia and 2 citizens of Slovenia convicting them for conspiracy to commit a crime, a few facts of giving and accepting bribe, fraud, and illegal intermediation. The case was about the 'fixed' matches with fixed results, and making profits from making bets in betting companies. During the investigation, the court accepted the

Prosecutor's application, and in June 2010 it applied the temporary preliminary injunction against the accused Person 1, resulted in prohibition of disposal and encumbrance of his apartment and parking lot in the garage, and his son was prohibited from doing the same actions with his personal car, too. Later on, in June 2010, the court applied the same measures against the accused Person 2, accused Person 1, one company and two more persons by prohibiting disposal or encumbrance of a number of real estate objects (apartments).

During the investigation and before submitting the indictment, the USKOK concluded the agreements with six accused persons, who agreed to plead guilty. In February 2011, all agreements were approved by the court and sanctions were applied according to the conditions of agreements. Thus, in accordance with Article 82 of the Criminal Code, the court confiscated the criminal proceeds from the accused persons, in particular, money in the amount of EUR 43,750 – from the accused Person 1; EUR 3,055 – from the accused Person 2; EUR 4,715 and Croatian Kuna 400 – from the accused Person 3; EUR 20,500 – from the accused Person 17; EUR 6,000 – from the accused Person 19; and EUR 4 500 – from the accused Person 20. In addition to pecuniary gain, which was seized, based on these court's decisions, their real property was confiscated, too, based on the procedural agreements with the accused Persons 1, 2 and 3, namely, the apartment of the accused Person 1 and a person related to him (his wife) costing Croatian Kuna 750,300; the real property of the accused Person 2 and persons related to him (his company and his wife) in Porec city, costing Croatian Kuna 1,567,747.75 and the real property of the accused Person 3 and persons, related to him (his company and his wife) in Porec city, costing Croatian Kuna 1 567 747.75.

The court delivered its judgment in this case in December 2011 and found 15 persons guilty and convicted them of multiple different crimes. In this judgment, the court justified separately its decision on confiscation of pecuniary gain and determined that the amount of the gain was EUR 165,500, which was the equivalent of Croatian Kuna 1,200,805. In accordance with the judgement, the following amount of money was confiscated from the accused persons: EUR 20,500 (from the accused Person 4), EUR 15,500 (from the accused Person 5), EUR 28,500 (from the accused Person 6), EUR 26,500 (from the accused Person 7), EUR 10,000 (from the accused Person 8), EUR 12,500 (from the accused Person 9), EUR 10,500 (from the accused Person 10), EUR 10,500 (from the accused Person 11), EUR 25,000 (from the accused Person 12), and EUR 6,000 (from the accused Person 20). The illegally obtained pecuniary gain in the amount of EUR 165,500 became the property of the Republic of Croatia; therefore, the court declared that each accused person should make payment in the specified amount to the state budget in the national currency within 15 days from the date, when the court's decision came into effect. Thus, the total amount of confiscation on this case was Croatian Kuna 5,691,602.50.

The analysis of the practices of application of confiscation measures, which is based on the data provided by the ACN countries in their answers to the questionnaire, shows that, in all countries of the CAN, the decision on confiscation is taken by the court, and the powers to raise the question about confiscation in the court are given, as a rule, to the prosecutor even in those countries that apply civil forfeiture (Albania, Georgia, Slovenia, and Ukraine). Bulgaria is the exception, where the Commission for Confiscation of Illegal Assets of Bulgaria may initiate proceedings in the court and participate in the civil proceedings as a party.

Decision on the confiscation of the property within different types of confiscation proceedings may have different form in the different countries of the ACN. The most typical form for application of different types of confiscation is the judgement of conviction, including approval of the procedural agreement or the judgment *in absentia*. In some cases, such judgment must be considered as the court's decision or the court order on criminal case (when the special confiscation may be applied without conviction in cases, provided by Law). During application of different types of non-criminal extended confiscation, the court must take a decision, a judgment, or a court order, which is typical for the relevant type of the court proceedings.

All the countries of the ACN have declared that decision on confiscation within the proceedings of any type may be appealed by persons, whose rights and interests have been affected in the result of such decision. The procedure for the confiscation measures implementation shall be mainly under the responsibility of the



institution of the juridical enforcement agents, some of powers for sale of the confiscated assets in some countries have been already transferred to the specially established Offices for Assets Management.

However, most of the ACN countries could not provide, in their answers to the questionnaire, the references for the measures that guarantee that the bodies, which apply the confiscation measures, have sufficient human and technical resources, and the appropriate level of knowledge, skills, and expertise for effective application of the confiscation measures.

**Georgia** has made a notification in this regard about its bodies specialising in combating the corruption, money laundering, and investigation of financial crimes, as well as about the offices of prosecutors in charge of such investigations, the assets search, and recovery. These bodies have adequate human, material, and financial resources for adequate performance of their functions. To ensure the relevant level of knowledge and expertise for investigators and prosecutors of these bodies, the regular training sessions and other activities are conducted to strengthen their capacity. Besides Georgia, multiple training sessions on application of the confiscation measures have been conducted also in **Lithuania, Romania, Serbia, and Montenegro**.

Other countries of the ACN either have not provided information in this regard, or the theme of such training sessions have not fully corresponded to the realities of our life. Based on this data, it would be useful to significantly increase the activities for strengthening the capacity of the law enforcement agencies in the region in the sphere of application of measures for confiscation of corruption assets and proceeds of money laundering.

In the context of human and technical resources, an interesting amendment has been made to the Criminal Procedure Code of **Croatia**. Thus, the Article 206.i of the Criminal Procedure Code requires, in case of investigation of the crimes where the substantial pecuniary gains have been obtained, to unite the efforts of financial investigators, advisers to the Prosecutor's Offices, and the associate experts of the Special Department of the Public Prosecutor's Offices for the criminal assets search and recovery, in order to carry out the immediate joint verification and get the evidence to freeze the assets. In these cases, the Public Prosecutor shall request from the Chief of Police and the competent body of the Ministry of Finance to make the staff members available to him; the staff members shall participate in the above joint investigations under his supervision, and, during the period of investigation, shall follow the instruction of the Public Prosecutor and be accountable to him for their performance. If the secondment of these officers is required, the Public Prosecutor shall consult with the Police Office and the Ministry of Finance to that extent.

Most of the ACN countries consider the system of confiscation, existing in their countries, to be effective; the factors, which have been mentioned as reasonable to be changed, the difficulties, which the competent bodies face in practice, the legislative and practical concerns, and restrictions include: too long period of the court proceedings, and high workload of the courts (Armenia and Croatia), poor efficiency of mechanisms for international cooperation in cases on confiscation (Azerbaijan), insufficient quality and speed of assistance from abroad in the tracing of assets (Georgia), when it is impossible or difficult to confiscate the assets from the nominal owners (Armenia and Azerbaijan), difficulties in search and identification of the assets (Slovenia), no criminal liability is imposed for unjustified enrichment, existence of banking secrecy, absence of the specialised body for management of the frozen or confiscated assets (Azerbaijan), too short period (three months) for freezing (Serbia), inadequate level of training of personnel of the competent bodies (Lithuania), absence of clear legislative regulations in this sphere (Bosnia and Herzegovina).

It is very important, in the context of the confiscation measures application, to note that in accordance with Article 18 of Preamble to Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, during implementation of this Directive the Member States may provide that, in exceptional circumstances, confiscation should not be ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person, on the basis of the circumstances of the respective

individual case which should be decisive. Member States should make a very restricted use of this possibility and should only be allowed to provide that confiscation is not to be ordered in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive.

## XI. RECOMMENDATIONS

### Recommendation 1

- 1.1. The ACN countries, where the legislation does not provide for the possibility of applying the confiscation to the **instrumentalities and proceeds of crime that have been transferred** by the suspect, accused person or intermediary to informed third parties (both legal and natural), should include such instrumentalities and proceeds in the legislation as the objects of confiscation measures. They should also clearly define the conditions of application of such measures and safeguards to prevent their abuse (e.g. as it is defined in the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union).
- 1.2. For those ACN countries, where such instrument is defined by the legislation, it is advisable to use it more actively in practice and develop the appropriate court practice.

### Recommendation 2

- 2.1. To refine the concept of **derivative (indirect) proceeds** in order to include all possible indirect proceeds of corruption crimes, including the subsequent reinvestment or transformation of direct proceeds, at the least in light of recommendations of the Directive 2014/42/EU.
- 2.2. Apply these confiscation measures more actively in order to develop the sustainable judicial practice of applying confiscation of the derivative proceeds of crimes from the perpetrators and third parties, provided that the relevant safeguards to prevent abuse are complied with.
- 2.3. Take action to establish clear regulation and methodology of assessment of the derivative (indirect) proceeds of corruption.

### Recommendation 3

- 3.1. The ACN countries, where the legislation does not provide for the possibility of confiscation of **mixed proceeds** of corruption crimes and profits therefrom, should include the above in the list of the objects of confiscation measures.
- 3.2. Other countries, if required, should establish clear regulation for applying confiscation in such cases in the legislation or through development of the stable judicial case law taking account of the proportionality principle.
- 3.3. The absence of such concept in the legislation can be compensated by existence of effective regulation and mechanisms of confiscation of assets of equivalent value in cases, when it is not possible to identify the proceeds of crime as a consequence of manipulation with the assets (attachment, transformation, intermingling, etc.).

### Recommendation 4

- 4.1. Envisage effective safeguards in the legislation to protect the **bona fide third parties' rights** during the confiscation proceedings. The safeguards should: (a) cover by their scope the confiscation of both proceeds and instrumentalities of crimes, (b) be based on the criteria (objective and subjective) clearly defined by the law or stable judicial case law, and (c) include the procedural rights

(notification of measures against the property, participation in the proceedings, the right to be heard and adduce arguments, as well as to appeal the decisions on confiscation).

#### Recommendation 5

- 5.1. To take steps to fully **criminalise acts specified in the United Nations Convention against Corruption** and to align the elements of corruption offences and money laundering with the international standards in this field in order to extend to them, in full, the legal regime of confiscation of instrumentalities and proceeds of crime and profits therefrom.

#### Recommendation 6

- 6.1. The countries of the ACN, where the legislation still provides for the **confiscation of all or part of the property of the convicted person as a sanction**, should consider the possibility of transitioning from this type of confiscation to the confiscation of instrumentalities and proceeds of crime (the special confiscation).

#### Recommendation 7

- 7.1. The countries of the ACN, where there is no **criminal special confiscation without conviction**, or where the established procedure of its application is ineffective, should consider the possibility of establishing such type of confiscation in cases, when the special confiscation of instrumentalities and proceeds of corruption crimes is not possible because of the death of offender or other circumstances that obstructing the criminal prosecution seriously and for a long time (absconding or severe illness of the suspect or the accused, when is it impossible to identify the perpetrator, termination of the criminal proceedings on certain grounds).
- 7.2. The special confiscation without conviction should be applied in the criminal adversary proceedings and with the respect of safeguards established by the law.
- 7.3. The special confiscation without conviction may apply to those crimes, where pecuniary advantage could be obtained directly or indirectly, and if such criminal proceedings could lead to the conviction of the person, should he appear in court.

#### Recommendation 8

- 8.1. If the ACN country adopted the **criminal extended confiscation** in addition to the special confiscation, it should envisage in the legislation the possibility of applying this type of confiscation in case of conviction for the corruption and money laundering crimes, resulting in obtaining of potential pecuniary advantages.
- 8.2. Such confiscation should be extended to the assets of the convicted person and informed third parties, provided that the value of such assets does not correspond to their lawful income (as an option – the difference exceeds the limit set by the law) and that the property was acquired within the time limits set by the law.
- 8.3. There should be the presumption of the criminal origin of the property with the simultaneous shifting of the burden of proof to the convicted person and/or informed third parties.
- 8.4. The extended confiscation may be applied in cases, when the court, based on the facts in the case, including the particular facts and available evidence, such as discrepancy between the value of the

assets and the legitimate income of the convicted person, concluded that the disputed property had been acquired with proceeds of crime in the result of criminal activities.

#### Recommendation 9

- 9.1. Consider the possibility of establishing the autonomous (non-criminal) **confiscation under the civil or administrative procedure of the unjustified assets** of a person with the reversal of burden of proof upon him and using alleviated standards of proof (a preponderance of the evidence, balance of probabilities or their analogues) in cases, which are clearly defined by the law, with the relevant assurances of fair trial procedural guarantees.

#### Recommendation 10

- 10.1. While improving the legislation and when applying the confiscation measures in practice, take into account the positions used by the **European Court of Human Rights** towards the confiscation, in particular, in the context of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms adopted in 1950 (the right to fair trial) and Article 1 of Protocol 1 to the said Convention (the right to peaceful enjoyment of property).

#### Recommendation 11

- 11.1. Improve the procedure of **collection and analysis of statistical data**, collect from the competent bodies on a regular basis the statistics on measures for confiscation of corruption and money laundering proceeds and maintain the collected data updated (with breakdown by years, types of crimes, types of confiscation, objects of confiscation measures and indicating the estimated value of the confiscated property for each category).

#### Recommendation 12

- 12.1. Take steps to ensure that the **agencies applying the confiscation measures** have sufficient human and technical resources, the appropriate level of knowledge, skills and expertise for effective application of the confiscation measures.
- 12.2. For this purpose, conduct regular training for the employees of the authorised bodies (investigators, detectives, prosecutors, and judges) on financial investigations, court proceedings, and the practice of application of measures on confiscation of proceeds of corruption crimes and money laundering.

#### Recommendation 13

- 13.1. To take steps for **application in practice** of the legal instruments available at their disposal for the purpose of confiscation of corruption and money laundering proceeds, thus developing the stable judicial case law and disseminating the best practices on confiscation in other countries of the region and beyond.

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