Anti-Corruption Legislation Review of the Law on Confiscation of Assets in Civil Proceedings

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ANTI-CORRUPTION LEGISLATION REVIEW OF THE LAW ON CONFISCATION OF ASSETS IN CIVIL PROCEEDINGS

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About the publisher: Aleksandar Krzalovski, Director

Author: Darko Avramovski

English translation: Evdokija Atanasovska

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Contact:

MCIC, address: ul. Nikola Parapunov no. 41a; PO box 55, 1060 Skopje;

Telephone: +389 76 365 381

e-mail: mcms@mcms.mk

Website: www.mcms.mk

Scribd: https://www.scribd.com/people/documents/2996697

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INTRODUCTION

Organized crime, corruption and financial crime are the greatest challenge faced by the modern criminal law. Being characterized as white-collar crime, that is, crime in which the offenders are highly educated, intelligent people, who usually have both formal and informal power in society and the state, it is a crime that is extremely difficult to detect and suppress. Taking into consideration that such criminal offences are committed in order to acquire assets or other benefits, the persistence of this type of crime is a great threat to the formal economy, the rule of law, social equality and the overall development of the state and society. As a result, several steps have been taken globally to enable a better and more effective fight against organized crime and corruption. The more significant, certainly, are the international documents related to this issue, such as the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the Criminal Law Convention against Corruption with its protocol, as well as other conventions of the Council of Europe and directives of the European Union. The most significant part of all of these, certainly, is the confiscation of illicitly acquired assets and other benefits, as a special criminal law measure intended for restitution of damage, as well as prevention and suppression of organized crime and corruption.

The confiscation of assets is an archaic measure, applied in the ancient period as a type of punishment, which was then replaced by fines and sentences of imprisonment, which is why it had had almost no practical application for several centuries. However, its modernization as a special criminal law measure to respond to the emergence and development of organized crime and corruption in the United Kingdom, the United States of America and Italy practically demonstrates its effectiveness in the fight against organized crime and corruption, which is why it began to be frequently applied towards the end of the 20th and the beginning of the 21st century, in many other systems. Taking into consideration that the reactualization of confiscation is done in parallel in different legal systems and countries with different legal culture and tradition, it can be also found in many different forms, and the international legal framework makes an attempt to cover the needs and conditions for application of the measure in all these different systems.

Guided by global and regional trends, North Macedonia has ratified the international documents related to confiscation of assets, and as a result, it has made several reforms in the domestic legislation, as well as has reformed and established some institutions, authorities and bodies that promote the fight against organized crime and corruption. As a result, in 2004, by the amendments to the Criminal Code, confiscation of assets was introduced, and these provisions were further improved in 2008, when extended confiscation was introduced as a special type of confiscation applicable only to a small number of criminal offences. In 2023, additional amendments were made to the Criminal Code, envisaging that extended confiscation may be applied to other criminal offences, thus increasing the scope of its potential application. In parallel, the Law on Criminal Procedure has introduced provisions under which a special proceeding for the confiscation of assets may be initiated in cases when it is not possible to conduct a criminal proceeding due to legal or factual obstacles. The change of the criminal procedure model and the beginning of application of the Law on Criminal Procedure in December 2013, led to structural changes of the criminal prosecution authorities, thus the Financial Police Office has been defined as a judicial police which, together with the police, is at the disposal of the public prosecutor. And, the same law also envisages the establishment of independent investigative centers within the Public Prosecutor's Offices, which are supposed to increase the capacities of the Public Prosecutor's Offices for conducting financial investigations and confiscation of illicitly acquired assets. In addition, in 2021, the three-year Strategy for Financial Investigations and Confiscation of Assets was adopted, whereas this year there is already an ongoing work to develop a new strategy.

However, the state records extremely poor results in terms of confiscation of illicitly acquired assets, in particular, in proceedings related to high corruption and serious forms of organized crime and corruption. This state of affairs has been ascertained in the reports of the European Union, the United States of America, the OSCE, the Council of Europe, the United Nations, but also in the research conducted by domestic actors as well as, in an indirect manner, based on the data in the publicly published reports on the work of the Public Prosecutor's Office of Republic of North Macedonia and the reports on the work of the courts, which record an extremely small number of decisions on confiscation of assets. An additional problem is that some of the confiscation decisions cannot be executed because the assets were not properly located, thus they no longer exist, or they were not secured in time, or the court's decision has not been precise enough in determining the assets that should be recovered etc.

Even though the main considerations and recommendations in this regard refer to the improvement of the existing legal framework, and above all, the creation of conditions for its adequate application through organizing trainings, improving communication among various actors, applying new technologies and improving interoperability and access to data of public prosecutors and judges, strengthening human and material resources in Public Prosecutor's Offices, investigative bodies and courts, as well as dealing with corruption within the ranks of the judiciary and the Public Prosecutor's Office, yet, the state has decided to again opt for legal amendments and introduction of new revolutionary and previously unknown concepts about our legal system and tradition. Thus, in 2021, the beginning of the process for the adoption of a new law was announced, and though it was first announced as a law on establishing the origin of assets, it was nevertheless transformed into a Law on Confiscation of Assets in Civil Proceedings. The procedure for drafting the Law on Confiscation of Assets in Civil Proceedings was conducted extremely in a non-transparent manner, thus the draft version of the Law was being worked on for more than 2 years, without the public having any information at all about the stage in which the process was, but also about the concept and idea of the Law in general. Following the absence of any consultative processes, after more than two years a working group was formed to discuss the initial version of the Law, including the representatives of the civil society sector as well. However, after the first meeting of the working group, when the members of the group saw the text of the Law for the first time, it was emphasized that comments changing the concept of the Law and going into the essence of the provisions would not be accepted, and that the working group would have only 4 meetings, therefore the Platform of Civil Society Organizations in the Fight against Corruption abandoned the process. Additionally, the regulatory impact assessment of the Law was conducted only for the sake of doing it, without considering all the elements that should be covered, but it only clarified the point of the Law and provided a general theoretical clarification of the confiscation as a special measure. Taking into consideration that the procedure for adopting the Law did not meet the standards of good governance, the fact that the Law regulates an extremely important issue that is already regulated by other laws and that is related to several of the basic human rights, as well as the great dissatisfaction of the majority of the expert public regarding the adoption of the Law on Confiscation of Assets in Civil Proceedings, the need has arisen to prepare an Anti-Corruption Legislation Review of the very same law.

This Anti-Corruption Legislation Review identifies and analyzes several types of risks, that is, risks that arise from: overlapping of legal provisions, imprecise definitions, involvement of multiple authorities in decision-making, shared and unclear competences, discretionary powers, inadequately regulated rules of proceedings. For the purposes of this document, we have used the Methodology for Anti-Corruption Legislation Review of the State Commission for the Prevention of Corruption[1], as well as the Comparative Analysis and Methodology of the Regional Cooperation Council of South-Eastern Europe and the Regional Anti-Corruption Initiative[2].

1 https://www.dksk.mk/fileadmin/PDF/Metodologija_za_antikorupciska_proverka_na_legislativata.pdf

2 https://rai-see.org/wp-content/uploads/2015/06/Comparative_Study-Methodology_on_Anti-corruption_Assessment_of_Laws.pdf

1. RISKS ARISING FROM THE OVERLAPPING OF LEGAL PROVISIONS AND SOLUTIONS IN THIS LAW WITH OTHER LAWS

The international legal framework is quite broad and gives greater freedom to domestic legislations for more detailed regulation of confiscation models and types, as well as the rules of proceedings in which the measure is imposed, certainly, as long as the right to a fair and just trial is not threatened. Without delving deeper into the criminal conviction-based confiscation, for the purposes of this anti-corruption review, it should be noted that a special part of the international legal framework authorizes the states to apply the confiscation under conditions when, due to objective reasons, a criminal conviction has not been pronounced.

In this regard, there are several models of non-conviction-based confiscation[3]:

- Confiscation in criminal proceedings whereby the criminal offence is proven and the origin of assets is established to be coming from the criminal offence, but due to some circumstances, such as death or mental illness of the perpetrator, it is not possible to issue a final conviction. This proceeding is conducted according to the principles of the criminal proceedings, with the difference that the court does not enter into establishing guilt of a particular person, but it is necessary to make a declarative decision establishing that the committed criminal offence from which the assets derive has the features of a criminal offence envisaged by law;
- Extended confiscation, that is, confiscation of assets acquired before the criminal offence was committed, which are not related to the commission of the criminal offence, that is, they are not invested in the commission of the criminal offence, nor they come from the commission of the criminal offence. This type of confiscation can only be imposed against assets owned by persons who have been convicted of the most serious forms of organized crime and corruption, whereby there must be some evidence indicating the imbalance of the assets with the legal sources of income of the person in a certain time-limited period before the commission of the criminal offense for which the person was convicted. Thus, the confiscation is "extended" to other assets of the person due to a justified assumption that the other assets of the person also derive from illegal sources, due the lifestyle and involvement in organized crime and corruption, and the burden of proof of the legal origin of the assets falls on the person concerned. However, one should take into consideration that some legislations define extended confiscation differently and it may be found in other forms (for example, some states define as extended confiscation the confiscation of proceeds generated as a result of legal multiplication of illicitly acquired assets);
- Unexplained wealth, that is, confiscation of assets, which may be conducted in civil or administrative proceedings, against a person who has the power of disposal of assets that are established to be disproportionately higher than the reported legal income of the person who has the power of disposal of the assets and for which the person cannot to prove that they come from legal sources. The proceeding may be conducted as a separate tax procedure, or as a civil procedure for contesting the right of ownership;
- Civil forfeiture or in rem confiscation of assets is typical of the Anglo-Saxon systems, even though it already finds frequent application in continental systems, such as Italy and the Netherlands. This proceeding is characterized by the fact that it is initiated against certain assets, and not against a certain person, thus the state practically disputes the legal origin of the assets, that is, it proves the involvement of the assets in criminal activities, without going into the establishing of a specific criminal offence, or guilt of the owner and the persons who have certain rights over the

3 Tools and Best Practices for International Asset Recovery Cooperation Handbook, Jill Thomas, Lawrence Day, Fiona Jackson, Advice on Individual Rights in Europe (AIRE) and Regional Anti-Corruption Initiative (RAI), 2019

assets. In this manner, the persons who have the power of disposal of the assets are the ones who have to prove the legal origin of the assets, or prove that they have bona fide possession. However, in this regard, one should take consideration that some countries, in particular, those from the Spanish-speaking area, use the term in rem confiscation for any concept of non-conviction-based confiscation[4].

Hence, it may be noted that there is a partial overlapping in the field of regulation of the various types of non-conviction-based confiscation, thus the differences are more related to the manner and form in which the proceeding is conducted and the non-conviction-based confiscation is pronounced. As a result, the majority of countries in the world have not envisaged all four models of confiscation of illicitly acquired assets, whereas the in rem proceeding is the least present. Of these, the in rem proceeding appears to be the least frequently applied as it causes controversy due to the low degree of proof that the state must meet in order to be able to impose confiscation, which is why the international conventions themselves, including the United Nations Convention against Corruption, do not envisage mandatory introduction of in rem confiscation, unlike extended and other types of confiscation.

In North Macedonia, under the Law on Criminal Procedure and the Criminal Code, the imposition of confiscation is envisaged in cases when it is not possible to conduct criminal proceedings, as well as the imposition of extended confiscation. On the other hand, even though it is not a matter of confiscation in the true sense of the word, Articles 76, 77 and 78 of the Law on Personal Income Tax regulate special tax procedures by which a person who has the power of disposal of assets that are not taxed and the origin of which cannot be proven, are taxed at a rate of 70% of its value. Thereby, the state practically introduced three of the existing mechanisms for asset control and confiscation of assets deriving from illegal sources, and the intention of the Law on Confiscation of Assets in Civil Proceedings was to introduce the fourth model, that is, in rem confiscation[5]. Taking this in consideration, there was very little space to be filled by the Law on Confiscation of Assets in Civil Proceedings, thus, as a result, as well as the fact that in our legal system it is practically impossible to introduce a true in rem confiscation proceeding, the Law poses risks of corruption and a conflict of interest due to overlapping of legal provisions, lack of clarity of the proceedings, as well as inadequately defined roles and competences.

1.1. Risks arising from a collision of provisions in terms of initiation of proceedings

First of all, it is important to note that pursuant to Article 540 of the Law on Criminal Procedure, a special proceeding for the confiscation of assets may be initiated when, due to legal or factual reasons, it is not possible to conduct criminal proceedings. Pursuant to Articles 7, 8 and 9 of the Law on Confiscation of Assets in Civil Proceedings, the confiscation proceeding is initiated whenever there is a suspicion of a committed criminal offence, but due to a lack of evidence, or other objective circumstances due to which criminal proceedings cannot be initiated. Accordingly, it may be noted that the laws use almost identical words to establish when the proceeding is initiated. Not only that the situations in which these two proceedings are initiated are identical, but also the authorities involved overlap to a large extent, yet, there are still different laws that establish partly different competences and rules of proceedings. Such a collision of laws will cause serious problems in practice, since it reduces legal certainty and predictability, and thus poses a special risk of corruption. Taking into consideration that in both cases the public

4 Model Law on In Rem Forfeiture, Legal Assistance Program for Latin America and the Caribbean, United Nations Office on Drug and Crime, 2011

5 Regulatory Impact Assessment Report – Draft Law on Confiscation of Assets in Civil Proceedings, Ministry of Justice, November 2023

prosecutor is the one who assesses whether there are grounds for initiating a confiscation proceeding, the public prosecutor will practically have full discretion to decide which of these proceedings to initiate, whether the proceeding under the Law on Criminal Procedure, or the one under the Law on Confiscation of Assets in Civil Proceedings.

If one takes into consideration that in an in personam proceeding, as it is the confiscation proceeding in cases when for objective reasons it is not possible to conduct criminal proceedings, the courts must make at least a declarative decision that (without going into the guilt and liability of the person) the assets are still somehow connected to a criminal offence, it means that the degree of proof by the state must be higher in order to impose non-conviction-based confiscation. On the other hand, the confiscation of assets in cases when it is not possible to conduct criminal proceedings offers a greater degree of protection of the rights of the persons involved due to procedural guarantees that are largely similar to the procedural guarantees and rights of parities in criminal proceedings. As a result, together with the higher degree of proof which is imposed on the state, the proceeding regulated in the Law on Criminal Procedure should be considered to be a law more favorable to the person who has the power of disposal of assets whose origin is suspicious, which is why this proceeding should always be applied. In this regard, it is necessary to take into consideration that in the case of Engel v. the Netherlands, the European Court of Human Rights establishes the criteria according to which the ECtHR has an authentic interpretation of whether a certain proceeding can be considered a criminal proceeding, regardless of how the very same proceeding is regulated and named in the domestic legislation, if it bears the features of a proceeding in which a sanction is imposed[6]. It is also important to take into consideration the standpoint of the ECtHR according to which the confiscation of assets, even in cases when it is imposed outside of criminal proceedings and without establishing guilt, constitutes a sanction in the sense of Article 7 of the European Convention on Human Rights, which automatically activates all procedural guarantees that a person involved in criminal proceedings should be entitled to[7]. Hence, the parallel regulation of these provisions by this law, inevitably increases the risks of corruption, as it allows the circumvention of procedural guarantees and the necessary degree of proof of the illicit origin of assets, which can be abused for various personal or political purposes.

Additionally, if one takes into consideration that the actions of the public prosecutor and the Financial Police Office are regulated in the Law on Criminal Procedure, the Law on Public Prosecutor's Office and the Law on Financial Police, which in this view are special laws, the provisions of the Law on Confiscation of Assets in Civil Proceedings referring to the actions of these actors in these situations should be disregarded according to the principle of lex specialis derogat legi generali. However, the double regulation of the same proceeding, by leaving great discretion to the public prosecutor to decide which proceeding to initiate, inevitably poses a special risk of corruption and a conflict of interest, which is embedded in the very concept of the Law on Confiscation of Assets in Civil Proceedings.

When it comes to an asset control outside of criminal proceedings and the connection of assets with criminal offences, as it was mentioned above, the Law on Personal Income Tax envisages tax procedures for taxing assets, whose origin cannot be proven, at a rate of 70%. According to the data received from the Public Revenue Office, a total of 126 such procedures have been initiated in the past 5 years, meaning that these legal provisions are applied in practice, thus creating a double regulation of the state's powers to control assets whose origin cannot be is proven, and it is not necessary to establish its connection with a criminal offence. In that sense, it is important to note that the Public Revenue Office does not have investigative bodies at its disposal in these procedures, as is the case in the proceeding envisages by the

6 Engel v Netherlands, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72

7 G.I.E.M. S.r.l. and others v. Italy, no. 1828/06 34163/07 19029/11

Law on Confiscation of Assets in Civil Proceedings, which gives an even clearer picture of how the civil proceeding for the confiscation looks more like a criminal prosecution.

1.2. Collision of provisions relating to the competences of the Public Prosecutor, the Financial Police and the State Attorney

Overlapping of the laws may also be observed in the provisions that regulate the competences of the Financial Police, whereby the Law on Confiscation of Assets in Civil Proceedings envisages more competences for the Financial Police than it is done by the Law on Financial Police. Thus, pursuant to Articles 7 and 10 of the Law on Confiscation of Assets in Civil Proceedings, the Financial Police gathers evidence about the origin of assets for the purpose of initiating civil proceedings for the confiscation, as well as takes actions after the public prosecutor establishes that there is no possibility to initiate criminal proceedings, but there is a possibility of initiating civil proceedings for the confiscation. It means that the Financial Police, according to these provisions, may conduct investigative actions outside of criminal proceedings, that is, for purposes other than initiating criminal proceedings or tax procedure before a tax authority, which is contrary to Article 12 of the Law on Financial Police, where the competences of the Financial Police Office are explicitly envisaged. This not only increases legal uncertainty and the risk of corruption and its abuse, but also the Law provides the state with serious powers to be able to use investigative techniques and methods inherent in the criminal proceedings in order to be able to control citizens' assets.

To follow up on this, under the provisions of the draft law contained in Article 7, when the public prosecutor assesses that there is reasonable suspicion that the assets are not acquired from legal sources, and there is no possibility of initiating criminal proceedings, he/she submits a notification to the Financial Police, which should initiate a financial investigation. It is contrary to the provisions of the Law on Criminal Procedure, under which the public prosecutor is superior to the Financial Police and issues orders for financial investigation and coordinates the actions of the Judicial Police, of which the Financial Police is a part, in the preliminary procedure stage (pre-investigation or investigation), but not after the investigation has been completed and it has been established that no indictment may be filed. In this regard, the question of whether the public prosecutor may give orders and directions to the Financial Police for cases when it has already been established that there are no grounds for continuing the criminal investigation is also controversial, which increases the chances of emergence of a different practice of action, and thus risks of corruption. In addition, it is specific that the Law somehow favors conducting a financial investigation after the criminal investigation has been completed, since in the course of conducting financial investigation, evidence relevant to conducting criminal proceedings may be also discovered. Finally, in this manner, public prosecutors may be additionally influenced not to conduct financial investigations in parallel with the criminal investigation. Besides the fact that until now the absence of timely financial investigations is perceived as one of the biggest reasons for the failure of confiscation in criminal proceedings[8], such provisions of the Law can additionally contribute to the deterioration of the situation, but also to the emergence of corrupt practices with a view to avoiding criminal prosecution and favoring the confiscation procedure in civil proceedings. It is one of the more serious risks of corruption that arise from the fact that there is a double regulation of the confiscation of illicitly acquired assets, thus there is a risk of corruption and a conflict of interest in confiscation in civil proceedings, instead of criminal proceedings within which the confiscation is imposed.

8 Natali Petrovska, Darko Avramovski – Practical Implementation of Confiscation Measure in Criminal Proceedings in the Republic of North Macedonia, Coalition All for Fair Trials, Skopje 2021

As a result, the conventional logic dictates that the proceedings envisaged by the Law on Criminal Procedure should be followed, that is, the public prosecutor should issue an order to the Financial Police to conduct a financial investigation while the criminal investigation is ongoing, that is, while they are verifying whether there is a criminal offence, and not after it is established that criminal proceedings cannot be initiated. And again, the double regulation of the same issues by different laws that envisage different rights, competences, obligations and rules of action is what has a huge impact on legal certainty, as well as on increasing the risks of corruption and a conflict of interest, in particular, in terms of when the choice of the proceeding may make a difference whether it will be a criminal prosecution or just a civil dispute regarding the legal origin of the assets. Hence, it may be noted that the risks contained in the Law on Confiscation of Assets in Civil Proceedings move towards both extremes - the Law being abused and confiscating assets that should not be confiscated, as well as the Law being abused to confiscate only the assets whereas the person be de facto amnestied from criminal prosecution.

Additionally, pursuant to Article 12, paragraph 5 of the Law on Confiscation of Assets in Civil Proceedings, "when the State Attorney assesses that additional data and evidence are needed for his/her action, he/she shall notify the Office thereof, and the Office shall be obliged immediately, and at the latest within five days from the receipt of the request of the State Attorney to provide him/her with the necessary data and evidence". Pursuant to Article 12 of the Law on State Attorney's Office, the State Attorney does really have the right to request that the state administration bodies, legal entities and natural persons provide him/her with data and evidence important for the protection of the property interests of the state, but the provision refers solely to data originally available to the body. It means that the State Attorney's Office does not have the right to contact the police or other investigative body with a request that that body obtain data by using investigative techniques and methods. As a result, in Article 12, paragraph 5, the state attorneys are equated with the public prosecutor, since they are given the possibility to give orders to the Judicial Police to undertake investigative actions and gather evidence, which is beyond the powers given in the Law on Financial Police and The Law on State Attorney's Office. This expansion of competences again affects legal certainty, circumvents some legal principles, reduces the clarity of regulations and results in a controversial concentration of power to the State Attorney.

Taking this into consideration, as well as the fact that under the Law on Confiscation of Assets in Civil Proceedings, the burden of proof is reverses, any person whose assets will be the subject of such a proceeding, will automatically be at a disadvantage compared to the opponent in the proceeding. By this, the State Attorney will get many more powers similar to the public prosecutor, and this whole proceeding will get many more features of a criminal prosecution, without any guarantee that the criminal proceeding offers. In that sense, there will also be a serious risk of violating the principles of a fair and just trial, as in a proceeding regulated in this manner, the State Attorney has the Financial Police at his/her disposal, which is a prosecuting authority and has the power to take actions such as deprivation of liberty, inspection and examination of documents, examination of baggage and persons, covert police action, use of other technical equipment and the like, and all this within the civil proceedings, where the burden of proof is reversed. This, in fact, is one of the biggest risks of corruption and a conflict of interest that inevitably permeates most of the provisions of the Law, and it refers to the possibility of abuse of the confiscation procedure and unlawful confiscation of legal assets.

1.3. Lack of alignment of the provisions regarding provisional measure for securing the assets for the purpose of execution of the confiscation decision with provisions of other laws

Pursuant to Article 4 paragraph 2, for issues not regulated by this law, the provisions of the Law on Securing of Claims are applied, however, under the provisions of that law, it refers to the securing

of claims arising from contractual obligations between a debtor and a creditor. The confiscation of assets cannot be seen through the prism of a debtor-creditor relationship of the state with a person who has the power of disposal of illegal assets, not only due to the protection of the property interests of the persons involved in these proceedings, but also due to the possibility that the state may initiate confiscation procedures, instead of procedures for execution of obligations in cases when, in fact, there are debtor-creditor relationships between the state and citizens. Thus, for example, the state may initiate a civil proceeding for the confiscation, instead of an unpaid tax collection procedure, as part of the assets corresponding to the value of the unpaid tax may be considered to be assets that do not derive from legal sources. If one takes into consideration that the claims are time-barred under a statute of limitations, but the confiscation of assets is not time-barred, as well as the fact that under this law the state may apply investigative measures for the purposes of protecting property interests in civil proceedings where, under the same law, the burden of proof is reversed to the person who has the power of disposal of the assets, it is easy to notice how the state may very simply abuse this proceeding to circumvent the legal guarantees of peaceful enjoyment of ownership. It is inevitable to conclude that this poses a special risk of corruption.

1.4. Risks arising from intervention in the Law on Tax Procedure

As it was mentioned above, there is an overlapping of provisions of the Law on Confiscation of Assets in Civil Proceedings and the Law on Tax Procedure. Thus, Article 4 paragraph 6 of the Law on Confiscation of Assets in Civil Proceedings envisages that «if a special procedure for tax assessment is initiated for assets that are subject of a proceeding regulated by this law, it shall be terminated, and after the completion of the proceeding regulated by this law, the final decision passed according to this law is submitted to the tax authority". Thereby it should be taken into consideration that even in the tax procedure, the burden of proof is reversed to the person who has the power of disposal of the assets, and after the final outcome of the administrative procedure, the person has certainly the right to judicial protection of his/her rights and challenge the administrative act. A particularly serious problem in these cases would arise if both procedures are initiated at the same time, or if the tax procedure is approaching its end. If one takes into consideration that the same matter is regulated by both laws again, whereby within the tax procedures not the entire assets are confiscated, but only 70% of the value, it should again be interpreted that this is the law that is more favorable for the affected persons, which is contrary to the provisions of the Law on Confiscation of Assets in Civil Proceedings. This not only contributes to the reduction of legal certainty by the fact that the same matter is regulated by provisions in several laws, but additionally there is a deviation from the legal principles, thus the Law on Confiscation of Assets in Civil Proceedings by itself is declared to be a superior law in relation to other laws. Additionally, the uncertainty of the outcome of the procedures and the possibility of their sudden transformation from a tax procedure to procedure of confiscation of assets in a civil proceeding increases the risk for it to be abused, thereby increasing the risk of corruption and a conflict of interest.

1.5. Overlapping of provisions with the Law on Bankruptcy, the Law on Trade Companies and the Law on Obligations

Similar to the tax procedure, pursuant to Article 4, paragraph 5 of the Law, if bankruptcy procedure or liquidation procedure is initiated for assets that are subject of initiated proceedings regulated by this law, the monetization of the bankruptcy estate, that is, the execution is suspended until the final completion of civil proceedings for the confiscation of assets. Similarly, paragraph 7 of the same Article states that if assets that are subject of the proceeding regulated by this law are subject to right of lien, the creditor is notified about the initiated proceeding, the proceeding establishes that the claim exists, and the judgment establishes that the claim from the right of lien comes into effect on the day of the final

decision on confiscation of assets regulated by this law. It may be noted that the Law again gives priority to confiscation in civil proceedings also in cases where liquidation or bankruptcy has been initiated, and at the same time envisages special grounds for terminating the right of lien. In addition to the risks of corruption that arise from the lack of clarity of the legal regulation and the possibility for emergence of different practices, there is also a risk of abuse of the confiscation procedure to prevent and prolong the bankruptcy procedure and the liquidation procedure, as well as the manipulation of various property rights.

1.6. Lack of alignment with the provisions regarding the management of confiscated assets

Article 19 of the Law states that "the management of confiscated assets seized by a final court judgment in a proceeding regulated by this law is implemented according to the Law on Management of Confiscated Property, Proceeds and Seized Objects in Criminal and Misdemeanor Proceedings". However, taking into consideration that the Law on Management of Confiscated Property, Proceeds and Seized Objects in Criminal and Misdemeanor Proceedings itself explicitly states that it is applicable in the management of assets seized in criminal and misdemeanor proceedings, and not in all proceedings where assets are confiscated, we again encounter a situation where this draft law is in collision with other laws, this time giving more competences to the Agency for Management of Confiscated Property, than it is done by the Law on Management of Confiscated Property, Proceeds and Seized Objects in Criminal and Misdemeanor Proceedings, which in this case is lex specialis. Additionally, the Law envisages that the confiscated assets in the proceedings regulated by this law may be given to be used by public institutions and associations that perform work related to the realization of social goals, based on a decision of the Government of the Republic of North Macedonia according to law. Such a provision again envisages an alternative regulation of the procedure for managing confiscated assets, where the conditions and methods for determining which assets may be given to be used by public institutions and associations are explicitly envisaged. In this manner, the risks of corruption and a conflict of interest arise again from the unpredictability of which law should be applied in which situation.

2. RISKS ARISING FROM UNCLEAR AND IMPRECISE PROVISIONS IN THE LAW

2.1. Risks arising from undefined goals and principles of the Law

Article 2, paragraph 3, line 3 of the Law states that one of its goals is to enable an effective fight against organized crime and corruption, but nowhere else in the text of the Law are there any provisions indicating that the goal of the Law is precisely the suppression and prevention of organized crime and corruption. On the contrary, throughout the text of the entire law, it may be noted that it has a broader purpose and that it may be applied to all persons, regardless of their connection with organized criminal groups or corruption. On the other hand, the goal of preventing the power of disposal of illicit asset is already covered by the Criminal Code, thus the goals of the Law remain unclear. It additionally increases the confusion in terms of the scope of application of the Law, its relationship with other laws and regulations, as well as the overall clarity and predictability of the proceedings for the persons involved thereto.

Article 3, paragraph 4 envisage the principle of proportionality, which includes the amount of assets that may be subject of the proceedings, the burden of proof of the defendant, in particular, when determining the provisional measures for securing the assets. The principle of proportionality is usually included in criminal law, where the punishment is determined in proportion to the gravity of the crime committed and the degree of guilt and liability of the convicted person. However, it remains unclear how proportionality is established in civil proceedings for the confiscation, in particular, when reversing the burden of proof and determining provisional measures for securing the assets, especially if we take into consideration that our legal system does not function by applying evidentiary rules. Does this mean that the larger the assets that are covered in the proceedings, the more the burden of proof will be reversed or vice versa? On the other hand, if the principle of proportionality is applied when determining the amount of assets that may be subject of the proceedings, the question arises whether this principle conflicts with the goals of the Law, since they refer to preventing the power of disposal of illicitly acquired assets and their multiplying and investing in crime. In other words, in some cases, according to this principle, all illicit assets should not be confiscated if this leaves the person without any assets or without sufficient means of living. Thereby it is important to note that the Law is not clear in terms of the competences for the application of this principle, whether the public prosecutor and the Financial Police are bound by it in the course of the investigation stage, the State Attorney when filing a lawsuit and initiating court proceedings, or the court when making the decision. This framework set up in this manner, resulting from the introduction of a new type of principles and evidentiary rules within court proceedings, without them being properly defined, increases the risk of corruption in the application of this principle, both in terms of its abuse to cause damage to the persons involved in the proceedings, and its abuse to prevent the confiscation of all illicitly acquired assets.

2.2. Risks arising from imprecise definitions

Article 4, paragraph 4, mentions the rights of injured persons, who exercise their rights in a special proceeding according to law. However, the Law does not provide additional clarifications, nor any definition of what person would have the status of an injured person, since the confiscation of assets in civil proceedings is not a criminal or misdemeanor proceeding within which injured persons may appear. On the other hand, if the Law anticipates the existence of persons who would suffer damage or loss of a right as a result of asset seizure in confiscation procedure, it means that the law itself is expected to encroach on the legitimate rights of citizens. Additionally, nowhere in the text of the Law are the injured persons mentioned, whether and to what extent they may participate in the confiscation procedure, neither from whom they may claim compensation for the damage, nor in what proceeding they may do it.

The meaning of the terms used in the Law are covered in Article 5 and it may be noted that, even though the Law introduces practically a fully new and unknown concept in our legislation, it provides the definitions of few terms, and at the same time most of them are circular or tautological definitions. Thus, for example, the definition of the term "assets whose acquisition cannot be proven to be coming from legal sources" is "assets for which, in the proceeding regulated by this law, it cannot be proven that it was acquired from legal income and lawfully (legal sources)". Such imprecise definitions certainly contribute to increasing confusion when reading the Law, thereby increasing the risks of corruption and arbitrary interpretation and application of these provisions. However, if the linguistic ambiguity itself and the circular definition of terms are not considered, it may be noted that there is an incompatibility between the definition of "reasonable suspicion that the assets were not acquired lawfully" and the manner in which this term is used throughout the further text in the Law. Thus, according to the given definition, the same is "suspicion when the competent authority, according to this law, has determined that there is a difference between the value of the assets and the total realized legal income", that is, «reasonable suspicion of concluded fictitious or unencumbered legal acts governing the power of disposal of assets

whose acquisition cannot be proven to be deriving from legal sources and which are not a basis for acquiring assets lawfully". According to this, "reasonable suspicion" is a degree of doubt after the financial investigation has been conducted and evidence of the existence of fictitious legal acts and illicit origin of assets has been obtained, thus there are grounds for initiating court proceedings, whereby the State Attorney files a lawsuit.

Pursuant to Article 7, the public prosecutor, in cases where he/she cannot initiate criminal proceedings, and has a reasonable suspicion that the assets are not acquired from legal sources, will notify the Financial Police to initiate proceedings according to this law. Pursuant to Article 9, one of the conditions for initiating confiscation procedure in civil proceedings is that there is a reasonable suspicion that the assets are not acquired from legal sources. Hence, it is not clear how the public prosecutor, as early as when rejecting the criminal complaint or stopping the criminal investigation, will be able to assess whether there is a reasonable suspicion at this stage of the procedure, when the financial investigation to verify the assets has yet to begin. Similarly, if the condition for initiating a proceeding is the existence of reasonable suspicion, it would mean that certain evidence should have already been obtained.

For the most part, the Law refers to initiating a court proceeding as the beginning of the whole procedure, but in such a case it remains unclear in which procedure the financial verification is conducted, as well as in which procedure the State Attorney may submit a request for provisional measure for securing the assets before filing the lawsuit. Additionally, if it is considered that the procedure begins with the filing of a lawsuit and the initiation of court proceedings, then the persons whose assets are covered by the financial investigation will not have any rights during the course of it, nor get acquainted with the evidence and the case that has been initiated against them before the beginning of the court proceedings. Also, if it is considered that the procedure begins with the filing of a lawsuit, the question arises at which stage and in which procedure the Financial Police conducts the verification of the assets. In this regard, it is not regulated which conditions should be met in order for the Financial Police to begin a verification of assets, the implementation of which should result in the initiation of a procedure for the confiscation of assets in civil proceedings. Such unclearly formulated definitions regarding the beginning of the procedure have a great impact on the emergence of risks of corruption and a conflict of interest, not only because it makes it difficult to calculate all other deadlines that are related to the beginning of the procedure, but also because of the possibility of abuse and manipulation of deadlines in the procedure.

There is a similar situation with other definitions, for example, the person who has the right and obligation to prove that he/she acquired the assets from legal sources in a proceeding regulated by this law is defined as "affected person", but throughout the entire text of the Law this term is used interchangeably with the term "defendant". In this regard, it is not clear what rights in the proceedings the other affected persons would have, that is, those persons who have rights to the assets, but are not their owners. Such unclearly formulated definitions in the Law, together with the unclearly set goals and principles, give the impression that the legislator did not have the clearest idea of what and in what manner wants to achieve by passing this law. Hence, the persons included in these proceedings would face serious lack of clarity and very difficult navigation through the rules of proceedings, which poses a serious risk of corruption, the eventual occurrence of which is highly probable.

According to the legal definition of persons acting in good faith, it may be concluded that they "are persons who acquired or used assets coming from legal sources and lawfully by real monetary compensation equal to the value of the assets and did not know or could not have known that the assets were not previously acquired from legal sources." Here, one should take into consideration that the purpose of the Law is to prevent the power of disposal of illicitly acquired assets. In this situation, the question arises as to why persons who have given adequate compensation in order to acquire assets completely lawfully, should be involved in these procedures. If the persons have evidence of the manner

of acquisition of the assets, then they cannot be considered to have the power of disposal of illicit assets that do not correspond to their income and financial position. In fact, taking into consideration the previously stated problem with unclearly defined conditions for the beginning of the procedure, the question arises as to whether in such situations the condition of reasonable suspicion of the illicit origin of the assets, which is necessary to initiate a confiscation procedure, may be met. Accordingly, persons acting in good faith should not be involved in these procedures at all and be liable for the manner in which the assets were acquired before they lawfully passed into their ownership, but the subject of the procedure should be the person who sold the illicitly acquired assets, in order to deduct from him/her the monetary compensation he/she received as a result of transferring the assets to a third party. Here, one should also take into consideration that apart from the definitions, persons acting in good faith, their rights and manner of participating in the procedures is not regulated in the other part of the legal text, thus it remains unclear whether they are considered to be "affected persons" until the court, by a final decision, establishes that they are "persons acting in good faith". Such corruption risk occurs to the greatest extent due to the fact that the Law has made an inadequate attempt to transplant the in rem confiscation proceedings in our country, and taking into consideration that the entire essence of the Law is oriented around this, such risks of corruption arising from unclearly set provisions and rules permeate the whole legal text.

2.3. Risks arising from undefined deadlines

The above-mentioned problem regarding the confusion of the Law in terms of which stage this procedure begins, whether when the public prosecutor takes pre-investigative and investigative actions in criminal proceedings, before concluding that there is not enough evidence for criminal prosecution, whether when the first action by the financial verification of the assets is taken, or even after a lawsuit has been filed to initiate court proceedings, affects the difficult calculation of all other deadlines by which the parties in the procedure are bound. However, what is even more important is that the Law is not clear whether the deadlines for the actions of the authorities and institutions it envisages are instructive or preclusive deadlines. This is particularly important, since besides the fact that the Law envisages deadlines in which the institutions are obliged to act, it does not envisage consequences for any deviation from these deadlines, in particular the deadlines for beginning the investigation, completing it and filing a lawsuit. Thus, it could lead to occurrence of a double practice, where missing the deadline may be tolerated, but also where missing the deadline would mean the impossibility of beginning or continuing the confiscation procedure. If one takes into consideration the previously mentioned problem with the unclear beginning of the procedure, together with the absence of clear defining of deadlines as instructive or preclusive, as well as the great impact this may have on the procedure, these provisions contain risks of corruption and a conflict of interest.

In this context, it is also important to note that the Financial Police is obliged to conduct the investigation, that is, the procedure for gathering evidence and data on the assets, within 60 days, or 90 days if it is a complex case. In addition to the previously mentioned risk, with view to the absence of any provisions that regulate the situation arising from missing this deadline, there is a special risk arising from the absence of a definition of which cases may be considered complex cases, or a reference to a by-law or other legal act regulating this matter. Taking into consideration that it is a difference of 30 days, in a situation where very short deadlines are envisaged, it is necessary to make a clear distinction when the Financial Police is bound by the 60-day deadline and when by the 90-day deadline.

2.4. Risks arising from unclearly regulated conditions for beginning the procedure

To follow up on the problem of determining the beginning of the procedure, Article 9 of the Law envisages that the procedure is initiated provided that the following cumulative conditions are met:

- there is a suspicion that the assets are coming from illegal sources; and
- there is a disproportion between the net value of the assets and the available legal and reported income for the acquisition of the assets, expressed as a cumulative difference that exceeds 13,000 euros in Denar counter value based on the average exchange rate of the National Bank of the Republic of North Macedonia, calculated annually in a period of time no longer than 10 years before the acquisition of the assets, or before the commission of the criminal offence for which there is a suspicion to be related to the assets.

Based on the quoted provision, it may be noted that it is rather unclear in terms of whether the value of the person›s entire assets is calculated, or only of a part of the assets for which there a suspicion to have been acquired illicitly. As a result, a different practice of action may occur, and thus increase the risk of corruption or a conflict of interest.

3. RISKS ARISING FROM BROAD AND DISCRETIONARY POWERS AND OVERLAPPING OF COMPETENCES

As it may be noticed in the previous sections of this Anti-Corruption Legislation Review, there is a high degree of unclearly defined legal concepts and an inadequately adapted model of confiscation of assets to the domestic conditions, legal framework, existing institutions and mechanisms available. Thus, in addition to the overlapping of legal provisions with other laws, their incompatibility, and expansion or limitation of the provisions of other laws and unclear legal terms and definitions, one may also notice inadequate regulation of the powers and actions of competent authorities and institutions that are involved in certain stage of this procedure.

3.1. Risks arising from a broadly defined scope of assets that may be subject of the proceedings

The scope of the assets that may be subject of the proceedings is envisaged under Article 6, thus according to these provisions, the competence of the domestic authorities is established for "assets inside or outside the Republic of North Macedonia that is owned by natural persons who are citizens of the Republic of North Macedonia, foreign citizens with residence in the Republic of North Macedonia, stateless persons with residence in the Republic of North Macedonia or legal entities registered in or outside the Republic of North Macedonia". According to this, it follows that the state establishes competence for determining the legal origin of assets outside the state, which is owned by foreign citizens, or by legal entities registered outside the state. This not only sounds controversial in terms of the sovereignty of the states and the rules for establishing local and real jurisdiction, but also raises the question of the practicality of such provisions, and certainly, the possibility of their abuse.

3.2. Risks arising from discretionary powers and overlap of the competences of the public prosecutor and the Financial Police

Pursuant to Article 7, when the public prosecutor stops the criminal investigation because there is not enough evidence or there are other reasons that make criminal prosecution impossible, and when there are conditions for beginning a confiscation procedure, he/she is obliged within eight days of stopping the investigation "to submit an initiative to the Financial Police Office, together with all the obtained documentation for examination and gathering of data on the sources and manners in which the assets was acquired." In this regard, it is important to take into consideration that the Public Prosecutor's Office in the course of the investigation stage can also apply special investigative measures, which would be used to gather data on the origin of the assets, but not on the criminal liability of their owner, thus again the state will be able to use such evidence in civil proceedings to determine the assets. Article 10, on the other hand, envisages that the competent authority for gathering data on assets whose acquisition is not coming from legal sources is the Financial Police. Additionally, the same Article envisages that a procedure may begin when any person submits an initiative to the Financial Police, but also to the Public Prosecutor's Office if the submitter believes that submitting an initiative to the Financial Police would jeopardize the procedure. At this stage, it may be noted that there is a sharing and overlapping of the competences of the Public Prosecutor's Office and the Financial Police, both in terms of gathering evidence and in terms of managing the investigation, without a clear distinction and hierarchy as it has been done in the Law on Criminal Procedure. It is particularly important that there are no special provisions that would regulate the exemption of public prosecutors or persons from the Financial Police who in charge of conducting investigative actions. Such overlapping of competences, followed by the absence of provisions regulating the conflict of interest and the conflict of competences in general, may lead to a positive, but also to a negative conflict of competences, thus the risks of corruption and a conflict of interest are also present in these provisions.

The situation is additionally complicated by the provisions of Article 11, according to which the Financial Police, after establishing that the conditions for beginning the procedure for the confiscation of assets are met, submits a report to the Public Prosecutor's Office. The provision formulated in this manner indicates that the Financial Police notifies the public prosecutor only if it considers that the conditions of Article 9 of the Law have been met, and not in every case once the investigation is completed. Taking into consideration the tradition of form's sake and literal interpretation of legal provisions, it is not difficult to assume that a practice may soon arise where such notifications are not delivered in case when the Financial Police does not gather sufficient evidence. Thus, for example, the majority of public prosecutors do not submit a request for the confiscation of assets in criminal proceedings, only because the Law does not explicitly require them to do it, which is also one of the factors that affects the low number of criminal confiscation decisions[9]. Hence, there is a risk of corruption and a conflict of interest, as well as inefficiency of the system for the confiscation in civil proceedings.

In addition, the public prosecutor is the one who ultimately decides whether the conditions of the Law are met, thus if they are met, he/she submits an initiative to the State Attorney, who then, according to paragraph 5 of Article 12, may request the Financial Police to gather additional evidence and data. Based on these provisions, it is again not clear whether the public prosecutor should also notify the State Attorney in case when he/she considers that the conditions of Article 9 are not met. This is important because the Financial Police has considered that the conditions have been met, which is why it submitted the report to The Public Prosecutor's Office. In this regard, it is unclear what type of decision the public prosecutor makes in a case when he/she considers that the conditions of the Law have not been met, as

9 Natali Petrovska, Darko Avramovski – Practical Implementation of Confiscation Measure in Criminal Proceedings in the Republic of North Macedonia, Coalition All for Fair Trials, Skopje 2021

well as whether there is a right to appeal such a decision at all and who would have this right. Finally, it is unclear whether the public prosecutor may ask the Financial Police to gather additional evidence, since according to the Law on Criminal Procedure he/she may issue such orders, but this proceeding is not conducted according to the rules of criminal proceedings, and yet he/she is the competent authority for making a final decision on whether the evidence will be submitted to the State Attorney.

3.3. Risks arising from broad discretionary powers of the State Attorney

The State Attorney, who has the authority to request the Financial Police to gather additional evidence, which is discussed as a risk of corruption in the section on the overlapping of legal provisions, also has the discretionary right not to initiate proceedings if he/she considers that the conditions of the Law are not met. This is the third actor in a row who may decide that the evidence to proceed with the procedure is not sufficient, and it is particularly unusual to come across so many actors who may make a discretionary decision to change the course or stop the procedure. Unlike the Public Prosecutor's Office and the Financial Police, the State Attorney is obliged to notify the public prosecutor and the Financial Police if he/she decides not to initiate a proceeding. However, these actors cannot do anything after the State Attorney makes such a decision, even though it is obvious that they have considered that the conditions have been met and the proceeding should be initiated. In this regard, there are large discretionary powers of the State Attorney, which, in the same way as the powers of the public prosecutor and the Financial Police, in the absence of provisions to regulate the conflict of interest, contribute to an increased risk of corruption.

Article 12 paragraph 3 and Article 13 paragraph 5 of the Law provide a possibility for the State Attorney to request the payment of cash in the amount of the value of the assets if the illicitly acquired assets are mixed with other, legally acquired assets which, if confiscated, will disproportionately reduce their value or their functionality, or if withdrawal is not possible or would be accompanied by difficulties. An attempt was probably made here to introduce the concept of value confiscation which is a concept of confiscation within the criminal proceedings, but the legal text uses the expression "payment of cash" and not confiscation of other assets of appropriate value. On the other hand, value confiscation does not mean the possibility for the state to choose whether to confiscate specific assets or a certain amount of money, but it is applied only when it is impossible to determine exactly which assets were acquired illicitly, but the value of the illicit assets is known. Taking this into consideration, as well as the fact that the point of confiscation in civil proceedings under this law is to seize assets that is disproportionate to a person's income, any assets, including cash of a certain value, can be seized under the law. This provision contributes to the confusion with a view to whether the state still has to prove the connection of specific assets to a criminal offence. On the other hand, through the application of this provision, if the payment of cash in a certain value is requested, and if the defendant does not pay, the state will have to try to collect these claims through the enforced collection procedure. Here again, it should be noted that the confiscation of illicitly acquired assets cannot be seen through the lens of a debtor-creditor relationship.

To follow up on this, it is not clear how the State Attorney will make a decision whether to confiscate certain assets, or to request the payment of cash, in particular if one takes into consideration that the investigation and gathering of evidence is conducted by institutions and authorities having the capacity to gather such evidence and locate illicitly acquired assets and the investigation has not indicated the need to confiscate monetary value or demand payment of cash. Taking this into consideration, the discretionary right of the State Attorney to decide whether to request the confiscation of certain assets or monetary value, as well as the effects of such a decision on the overall procedure, poses a risk of corruption and a conflict of interest.

3.4. Risks arising from the discretionary powers of the Minister of Finance

Article 9 states the conditions for beginning a confiscation procedure according to this law, and among other things, it states that "to determine the net value of the assets, the Minister of Finance adopts a methodology for the net value of the assets, which calculates the amount of the cash spent for acquisition of the assets, the taxes and contributions paid, the living expenses, the compensation for the transfer, that is, the acquisition of the assets and the compensation corresponding to the value of the assets". The envisaged method of calculating the value of the assets according to the methodology adopted by the minister is unacceptable in terms of several aspects, but mainly because it leaves great discretionary powers to the minister in charge of adopting and changing the methodology. At the same time, based on the wording of the provision itself, it may be concluded that the methodology actually represents a practical guide on how to determine not only the value of the assets, but also whether it corresponds to the legal income of the person, something that should be in the exclusive competence of the court. Thus, the question arises whether the court is bound by this methodology or has the possibility to make a free decision. In other words, if the value of certain assets determined according to the methodology adopted by the minister is challenged by evidence that indicates that the assets have (l) a lower value, will the court be able to give credence to this evidence and consider that the methodology does not adequately reflect the real situations, or will it have to ignore such evidence because it is clearly contrary to the predetermined method of calculating the value of the assets?

Taking into consideration that such uncertainty arising from inadequate distinction of competences poses a high risk of corruption and a conflict of interest, the value of the assets must not be determined according to an instruction or any act, but must be determined by financial investigations and financial expertise, presented in the court proceedings, as it is an obligation for every other plaintiff in civil proceedings, and in fact it is also a method of determining the value of illicitly acquired assets in criminal proceedings. The state must not have privileged treatment, nor find a way to circumvent procedural guarantees in order to facilitate the actions of state authorities, no matter how noble the goal it wants to achieve is. Taking this into consideration, there is a serious risk of corruption and abuse of the discretionary powers of the Minister of Finance by adopting and changing the methodology for determining the net value of the assets, the legal income of the persons who have the power of disposal of the assets, the costs and the compensation paid for the acquisition of the assets.

4. LACK OF PROCEDURAL GUARANTEES

Based on the above-mentioned, it may be noted that the Law does not pay attention to the protection of the rights of persons involved in these proceedings at all, thus there is no provision in the text as to which persons have passive legitimation in these proceedings, that is, against which persons the proceeding is initiated, that is, the lawsuit is filed. Flirting between an in rem proceeding initiated against certain assets and a civil proceeding against a person whose right of ownership over certain assets is disputed, the Law forgets to regulate the rules of proceedings and to envisage the rights and procedural guarantees and other safeguards which would prevent the abuse of the Law. Thus, the law is exclusively oriented towards regulating the competences and actions of the state authorities and regulating the conditions under which the proceedings is initiated and the manner in which it is conducted, and all for the purpose of giving a free hand to the institutions and state authorities to promote the application of the confiscation of assets.

4.1. Absence of time-limits provisions and retroactive application of provisions

The law does not contain any provisions referring to its retroactive application, thus taking into consideration that the purpose of the confiscation is to seize assets over which the person has no right of ownership at all as it derives from illegal sources, it remains unclear whether and to what extent the law will have the possibility to target assets acquired before its entry into force. It is particularly significant if one takes into consideration that it is possible that there had been criminal proceedings conducted within which evidence of the illicit origin of assets, but not of the person's guilt was discovered, which is why the investigations were stopped, thus it remains unclear whether on the basis of the same evidence it is possible to initiate civil proceedings for the confiscation. It should be noted here that it is not unknown for this type of laws to have retroactive application, which is explicitly stated in the provisions, but in our case, for the application of the Law, it is also necessary for the Minister of Finance to pass a by-law, but it is very unlikely that this by-law may be applied to recalculate the value of a person's assets and income based on evidence that had been gathered previously.

In this regard, the Law does not contain any provisions referring to time-limits on the verification of assets, that is, according to the Law, any assets can be subject to verification, regardless of how long ago it was acquired. Taking this into consideration, Article 5, paragraph 4, contains a provision according to which "inheritance of assets does not constitute grounds for acquiring assets lawfully if the assets of the testator cannot be proven to have been acquired from legal sources". Such a provision again intervenes in other laws, since according to domestic law, inheritance is an accepted form of acquisition of the right of ownership, therefore very provision contributes to legal ambiguity. But what is even more concerning in this situation is that in this manner the excessive confiscation of assets that was acquired a long time ago is put at risk. Thus, assets that were acquired several generations ago, in particular if it is movable property of greater value, such as paintings, rare objects or jewelry, they may be confiscated if they are found to be the subject of this proceedings, as the person will not be able to find enough evidence to prove the legal origin of the assets he/she inherited, which were acquired long before he/she was born. Taking into consideration the discretionary powers, the absence of provisions to prevent conflict of interest and bias, such provisions may be abused to achieve personal or political goals.

4.2. Absence of precise provisions for establishing passive legitimation and other interested persons

The law does not contain any provisions for a more detailed regulation of who is a holder of passive legitimation and which persons could be involved in these proceedings. As it was mentioned above, the law uses the terms "defendant" and «affected person» interchangeably, whereby the definitions clarify only the term "affected person", as a person "who has the right and obligation to prove that the assets are acquired from legal sources in a proceedings regulated by this law". Such clarification does not give a very clear picture of the holder of passive legitimation, but through the analysis of the entire legal text, it follows that the "affected person" is actually the defendant who is registered as the legal owner of the assets, or if the assets have no legal owner, as the person who has the power of disposal of the assets. Hence, the Law does not pay attention to others, third parties who may have certain real and other rights over the assets and does not envisage their participation in these proceedings. On the contrary, the Law even intervenes in the Law on Ownership and Other Real Rights, thus Article 4, paragraph 7 envisages that in cases when the subject of the proceedings are assets on which there is a right of lien "it is established that the claim exists, and the judgment establishes that the claim from the right of lien comes into effect on the day of the final decision on confiscation of assets regulated by this law". The creditor is notified of the proceedings and has the obligation to initiate a procedure for realization of the right of lien within 30 days. In addition to the fact that this provision is unclear in terms of whether the creditor will realize the

right from the confiscated assets, since there are no provisions in the Law referring to this, this provision is contrary to Article 232 of the Law on Ownership and Other Real Rights which states that when there are several different lien rights on the same item, the order in which they will be settled is determined according to the order in which they are registered in a public record. Additionally, it is not clear whether the creditor has the possibility to request a revert to former state if he missed the 30-day deadline for justified reasons.

The absence of such provisions practically makes it impossible for third parties who have any rights over assets that are subject to confiscation in civil proceedings, to ensure efficient and effective judicial protection of their rights, since they do not have the possibility to participate in the proceedings in which their rights are being decided on. This not only contravenes Article 6 of the European Convention on Human Rights and Article 1 of Protocol 1 of the ECHR, but also poses a high risk of corruption and a conflict of interest, in particular if we take into consideration the broad context and provisions of the Law.

4.3. Absence of definition of the rights and participation of the affected persons in the proceedings

The Law has not introduced any provisions that envisage any obligation for any authority to send a notice to the defendant neither when the investigation has been started, nor when it has been completed, not even in a case when a request has been submitted for securing the assets, despite the fact that it has many features of a criminal investigation. Taking into consideration that it does not regard claims in the true sense of the word, as well as the fact that the assets of third parties may be affected by these measures, it is necessary to introduce special provisions for their participation and procedural guarantees in the procedures for the provisional measure for securing the assets subject to civil forfeiture. In such a situation, certainly, the Law should be adopted with a two-thirds majority as it already seriously interferes with the regulation of court proceedings. Even though the Law refers to the Law on Civil Procedure and the Law on Securing of Claims, however, if one takes into consideration the entire nature of this procedure, the involvement of the criminal prosecution authorities, the unlimited time application of the Law, as well as the threatened consequences on the assets of the person who is affected by the procedure, it is necessary to have adequate guarantees for his/her involvement in the procedure at an earlier stage, in order to avoid the risks of corruption and abuse of the Law.

The absence of significant guarantees is also evident in Article 8, which is intended to establish some limit for the application of this law, thus envisaging that gathering and analysis of evidence and data to determine the illicit origin of assets may only be connected when there is a suspicion of some criminal offences. However, the Article does not limit the possibility of initiating such proceedings, as in addition to an enumerated list of some criminal offences, it also contains a general wording that includes all criminal offences by which one may acquire proceeds of crime. In terms of this Article it is interesting that it also includes criminal offences by which one cannot acquire proceeds of crime, such as sexual assault on a child. Hence, it seems that this Article is completely unnecessary since it does not limit the application of the provisions of the Law only to the most serious forms of organized crime and corruption, and it does not even envisage what degree of suspicion of a criminal offense should be met in order to be able to initiate the proceedings.

Article 14 states the rights of the defendant, whereby stating that he/she has all the rights as a party under the Law on Civil Procedure, but also the second paragraph of the same Article states that the burden of proof that the assets were acquired from legal sources is on the side of the defendant in the proceedings. This contravenes with Article 208 of the Law on Civil Procedure, under which the rule of reversing the burden of proof applies only when some fact cannot be established with certainty. Precisely as a result of this, besides provisions in other laws similar to these one, such as reversing the

burden of proof in proceedings to determine discrimination, there are other provisions indicating that the plaintiff is obliged to present sufficient evidence to reach a certain threshold of proof or probability for the existence of discrimination, before the burden of proof is reversed. Hence, it is necessary for the Law to regulate the degree of proof that is required to be achieved by the state, that is, to envisage the obligation for the state to present sufficient evidence indicating that the assets probably do not derive from legal sources. The given wording states that the court automatically accepts the evidence and the state's case theory as correct, whereas the defendant must fully prove the legal origin of the assets.

Furthermore, Article 18 stipulates that the person against whom a measure for securing the assets has been imposed has the right to use the assets for which the measure has been imposed until the final decision upon the lawsuit, within the limits of providing for his/her essential living needs. In this section, it is unclear what the purpose of the measures for securing the assets is if the power of disposal of the assets is allowed, in particular since under the referenced Law on Securing of Claims, a ban on use and power of disposal may be established, which is a measure contradictory with the provisions of this draft law. Additionally, there are no provisions that refer to who exercises the control of whether the power of disposal of the assets is within the limits of providing for the essential living needs, or it is a question of a deliberate reduction of the value. It is particularly problematic if one takes into consideration paragraph 5 of the same Article, according to which "the defendant is not liable for the reduction of the value of the assets that comes as a result of its regular use, but is liable for caused damage and destruction of the assets." In this context it is not clear whether he/she is liable for any damage or destruction of assets, as in cases of vis major, fault of another, unintentional damage, hidden defects and deficiencies, etc., or only if it is done with the intention of reducing the value.

5. RISKS ARISING FROM THE ABSENCE OF ADEQUATE CONDITIONS FOR THE APPLICATION OF THE LAW

A separate cluster of risks of corruption may arise in the course of the practical application of the Law, due to the lack of adequate resources and knowledge for the proper implementation of this concept of confiscation in North Macedonia. It means that such risks are related to the very concept and essence of the Law, that is, they are not related to a specific article of the Law.

5.1. Risks related to the capacities of the Financial Police

Taking into consideration that according to the Law, the competent authority for gathering data and evidence on the origin of assets is the Financial Police, as well as the fact that any person may submit a report, that is, notification of suspicion of the existence of illicit assets, directly to the Financial Police, which in turn is bound by extremely short deadlines for action, the question arises whether the urgency of these proceedings will jeopardize the actions of the Financial Police in criminal proceedings. As a comparison, Article 301 of the Law on Criminal Procedure envisages that the criminal investigation shall be completed within 6 months, a deadline which may be extended an additional 6 months, and in exceptional cases an additional 3 months, whereas in the proceedings related to organized crime and corruption, the criminal investigation may be extended an additional 6 months. Based on the legal text it is not clear why this proceeding is prioritized in the investigation and evidence gathering stage at the expense of criminal proceedings, where not only can there be measures for securing assets, but also measures for securing persons, which makes criminal proceedings a far higher priority.

On the other hand, this arrangement also leaves a special risk that criminal proceedings will be abandoned and completely replaced by confiscation of assets in civil proceedings, and even the already

rare confiscation in criminal cases may disappear completely due to the burden on the capacities of the Financial Police to conduct verification of assets following previous reports from citizens for the purposes of confiscation in civil proceedings. In this regard, the regulatory impact assessment does not envisage that financial and other resources are not needed for the successful implementation of the Law, which means that there is an expected increase in the workload of the Financial Police, shortening of the deadlines in which they are obliged to act, but not strengthening its capacities in order for them to be able to handle the large influx of cases that they must solve in a relatively short period of time. This poses a double risk, that is, it poses a risk of reducing the quality of financial investigations and gathering evidence of illicit origin of assets, which certainly does not go in the direction of suppressing corruption and organized crime, but also extremely short deadlines considered in the context of other risks regarding discretionary powers, unclear proceedings and absence of procedural guarantees additionally increase the risks of corruption and a conflict of interest.

5.2. Risks related to the capacities of the State Attorney's Office and the courts

Similar to the case of the Financial Police, in the procedure for adoption of the Law on Confiscation of Assets in Civil Proceedings, no attention was paid to the consequences that would be also felt by the State Attorney's Office and the courts in the application of the Law. It has been well known for a long time that there is a shortage of judges, particularly in the courts located outside of Skopje, and this shortage is constantly increasing[10], whereas based on the annual reports on the work of the State Attorney's Office it may be noted that it, like other authorities, works with reduced capacities, that is, with 47 instead of 56 state attorneys, whereas in some regions there are no state attorneys at all[11]. And again, there is no single projection of the number of expected cases that would be initiated under this law in order to make an adequate projection of the necessary number of additional human and material resources to cope with the increased workload. In this regard, it is important to note that the majority of the cases handled by the State Attorney's Office are exactly in civil procedure, and what is even more important, their number is constantly increasing, which means that the State Attorney's Office is already facing a problem in terms of the workload in civil procedures, which according to this law is expected to increase additionally.

In addition, the question arises about the individual and functional capacities of the state attorneys to conduct this type of proceeding, which is a novelty in our law. Even though the Law calls the proceeding civil, it may still be noted that it looks more like criminal proceeding, which entails involving the criminal prosecution authorities and conducting a financial investigation and gathering evidence on the origin of the assets of a certain person. In this regard, state attorneys may give instructions to the Financial Police to gather certain evidence, and they even have the authority to assess whether there is a suspicion that certain assets shall be wasted and accordingly propose measures for securing the assets. Here, the question may be raised of whether the state attorneys have enough experience and knowledge to be able to evaluate the existence of suspicion, or to assess whether certain evidence will be sufficient to prove an illicit origin, or whether it is necessary to gather new ones, as these things are usually under the jurisdiction of public prosecutors, and state attorneys, except for limited cases and in a limited capacity, do not participate in criminal proceedings at all.

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5.3. Risks related to the capacities of other authorities

These risks are related to the fact that there are no adequate citizens' asset registers, which refer to both immovable property and movable property of citizens. This is particularly evident in a part of rural areas where there are neither urban plans, nor proper registration of buildings and other property, and it is particularly complicated by the procedures for determining the status of an illegally constructed building. This not only complicates the gathering of evidence by the state authorities, but also seriously complicates the gathering of evidence on the legal origin of the assets by the citizens whose assets are the subject of these proceedings. Additionally, the functionality of the state administration system should also be taken into consideration, such as the difficult access to documents and evidence for citizens in order for them to be able to easily obtain evidence, in particular for immovable property that they have in the family for generations, especially if it is a matter of paintings and other objects whose value is extremely difficult to determine, and in certain cases it is impossible to prove when and how they were acquired. In this regard, it is important to take into consideration that despite the fact that the criminal proceedings provide far greater procedural guarantees for the participation of the defendants in the investigative stages of the proceedings, as well as special guarantees and the possibility of conducting an independent investigation by the defendant himself/herself, such provisions are not applicable in practice at all. This results from the great unfamiliarity of state authorities and institutions with such a possibility and the great mistrust that the institutions themselves express towards the citizens who request from them data and evidence, as well as the unfamiliarity of the citizens with the competences of the institutions themselves and lack of knowledge in terms of which authority or institution they should contact in which cases. Moreover, such situation is conditioned by the fact that the state apparatus itself does not have the capacity to provide easy access to necessary data and evidence, in particular when it needs to be done in extremely short deadlines.

According to the legal text, as it was mentioned, the burden of proof is reversed to the person who claims to have a power to dispose of the assets legally, whereby it is unclear whether and to what extent the state has to prove their illicit origin. In addition, a condition for the proceedings to be initiated is the existence of a suspicion, which is arbitrarily determined by a criminal prosecution authority, but also if the value of the person's assets is 13,000 euros more than his/her income in the past 10 years. Besides the fact that such a provision is not clear enough, something that was discussed in the section under point two is that the same provision envisages an extremely low value of the assets for which proceedings may be initiated (13,000 euros annual difference), thus the state has a great freedom to initiate or not to initiate such proceedings in many cases. Thus, if the above is taken into consideration in correlation with all other detected risks of corruption and a conflict of interest, there is a serious risk that the Law will be abused and used for personal or political purposes in order to cause damage, or that a certain person will be forced to do or suffer something, whereby the same action is presented not as a criminal prosecution and imposition of any sanction, but only as a control over the assets by the state.

Finally, if one takes into consideration the provisions of Article 14, paragraph 3 that the defendant's statements and the evidence presented in the course of this proceeding cannot be used to initiate criminal proceedings against him/her, it must be noted that there is also a completely opposite risk of corruption, that is, the Law being abused and being applied instead of the Law on Criminal Procedure. It means that in cases when there is sufficient evidence to initiate criminal proceedings, in which, in addition to confiscation, there is a threat of imposing imprisonment and fines, it may still be decided to initiate civil proceedings for the confiscation. Thus, as soon as the confiscation procedure is over, the evidence will no longer be able to be used to establish criminal liability and thus grant de facto pardon, that is, amnesty from criminal prosecution for a certain person.

CONCLUSIONS AND RECOMMENDATIONS

If the above comments are taken into consideration, one gets the impression that the whole law was passed in order to facilitate the action and the degree of involvement and commitment by the public prosecutors and the Financial Police, in the hope that the lowering of the standards for proving the illicit origin of assets by the state will bring about a greater number of imposed confiscation measures. Throughout the entire text, there are no adequate guarantees regarding the citizens who could be affected in these proceedings, there are no control mechanisms over the actions of the authorities and institutions, as well as provisions to limit the application of the Law. Additionally, it is extremely unclear in many aspects, it overlaps with many other valid laws and gives the impression of an indelicately transplanted concept, which does not seem to be fully known even to the legislator. As a result of this, as well as the discretionary powers of the state authorities envisaged by the Law, one gets the impression that this law is an attempt to circumvent procedural guarantees and the necessary commitment of the state when conducting thorough criminal and financial investigations.

This situation is complemented by the extremely large number of indicated risks of corruption and a conflict of interest in the legal provisions themselves, as well as confusing and circular regulation of proceedings, competences, and even key concepts and the very beginning of the procedure that is established under the Law. The very concept proposed by the Law is not clear enough and it looks more like selectively taking certain parts of certain non-conviction-based confiscation proceedings and forcibly merging them into one proceeding, which by itself is illogical and brings extremely high risks of abuse and inadequate application. As a result of all this, it is practically impossible to provide specific directions for improving certain provisions of the Law in order to improve it, to enable its application and to reduce the risks of corruption and a conflict of interest.

The final conclusion is that the state should improve the already existing mechanisms for asset control and strengthen the practical application of confiscation of assets in criminal proceedings, as well as in cases when it is not possible to conduct criminal proceedings under the rules of the Law on Criminal Procedure, instead of opting for revolutionary solutions, which in this form and in the context of our country will cause many more problems than contribute to overcoming the existing ones. Hence, the only recommendation is that the law be repealed even before the beginning of its application and that the state devote serious attention and effort to enabling greater use of confiscation within criminal proceedings, even when it is not possible to conduct criminal proceedings, as well as to strengthen the asset control under the existing legal provisions.