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Ministry of Justice

COMMENT, PROPOSAL AND SUGGESTION

Draft Law on Amendments to the Law on the Confiscation of Property Benefits Acquired through Criminal Activity

Comment/Proposal/Suggestion 1: Article 1 of the Draft

The draft removes the possibility of confiscating property benefits from the family members of the offender, as specified in Article 1 and several other articles of the Law. Instead, they are treated as third parties, where the prosecution is obligated to prove that the property registered in their names is actually owned by the accused person. This narrows the application of this Law compared to the current regulation. Therefore, we believe that all articles of the Draft which foresee these changes should be deleted. The amendment, which no longer treats the family members of the offender directly as subjects for the confiscation of property benefits but rather as third parties, requires the prosecution to prove that the property formally registered to the family members of the offender is, in reality, owned by the accused person.

Explanation of Comment/Proposal/Suggestion 1:

In practice, proving that the property is actually owned by the offender, and not their family members, can be complex and demanding. This may involve complicated financial investigations and the analysis of transactions and ownership structures, which further burdens the resources of the prosecution. Additionally, there is a risk that this approach will enable offenders to more effectively hide property benefits acquired through criminal activity by transferring property to family members or using complex legal and financial arrangements to conceal true ownership.

This potentially narrows the application of the law in the fight against crime, making the process of confiscating property less effective and more difficult to implement. This could reduce the deterrent effect of the law, which should aim to prevent criminal activities by making it harder for offenders to retain property benefits acquired illegally.

Comment/Proposal/Suggestion 2: Article 8 of the Draft

In contrast to Article 14 of the current Law, which is deleted by the Draft, Article 10b stipulates that the police may, but are not required to, take necessary measures on their own initiative or at the request of the state prosecutor to detect and identify property benefits acquired through criminal activity.

Explanation of Comment/Proposal/Suggestion 2:

Such a change could weaken efforts in the fight against crime by reducing the obligation of police action. Without a clearly defined duty to take measures for identifying property benefits acquired through crime, there is a risk of inconsistent practice and the possibility that some cases may remain uninvestigated. This could lead to a situation where criminal activities and their benefits are more easily overlooked or ignored, thereby undermining the law's goal of confiscating property acquired illegally.

Comment/Proposal/Suggestion 3: Article 9 of the Draft

The required standard of proof that property benefits were acquired through criminal activity is reduced compared to the current Law (reasonable suspicion instead of founded suspicion), but at the same time, a higher standard of proof is required to establish that a criminal offense was committed (founded suspicion or grounds for suspicion), effectively making the conditions for initiating the process of property confiscation stricter.

Explanation of Comment/Proposal/Suggestion 3:

The change in the standard of proof in the draft law, although it may appear as an attempt to achieve a better balance between efficiency in combating crime and protecting individual rights, carries certain risks and potential negative consequences.

Increasing the standard of proof for initiating the process of property confiscation may be seen as an obstacle to the effective fight against crime. If law enforcement agencies have to meet a stricter standard of proof to initiate the confiscation process, this could slow down or even prevent the confiscation of property acquired through criminal means, thereby providing criminals with an additional layer of protection and making it easier for them to retain illegally acquired property.

Comment/Proposal/Suggestion 4: Article 10 of the Draft

The state prosecutor is required to summon the person whose property is under investigation during a financial investigation to explain the circumstances related to the data and evidence concerning the property, income, and living expenses of that person. This allows the person to learn that their property is under investigation before it is frozen by a court decision, giving them the opportunity to attempt to dispose of it.

Explanation of Comment/Proposal/Suggestion 4:

Summoning a person to explain the circumstances of their property before the court makes a decision to freeze that property can enable them to take steps to dispose of or conceal the property to avoid its eventual confiscation. This could potentially hinder or even prevent the efforts of law enforcement to effectively confiscate property benefits acquired through criminal activity. Such a provision could enable criminals to evade justice. This could be particularly problematic in cases involving suspected complex money laundering schemes or other sophisticated criminal methods, where swift and effective action is crucial for the success of the investigation.

Comment/Proposal/Suggestion 5: Article 12 of the Draft

While Article 14 of the current Law stipulates the obligation of other entities to provide the police with data related to the financial investigation, the deletion of this article means that this obligation is no longer clearly stipulated by this Law. Instead, Article 13 prescribes that these entities must provide the data to the prosecutor. Since Article 10b of the draft stipulates that the police may take necessary measures on their own initiative to detect and identify property benefits acquired through criminal activity, it is necessary to obligate the entities to provide information to the police in such cases.

Explanation of Comment/Proposal/Suggestion 5:

The change that omits the explicit obligation of entities to provide data relevant to the financial investigation to the police, redirecting this obligation to provide data exclusively to the prosecutor, can be doubly problematic.

First, by removing the obligation to provide information directly to the police, the efficiency and speed with which financial investigations are conducted may be reduced. The police should act as the first line in detecting and investigating criminal activities, including those involving property benefits acquired through crime. This ability of the police to react quickly and take appropriate steps in the early stages of the investigation is crucial for the successful prevention, detection, and seizure of property acquired through crime.

Second, redirecting the obligation to provide information exclusively to the prosecutor can further burden an already overloaded prosecution, potentially slowing down the investigation process. The prosecution is crucial for leading and directing investigations, but their capacity to quickly process large amounts of information is limited. This change could result in a situation where valuable time needed for information exchange between the police and the prosecution is lost, giving criminals more time to hide or transfer their property, thereby hindering the efforts of law enforcement to lawfully confiscate property acquired through crime.

Comment/Proposal/Suggestion 6: Article 13 of the Draft

Other bodies (police, military police, administrative bodies responsible for tax, customs, and the prevention of money laundering and terrorism financing, as well as other bodies) **can no longer propose the establishment of a financial investigation team, as provided by the current Law. Instead, only the state prosecutor can do so, but is not required to.**

Explanation of Comment/Proposal/Suggestion 6:

The removal of the ability for other bodies, including the police, military police, and those responsible for taxes, customs, prevention of money laundering, and financing of terrorism, to propose the establishment of a financial investigation team, concentrates this power exclusively in the hands of the state prosecutor. This change has potentially significant implications for the process of investigating financial crime.

First, the state prosecutor is placed in the position of the main actor in deciding to initiate complex financial investigations. While the prosecutor already plays a key role in prosecuting criminal offenses, such centralization can result in a slowdown in the decision-making process. In situations where a quick response is crucial, such as freezing assets before they can be transferred or hidden, this model may limit efficiency.

Second, the multidisciplinary approach to investigating financial crime is reduced. Financial investigation teams, which include experts from various fields, are crucial for effectively addressing complex cases of financial crime that often cross the boundaries of a single jurisdiction or area of expertise. Limiting the ability to form such teams based on proposals from various bodies may reduce the system's ability to respond quickly and efficiently to the challenges posed by financial crime.

Third, such a change can further burden the prosecution, which already carries a significant load in the process of investigating and prosecuting crime. Given the complexity and scope of financial crime, effectiveness in combating this type of crime often depends on the ability of various bodies to share information and resources. By centralizing decision-making within the prosecution, there is a risk of creating a bottleneck in the process, which can reduce the overall efficiency of the system.

In the context of combating financial crime, it is crucial to maintain and promote a multidisciplinary approach that allows for a swift and effective response. Considering the possibilities for better coordination and cooperation between different bodies, rather than limiting the initiative to a single entity, can be beneficial for improving the overall efficiency and effectiveness in the fight against financial crime.

Comment/Proposal/Suggestion 7: Article 16 of the Draft

A deadline is introduced within which the financial investigation must be completed, specifically within six months after the final judgment for prescribed criminal offenses, unlike the current Law where such a deadline does not exist and the prosecutor completes the financial investigation when it is determined that the state of affairs is sufficiently clarified.

We believe that in a situation where the state prosecutor's office does not have direct access to data, nor adequate capacity to conduct complex financial investigations, which may include prolonged data exchange within international cooperation, such a solution can have very negative effects and lead to the discontinuation of investigations in cases where there is significant property acquired through criminal activity.

Explanation of Comment/Proposal/Suggestion 7:

The introduction of a six-month deadline for the completion of a financial investigation after the final judgment for certain criminal offenses represents a significant change from the previous approach, where the prosecutor had the discretionary right to conclude the investigation when it was determined that the state of affairs was sufficiently clarified. This change has potentially profound implications for the efficiency of the judicial system in combating financial crime, especially in the context of the complexity of financial investigations.

Financial investigations, by their nature, can be extremely complex and require a detailed examination of large amounts of data, including transactions, accounting records, and international financial flows. Such investigations often require specialized expertise and may involve cooperation with foreign jurisdictions, which further complicates and prolongs the process.

Setting a strict six-month deadline for the completion of a financial investigation can lead to several negative outcomes:

1. **Superficial investigations:** The deadline may force prosecutors to rush to complete investigations to comply with the legal timeframe, leading to less thorough investigations and lower quality evidence. This could affect the judiciary's ability to effectively prosecute and prove cases of financial crime.
2. **Discontinuation of investigations:** In cases where it is evident that the investigation cannot be completed within six months, there is a risk that investigations will be halted or neglected. This could allow individuals who have benefited from criminal activities to retain their assets without fear of legal repercussions.
3. **Challenges in international cooperation:** Financial investigations that require international cooperation can be particularly challenging to complete within a short timeframe. Limiting the deadline to six months can hinder effective international cooperation, which is crucial for combating transnational financial crime.
4. **Legal uncertainty and inequality:** Strict deadlines can lead to legal uncertainty and the perception of inequality before the law, especially if deadlines are applied selectively or if investigations are halted due to technical obstacles rather than a lack of evidence.

Given these challenges, the proposed six-month deadline for completing financial investigations could potentially jeopardize justice and efficiency in combating financial crime. Instead of strict deadlines, an approach that allows for flexibility, while simultaneously ensuring adequate resources and support for the prosecution to conduct thorough and efficient investigations, could be a more effective way to address the complexity of financial crime.

Comment/Proposal/Suggestion 8: Article 20 of the Draft

An eight-day deadline for the state prosecutor to submit a reasoned proposal for the imposition of a provisional measure ordered by the prosecutor is too short, or else the measure will be revoked. This unnecessarily endangers the process of confiscating property acquired through criminal activity, considering the capacities of the prosecutor's office. It is logical that those individuals, if the measure is revoked due to the prosecutor's failure to act within the prescribed timeframe, will attempt to dispose of or conceal the property, thereby preventing its permanent confiscation.

Explanation of Comment/Proposal/Suggestion 8:

The introduction of an eight-day deadline for the state prosecutor to submit a reasoned proposal for provisional measures, which have already been ordered by the prosecutor, places significant pressure on the prosecution and can have several negative consequences on the process of confiscating property acquired through criminal activity. This can undermine the fundamental purpose of these measures, which is to prevent suspects from disposing of assets that may be subject to confiscation at a later stage of the proceedings.

The prosecution faces limited resources and a heavy caseload, making it challenging to respond quickly within such a short timeframe. In practice, this means that prosecutors must rapidly gather and present detailed evidence and arguments in support of the request for provisional measures, which can be difficult to achieve without compromising the quality of the proposed measures.

If the prosecution fails to submit a reasoned proposal within the eight-day deadline, there is a risk that the provisional measure will be revoked. This would provide suspects with the opportunity to dispose of or conceal their assets, significantly reducing the chances of their later confiscation. This not only undermines the justice process but also allows criminals to retain benefits acquired illegally.

Short deadlines can lead to legal uncertainty and increase pressure on the judicial system, which can affect its overall efficiency. It is crucial to balance the need for swift action to secure assets and the need for thorough preparation and justification of legal action. Too short deadlines can jeopardize this balance.

Comment/Proposal/Suggestion 9: Article 21 of the Draft

It is unclear why the hearing for deciding on the proposal for imposing a provisional measure is being abolished, especially when the current Law prescribes a very short timeframe for holding it. Instead, the investigative judge issues a decision that can be appealed by the prosecution or the other party. Additionally, in the case of an appeal, it is stipulated that the holder or owner, or their defense attorney, may, but is not required to, provide evidence of the origin of the property benefits. This opens up a significant opportunity for appeals based solely on procedural grounds and prevents the court from examining evidence of how the disputed property was actually acquired.

Explanation of Comment/Proposal/Suggestion 9:

The abolition of the hearing for deciding on the proposal for imposing a provisional measure represents a significant change in the process that can have multiple negative implications for the fairness and transparency of judicial proceedings.

A hearing provides a platform for open discussion and presentation of evidence and arguments from both sides. Its abolition and the transition to a system where the investigative judge makes decisions independently, with the possibility of an appeal, can reduce the transparency of the process. Without a hearing, there are fewer opportunities for direct discussion of the merits of the case, which can negatively impact the fairness of decisions.

This is particularly significant given the widespread corruption in the judiciary, the suspicion of organized crime infiltration in this branch of government, and the fact that vetting has not been conducted.

The possibility of appealing the decision of the investigative judge, along with the provision that allows but does not require the holder or owner of the property (or their defense attorney) to provide evidence of the origin of the property benefits, opens the door for appeals based primarily on procedural grounds. This can lead to abuse of the appeals system to delay the process and avoid the efficient confiscation of property acquired through criminal activity. A system where parties 'may,' rather than 'must,' provide evidence can make it difficult for the court to gain a comprehensive understanding of the origin of the disputed property. If parties choose not to provide evidence, the court may be forced to make decisions based on incomplete information, which can affect the correctness and fairness of the decision.

Comment/Proposal/Suggestion 10: Article 27 of the Draft

The conditions prescribed by the current Law, under which the panel will not accept the appeal of the holder, are being abolished. For example, if there is a risk that subsequent confiscation will be prevented or hindered. This is particularly significant in the case of property owned by offshore companies, which can be dissolved or the property can be transferred to another offshore company without the knowledge of the competent authority in Montenegro.

Explanation of Comment/Proposal/Suggestion 10:

The abolition of the conditions under which the panel will not accept the appeal of property holders, especially in situations where there is a risk of preventing or hindering subsequent confiscation of property, opens a significant legal gap that can have detrimental consequences for the efficiency of the fight against financial crime and corruption.

The specificity of property owned by offshore companies lies in the fact that such property is often very mobile and can be easily and quickly transferred from one jurisdiction to another. In the context of this amendment, if the prescribed conditions preventing the acceptance of an appeal in the case of a risk of hindered subsequent confiscation are eliminated, this directly facilitates the removal or concealment of property by the holders before judicial authorities can carry out the confiscation.

Given that offshore companies are often used to transfer assets across borders and jurisdictions, such a change can hinder international cooperation and the tracking of asset flows. This can result in significant complications and a more challenging legal fight against international financial crime.

Public trust in the efficiency of the judicial system and the state's ability to combat financial crime and corruption can be seriously undermined if there is a perception that the legal system is not equipped to prevent manipulation and abuse of legal mechanisms to protect assets acquired illegally.

Comment/Proposal/Suggestion 11: Article 29 of the Draft

The current Law prescribes that a provisional measure imposed during the investigation is revoked ex officio if, within two years from the date of the decision imposing it, the indictment does not become final.

The solution in the Draft, which states that in such cases a proposal for the imposition of such a measure cannot be resubmitted for the same property, is particularly problematic due to the well-known issues related to the inefficiency of the courts. In practice, this could lead to the disposal of the property during the court proceedings and prevent its permanent confiscation even in cases where the person is convicted.

Explanation of Comment/Proposal/Suggestion 11:

The amendment proposed in the Draft Law, which prevents the resubmission of a proposal for the imposition of a provisional measure on the same property after such a measure is revoked if the indictment does not become final within two years, represents a significant step backward in the effective fight against financial crime and corruption.

The well-known issues of court inefficiency can lead to significant delays in judicial processes, often beyond the control of the prosecution and other justice bodies. This amendment legally regulates a situation that effectively punishes the judicial system for its own inefficiency, instead of seeking solutions to expedite processes and implement justice more effectively.

If the property that is the subject of a provisional measure is disposed of in the period after the revocation of the provisional measure and before the submission of a new indictment or during the court proceedings, it can seriously undermine the state's ability to permanently confiscate property acquired through criminal activity. Such a situation opens the door to abuse, where individuals can exploit legal loopholes and technical issues within the judicial system to protect property acquired through illegal activities.

This amendment limits the tools and mechanisms available to the judicial system for preventing and sanctioning financial crime. Provisional measures are a crucial instrument in preventing the dissipation or concealment of assets during the course of judicial proceedings, and as such, they should be flexibly usable in accordance with the dynamics of the judicial process.

Comment/Proposal/Suggestion 12: Article 30 of the Draft

The six-month deadline within which the prosecutor must submit a request for the permanent confiscation of property benefits, as prescribed in the Draft, is four times shorter than the current legal solution, which provides for two years. Given the limited capacity of the prosecution and the complexity of investigations related to the confiscation of property, as mentioned in previous comments, we believe that prescribing such a short deadline can, in practice, prevent the confiscation of valuable property.

Such a short deadline is particularly problematic in cases where it is determined that the criminal proceedings cannot continue due to the death, illness, flight, immunity, amnesty, or pardon of the perpetrator of the criminal offense, because then the prosecution has significantly less time to conduct a financial investigation and determine what property that person possesses.

Explanation of Comment/Proposal/Suggestion 12:

Introducing a stricter six-month deadline for submitting a request for the permanent confiscation of property benefits, compared to the previous legal framework which provided for two years, poses a challenge in a judicial system already facing limited capacities and the complexity of investigations related to financial crime.

Prosecutors work with limited resources, including human capital and technical equipment. The complexity of financial investigations, which may involve studying complex financial transactions, international cooperation, and analyzing large amounts of data, requires time and attention. Pressuring the prosecution to complete these processes within a short six-month timeframe can negatively impact the quality and thoroughness of the investigations.

Financial investigations, especially those dealing with money laundering or other forms of financial crime, are inherently complex. They often involve trails that lead through multiple jurisdictions and require cooperation with foreign authorities. A short deadline can further complicate this already challenging process, particularly in situations where more time is needed to obtain international legal assistance.

This is particularly problematic in cases where criminal proceedings cannot continue due to reasons such as death, illness, flight, immunity, amnesty, or pardon of the perpetrator. These cases present challenges for the judicial system and require additional time for adjustment and finding alternative legal solutions.

There is a real risk that, due to the limited timeframe, some investigations will not be completed on time, which could result in missed opportunities to confiscate significant property benefits acquired through criminal activities. This would have a direct negative impact on the fight against crime and corruption, as well as on general trust in the judicial system.

Comment/Proposal/Suggestion 13: Article 41 of the Draft

It is necessary to prescribe the obligation of enacting a specific bylaw that will regulate the cases and manner in which perishable goods and animals that have been confiscated can be donated for humanitarian purposes to prevent abuse. It should specifically stipulate that they cannot be given to individuals who are in any way connected to the persons from whom the property was confiscated.

Explanation of Comment/Proposal/Suggestion 13:

The proposal to prescribe the obligation of enacting a specific bylaw that would regulate in detail the handling of perishable goods and animals confiscated in criminal proceedings offers a practical solution to several key problems that the judicial system may face when managing this type of property.

Proper management of perishable goods and animals can ensure their use for humanitarian purposes, such as donations to institutions involved in social protection or animal shelters. This not only reduces the costs of storing and maintaining confiscated property but also contributes to the general good.

Clearly defining the procedures for donating confiscated property for humanitarian purposes helps prevent potential abuses. This includes preventing the return of property directly or indirectly to the individuals from whom it was confiscated, which may involve prohibiting the donation of property to organizations or individuals who are in any way connected to the original owners.

Implementing detailed rules and procedures through bylaws contributes to greater system transparency. This includes the public availability of information on how confiscated property is utilized, which can increase public trust in institutions.

Comment/Proposal/Suggestion 14: Article 42 of the Draft

The Draft obliges the competent authorities to state the circumstances from which the grounds for suspicion that the property benefits were acquired through criminal activity arise within requests for international cooperation. This implies a higher level of proof compared to the current legal solution, which stipulates that only reasonable suspicion must arise from these circumstances.

Explanation of Comment/Proposal/Suggestion 14:

The introduction of a stricter standard of proof in the context of requests for international cooperation, where the competent authorities are required to state the circumstances from which the grounds for suspicion that the property benefits were acquired through criminal activity arise, can carry a number of negative implications.

Increased proof requirements can hinder international cooperation, especially in the early stages of an investigation. The requirement for more detailed and concrete evidence before sending a request for international cooperation can significantly extend the time needed to prepare such requests. In situations where speed is of crucial importance, this can represent a significant drawback.

Stricter proof requirements may require greater resources, including time and expertise, which can lead to increased costs for judicial authorities. In the context of limited budgets, this can create additional pressure on already overburdened judicial systems.

If the proof requirements are too strict, there is a risk that legitimate investigations may be hindered or prevented due to a lack of initial evidence. This can limit the state's ability to effectively cooperate in the fight against international crime, including money laundering and financing of terrorism.

Comment/Proposal/Suggestion 15: Article 43 of the Draft

We believe that the introduction of this solution will lead to numerous procedural errors regarding which law should be applied in ongoing proceedings, and this issue should be consistently regulated by Article 84b.

Explanation of Comment/Proposal/Suggestion 15:

The introduction of new legal provisions or amendments to existing ones always carries implementation challenges, particularly during the transitional period. The proposed solution could lead to procedural shortcomings related to the application of the law in ongoing proceedings.

Prosecutors and judges may have differing interpretations regarding which law applies to a specific case, potentially slowing down the judicial process. Without clear regulations on how to reconcile old and new legal provisions, conflicts between provisions may arise. This can lead to legal dilemmas and challenges in interpreting the law, further complicating judicial proceedings. This issue is particularly pronounced in complex cases that require detailed analysis and application of the law.

Changes in the law can affect the rights and expectations of parties involved in a case, especially if the new law is applied retroactively to ongoing cases. This can lead to challenges regarding the legal basis for actions or decisions that have already been taken.