**DRAFT**

**LAW AMENDING THE LAW ON CONFISCATION OF MATERIAL BENEFIT DERIVED FROM CRIMINAL ACTIVITIES**

**Article 1**

The words: "and Property of Illegal Origin" shall be inserted in the title of the Law on Confiscation of Material Benefit Derived from Criminal Activities (Official Gazette of Montenegro, nos. 58/15 and 47/19), after the word "Activities".

**Article 2**

In Article 1 para. 1, the words: "conditions for confiscation of material benefit derived from criminal activities" shall be replaced by the words: "financial investigation and conditions for confiscation of material benefit derived from criminal activities and property of illegal origin", after the words: "such material benefit", the following shall be added: "or such property," and after the words: "derived from criminal activities" a comma shall be added, followed by the words: "property of illegal origin."

**Article 3**

In Article 2 para. 1, at the end of item 11, full stop shall be replaced by a semicolon and a new item shall be inserted worded as follows:

"12) Other criminal offences committed with wrongful intent punishable by five years of imprisonment or more if material benefit derived from criminal activities or property of illegal origin result therefrom."

**Article 4**

After Article 2 there shall be inserted the following Article:

**Conditions and Mode of Confiscation of Property of Illegal Origin**

**Article 2a**

 Property of illegal origin may be confiscated from a person for whom there are grounds for suspicion to have committed the criminal offence referred to in Article 2 para. 1 of this Law (hereinafter referred to as "the suspect") if there is a reasonable suspicion that it was acquired illegally and if the legality of its origin is not proven.

The property referred to in paragraph 1 of this Article shall also be confiscated from legal predecessors, legal successors and family members of the persons referred to in paragraph 1 of this Article, as well as from third persons.

If the property referred to in paragraph 1 of this Article was acquired for another person, that property shall be confiscated.

Where the confiscation of property referred to in paragraph 1 of this Article is not possible, other property corresponding to the value of the property of illegal origin shall be confiscated."

**Article 5**

The title of Article 3 shall be amended to read as follows: "Material Benefit Derived from Criminal Activities."

Paragraph 2 of Article 3 shall be deleted.

**Article 6**

After Article 3 there shall be inserted the following Article:

**"Property of Illegal Origin**

**Article 3a**

Property of illegal origin means property that is not proven to have been legally acquired.

 Property shall be considered not acquired legally if there is an obvious disproportion between its value and the lawful income of the suspect and the person referred to in Article 2a para. 2 of this Law, after deduction of taxes and contributions paid for the period in which the property was acquired.

Value of the entire suspect’s property as well as the property that was transferred to third persons or merged with their property or passed to legal successors shall be taken into consideration when determining the disproportion.

Property shall be considered to be of illegal origin if it is transferred to family members without remuneration or with remuneration that does not correspond to its actual value."

**Article 7**

After Article 4 there shall be inserted the following Article:

**"Confiscation of Property of Illegal Origin Procedure**

**Article 4a**

The financial investigation for confiscation of property of illegal origin shall be conducted by the state prosecutor’s office in charge of conducting the procedure for the criminal offence referred to in Article 2 para. 1 of this Law.

 Seizure of property of illegal origin (provisional measures to preserve assets and seizure of movable property) shall be conducted in accordance with this Law.

The procedure of confiscation of property of illegal origin shall be conducted in accordance with this Law and the Law on Civil Procedure, and it shall be initiated by the Protector of Property Interests of Montenegro (hereinafter referred to as "the Protector").

The procedure of confiscation of property of illegal origin may also be conducted after the conviction in criminal proceedings becomes final."

**Article 8**

Article 5 shall be amended to read as follows:

"Courts of appropriate jurisdiction shall decide on the seizure and confiscation of material benefit derived from criminal activities or property of illegal origin.

The tasks of tracing material benefit derived from criminal activities or property of illegal origin shall be performed by the state prosecutor’s office and the organisational unit of the state administration body in charge of internal affairs which is performing police tasks (hereinafter referred to as "the police").

The tasks of managing confiscated material benefit and items seized in criminal and misdemeanour proceedings, as well as of property pledged to the court as bail shall be performed by the administrative body in charge of state property management (hereinafter referred to as "the competent body").

The competence of the state prosecutor's office in proceedings referred to in paragraphs 1 and 2 of this Article shall be determined according to the competence to conduct proceedings for the criminal offence referred to in Article 2 para. 1 of this Law.

Bodies referred to in paragraphs 1, 2 and 3 of this Article shall act with urgency."

**Article 9**

Article 7 shall be amended to read as follows:

"The terms used herein shall have the following meanings:

1) *Instrumentality of a crime* means the actual item which was used or intended for use, in whole or in part, for the commission of a criminal offence, or an item arising out of the commission of a criminal offence;

2) *Property* implies property rights of all types, irrespective of whether they relate to assets of tangible or intangible nature, movables or immovables, securities and other documents which serve to prove property rights;

3) *Accused person* means a suspect, a person against whom criminal proceedings have been instituted or a person convicted of a crime under Article 2 para. 1 of the present Law;

4) *Holder* means the accused person, suspect, legal predecessor, legal successor or family member of the accused person or a third person;

5) *Third person* means a natural or legal person to whom material benefit derived from criminal activities or property of illegal origin has been transferred without remuneration or for remuneration which manifestly does not correspond to the actual value of the material benefit or property and who knew or could have known that the material benefit has been derived from criminal activities or that the property is of illegal origin or who or ought to have known that;

6) *Legal predecessor* means a natural or legal person whose property rights have been transferred to the holder;

7) *Legal successor* means heir of the accused person, suspect, third person or his heirs, or a natural or legal person to whom property rights have been transferred by means of a legal transaction;

8) *Injured party* means the person whose personal or property right was infringed or threatened by the criminal offence;

9) *Defence counsel* means the attorney representing the accused person or the suspect in the confiscation procedure of material benefit derived from criminal activities or property of illegal origin;

10) *Legal representative* means the lawyer who is authorized to represent the legal predecessor, legal successor, or accused person’s family member, or the suspect or a third person;

11) *Bona fide third party* means the person that has been demonstrated to have a right in relation to the material benefit or property subject to confiscation which prevents the confiscation thereof or who at the time of acquisition of such right did not know, could not have known or was not obliged to know that the material benefit has been derived from criminal activities or that the property is of illegal origin;

12) *State body* means state bodies, state administration body, local government body, local administrative body and holders of public authorities and public services."

**Article 10**

In the title of Chapter II, Article 13 para. 2, the title of Article 14 and Article 14 paras.1 and 2, Article 17, Article 19 paras. 1 and 2, Article 20 para. 1, Article 25 para. 1 item 5, Article 26 para. 3, the words: "material benefit derived from criminal activities" in different case forms shall be replaced by the words: "material benefit derived from criminal activities or property of illegal origin" in the appropriate case form.

**Article 11**

After Article 8 there shall be inserted the following Article:

**"Confiscation from Suspects**

**Article 8a**

Property of illegal origin may be confiscated from a suspect, if acquired in the period before and/or after the commission of the criminal offence referred to in Article 2 para.1 of this Law until the bringing of an action for confiscation of property of illegal origin, when the court finds that there is a temporal connection between the period during which the property was acquired and other circumstances of the specific case that justify the confiscation of such property.

If the property of illegal origin is merged with legally acquired property, the total property of the suspect shall be subject to confiscation up to the assessed value of the property of illegal origin.

**Article 12**

Articles 9 and 10 shall be amended to read as follows:

**"Confiscation from Family Members**

**Article 9**

Material benefit derived from criminal activities or property of illegal origin shall be confiscated from the perpetrator's family member referred to in Article 2 para. 1 of this Law, or from the suspect, irrespective of whether he lives in a joint household with the perpetrator or suspect.

Family member referred to in paragraph 1 of this Article shall be deemed to mean a spouse or a common-law partner or same-sex cohabiting partner of the perpetrator referred to in Article 2 para. 1 of this Law, or of the suspect, his blood relative in the direct line of descent onto any degree, collateral relative onto the fourth degree of kinship or a relative by marriage ending with the second degree of kinship."

 **Confiscation in the Event of Death**

**Article 10**

If the person against whom criminal procedure has been instituted of a criminal offence referred to in Article 2, para. 1 of this Law dies or when instituted proceedings can not be continued due to the presence of circumstances which permanently preclude prosecution, material benefit derived from criminal activities or property of illegal origin shall be confiscated in the confiscation procedure of material benefit or property.

If the person against whom criminal procedure has been instituted of a criminal offence referred to in Article 2 para. 1 of this Law dies, material benefit derived from criminal activities or property of illegal origin shall be confiscated from his legal successors or from the person against whom criminal proceedings can not be continued due to the presence of circumstances which permanently preclude prosecution."

**Article 13**

Articles11 and 12 shall be amended to read as follows:

**"Initiating Financial Investigations**

**Article 11**

 Financial investigations in view of confiscating material benefit derived from criminal activities may be instituted under an order of the state prosecutor, provided the following exists:

1) Reasonable suspicion that material benefit was derived from criminal activities; and

2) Reasonable grounds for suspicion that the criminal offence referred to in Article 2 para. 1 of this Law has been committed.

Financial investigations in view of confiscating property of illegal origin may be instituted under an order of the state prosecutor, if:

1. There are reasonable grounds for suspicion that the criminal offence referred to in Article 2 para. 1 of this Law has been committed;
2. Property of illegal origin was not acquired by committing a criminal offence;
3. The value of the property of illegal origin exceeds the total assessed value of €50,000; and
4. There is a reasonable suspicion that property was acquired illegally.

The order referred to in paragraphs 1 and 2 of this Article shall designate a person against whom financial investigation is to be conducted.

The order referred to in paragraph 2 of this Article may be issued by the state prosecutor against the accused person even after the finality of the judgment for the criminal offence referred to in Article 2 para. 1 of this Law, within one year from the finality thereof.

**Purpose and Scope of Financial Investigation**

**Article 12**

Data and evidence of property, lawful income and costs of living of the holder, which the state prosecutor or the Protector needs to submit a request to confiscate material benefit derived from criminal activities or to bring an action for confiscation of property of illegal origin shall be collected during the financial investigation, as follows:

1) Data and evidence of the holder's property or lawful income after the deduction of taxes and other dues paid and data and evidence of the relation between the holder's income and property;

2) Data and evidence of the property transferred to third persons or passed on to the legal successor and on the mode of acquiring and transferring property;

3) Other data and evidence of importance for confiscating material benefit derived from criminal activities or property of illegal origin.

Upon a written request of the state prosecutor, state bodies, banks and other financial institutions shall submit data, regardless of the confidentiality of the data requested (classified information, personal data, business, banking or professional secret), without delay and without the obligation to pay a fee.

The state prosecutor shall state the following in the request referred to in paragraph 2 of this Article: the information he is requesting; name and surname, date and place of birth or personal identification number and domicile of the person to whom the data relate; the period of time to which the data relate and a caution that the fact that such data have been requested and provided must not be disclosed to the person in question and other persons.

At the request of the state prosecutor, the investigative judge may issue an order obliging a state body, bank or another financial institution to deliver data necessary to trace and identify material benefit derived from criminal activities or property of illegal origin.

In cases of failure to act upon the order referred to in paragraph 4 of this Article, the investigative judge may punish the responsible officer of the state body, bank or another financial institution with a fine amounting up to €5,000 and the bank or another financial institution itself up to €50,000.

Should the state body, bank or another financial institution not enforce the order of the investigative judge even after imposing the fine referred to in paragraph 5 of this Article, the investigative judge shall enforce the order referred to in paragraph 4 of this Article coercively.

An appeal may be lodged against the order referred to in paragraphs 4 and 5 of this Article within 48 hours as of the moment of receiving the order.

The appeal referred to in paragraph 7 of this Article shall be decided by the panel of the competent court referred to in Article 24 para. 7 of the Criminal Procedure Code."

**Article 14**

After Article 16 there shall be inserted the following two Articles:

**"Data Confidentiality**

**Article 16a**

 Information obtained during the financial investigation shall be confidential.

Officers participating in the financial investigation procedure shall draw the attention of all involved to the duty to maintain the confidentiality of data.

**Duration of Financial Investigation**

**Article 16b**

Financial investigation may last for a maximum of one year.

The competent authorities in the financial investigation shall act with urgency.

In case of justifiable reasons, the duration of the financial investigation may be extended by a maximum of six months under a decision of the competent state prosecutor’s office."

**Article 15**

Article 18 shall be amended to read as follows:

"The state prosecutor shall complete the financial investigation within the time limit referred to in Article 16b of this Law or when he has established that the facts of the matter have been clarified sufficiently to file a request for confiscation of material benefit derived from criminal activities or to bring an action for confiscation of property of illegal origin or to discontinue the financial investigation.

When it determines that the facts of the matter have been sufficiently clarified and before concluding the financial investigation, the state prosecutor shall summon the accused or suspect whose property was the subject of the financial investigation to state his case and submit evidence of the legality of property acquisition.

The summons referred to in paragraph 2 of this Article shall contain the reasons for summoning, the time limit within which the accused or suspect referred to in paragraph 2 of this Article may respond, as well as a caution of the legal consequences of non-responding and that no further summons shall be issued in that case.

The state prosecutor shall make a written record of the accused or suspect’ statement referred to in paragraph 2."

**Article 16**

After Article 18 there shall be inserted the following two Articles:

**"Discontinuance of the Financial Investigation**

**Article 18a**

The state prosecutor shall issue an order to discontinue the financial investigation if he finds during the financial investigation or after its completion that there are no conditions to bring an action to confiscate property of illegal origin.

The state prosecutor shall order that the financial investigation be discontinued upon the expiration of the time limit referred to in Article 16b of this Law.

In case of discontinued financial investigation, the competent state prosecutor shall submit the notification with the financial investigation case files to the administrative body responsible for tax affairs for the purpose of conducting the tax assessment procedure.

The administrative body in charge of tax affairs shall conduct the procedure referred to in paragraph 3 of this Article within three months from the date of delivery of the notification and case file.

**Report on the Financial Investigation**

**Article 18b**

When it determines that the facts of the matter have been sufficiently clarified to bring an action for the confiscation of property of illegal origin, the state prosecutor shall conclude the financial investigation and develop a report on the financial investigation.

The report referred to in paragraph 1 of this Article with the case files shall be submitted by the state prosecutor to the Protector within 15 days from the conclusion of the financial investigation."

**Article 17**

In Article 30, paragraph 4 item 2 shall be replaced by the following:

"2) There is insufficient evidence affording reasonable suspicion that the material benefit or property subject to a provisional measure to preserve assets has been derived from criminal activities or acquired illegally;".

**Article 18**

Paragraphs 1, 2 and 3 of Article 32 shall be amended to read as follows:

"A provisional measure to preserve assets may last the longest until the decision on confiscation of material benefit derived from criminal activities becomes final, i.e. until the judgment on the action for confiscation of property of illegal origin becomes final.

Where, in cases of confiscation of material benefit derived from criminal activities, the provisional measure to preserve assets was imposed during preliminary investigation, it shall be abolished ex officio if investigation is not initiated within six months as of the date of issuing the ruling imposing the provisional measure to preserve assets.

Where, in cases of confiscation of material benefit derived from criminal activities, the provisional measure to preserve assets was imposed during investigation, it shall be abolished ex officio if the indictment is not confirmed within two years as of the date of issuing the ruling imposing a provisional measure to preserve assets."

**Article 19**

In Article 35, paragraph 2 for the words: "In the case referred to in Article 10 of this Law, "request" shall be replaced by the words: "Request".

**Article 20**

 After Article 46, a new chapter including five Articles shall be inserted as follows:

**"Va. CONFISCATION OF PROPERTY OF ILLEGAL ORIGIN**

**Initiation of the Confiscation Procedure**

**Article 46a**

After the completion of the financial investigation, the Protector shall bring an action for confiscation of property of illegal origin within 60 days, in accordance with the Law on Civil Procedure.

The action referred to in paragraph 1 of this Article shall be accompanied by:

1. A written record of the respondent’s statement during the financial investigation;
2. A written report of the state prosecutor on the financial investigation;
3. Evidence of the holder’s property and of his lawful income; and
4. Court decision ordering a provisional measure to preserve assets.

If a provisional measure to preserve assets was ordered during the financial investigation, an extension of that measure must be requested in the action.

The action referred to in paragraph 1 of this Article shall be exempt from the court fee.

A copy of the action referred to in paragraph 1 of this Article shall be immediately forwarded by the court to the body competent for tax affairs.

In addition to the information referred to in paragraph 2 of this Article, the action referred to in paragraph 1 brought against the legal successor shall also contain evidence that the property is of illegal origin, while the action against third persons shall also contain evidence that the property transferred without remuneration or with remuneration does not correspond to the actual value if the third person knew, could have known or was obliged to know that the property was of illegal origin.

**Public Invitation**

**Article 46b**

Upon receipt of the action referred to in Article 46a para. 1 of this Law, the court shall immediately issue a public invitation informing unidentified third persons that an action has been brought.

The invitation referred to in paragraph 1 of this Article shall contain:

1. Information on the court conducting the proceedings and the procedure case number, as well as on the property in connection with which the proceedings are being conducted;
2. Name, surname and address of the natural person, or name and head office of the legal person as the respondent;
3. Operative part of the decision on provisional measures to preserve assets and seizure of movable property;
4. Invitation to submit a statement of joining the litigation in accordance with the Law on Civil Procedure, within three months from the publication of the invitation;
5. Caution of the legal consequences of failing to act;
6. The date of publishing the invitation.

The invitation referred to in paragraph 1 of this Article shall be published in the Official Gazette of Montenegro and on the bulletin board of the court, and by court order, in other print media in Montenegro as well.

**Burden of proof**

 **Article 46c**

In civil proceedings, the Protector shall present facts and evidence about the respondent’s property, his lawful income and circumstances indicating to the existence of an obvious disproportion between the value of the property after deduction of taxes and other dues paid and lawful income.

If the property of illegal origin has been passed on to a legal successor, transferred to a family member or third person, the Protector shall state the facts in the civil proceedings and submit evidence of the transfer without remuneration or with remuneration that does not correspond to the actual value.

The respondent, legal successor, family member, third person, or their legal representatives may challenge the presumption referred to in paragraph 1 of this Article if they prove that the property is not of illegal origin.

**Judgment**

**Article 46d**

In the judgment upholding the claim, the court shall determine that certain property is of illegal origin, that it is to be confiscated from the respondent and other persons referred to in Article 2a of this Law and that it is to become the property of Montenegro.

By the end of the man hearing, the Protector may modify the claim without the consent of the respondent, by requiring the confiscation of property corresponding to the value of property of illegal origin or that the respondent pay an appropriate amount due to impossibility to confiscate property of illegal origin on account of circumstances which arose after the bringing of the action.

If the claim is not upheld, the court may not abolish the provisional measure before the expiration of the period of 30 days of the date when the final judgment was delivered to the competent tax authority.

**Relevant application**

**Article 46e**

The provisions of the Law on Civil Procedure shall apply accordingly to the procedure based on an action for confiscation of property of illegal origin."

**Article 21**

After Article 84 there shall be inserted the following Article:

**"Instituted proceedings**

**Article 84a**

Proceedings in which a first-instance decision on confiscation of material benefit derived from criminal activities has been made by the date of entry into force of this Law shall continue in accordance with the provisions of regulations in force before the entry into force of this Law.

If the first instance decision on a request to confiscate material benefit derived from criminal activities was revoked and the case was remanded to the court of first instance for retrial, provisions of this Law shall apply in further proceedings.

If the final decision to confiscate material benefit derived from criminal activities rendered before the entry into force of this Law has not been executed, execution shall be conducted in accordance with the provisions of this Law.

 Provisions of this Law shall apply to financial investigations instituted before the entry into force of this Law.”

**Article 22**

This Law shall enter into force on the eighth day following that of its publication in the Official Gazette of Montenegro.

**STATEMENT OF THE REASONS**

**I. CONSTITUTIONAL BASIS FOR ADOPTING THE LAW**

The constitutional basis for adoption of the Law Amending the Law on Confiscation of Material Benefit Derived from Criminal Activities is enshrined in Article 16 item 5 of the Constitution of Montenegro, which stipulates that laws also regulate other matters of interest to Montenegro, in accordance with the Constitution.

**II. REASONS TO ADOPT THE LAW**

The reasons for passing the Law on Amendments to the Law on Confiscation of Material Benefit Derived from Criminal Activities are to prevent the acquisition and use of property of illegal origin in order to protect legally acquired property and the economic, social and environmental use of property acquired in accordance with regulations. The aim of the Law is to confiscate property from those who have acquired it illegally, regardless of whether the property was transferred to them with or without remuneration or with remuneration that does not correspond to its actual value.

The 2015 Law on Confiscation of Material Benefit Derived from Criminal Activities comprehensively provided for substantive, procedural and provisions prescribing the management of seized or confiscated material benefit. It envisaged a full model of criminal law confiscation of material benefit based on a final judgment (Model 2 - Extended confiscation of material benefit).

However, since the Montenegrin criminal law incorporated this legal principle Montenegrin courts have rendered 14 final court decisions. This fact may indicate to limitations of the normative framework from the perspective of efficiency of the existing model of confiscation of material benefit in the legal system of Montenegro. The number of court decisions rendered, as well as the structure and characteristics of these proceedings, must necessarily be considered in terms of their dependency on preliminary criminal proceedings. The condition for filing a request for confiscation of material benefit, in terms of final termination of criminal proceedings by a conviction for a criminal offence under Article 2 of the Law, as well as the two year time limit for filing a request after the court decision in criminal proceedings becomes final, are decisive for the temporal vacuum until the fulfilment of procedural possibility to apply for confiscation of material benefit.

The above draws attention to insufficient efficiency and effectiveness of the existing system, both due to the objective possibilities of the system based on criminal procedure, and due to certain shortcomings in its practical application. This state of affairs shows the need to introduce a system that will simultaneously enable more efficient and effective confiscation of illegally acquired material benefit and fight against serious forms of crime, but also strengthen the rule of law.

Traditional confiscation based on criminal convictions has not equipped state law enforcement and judicial authorities with the necessary and effective tools enabling the confiscation of a satisfactory percentage of proceeds of organized crime. Reasons for this may be that a conviction for the alleged crime may not be possible, despite the existence of potential profits gained from illegal activity that could justify confiscation. Non-conviction based seizure measures make it possible to bridge this gap and seize criminal assets through separate court proceedings, which may be of a criminal, civil or administrative nature.

Numerous legislative and other initiatives to increase the confiscation of proceeds of crime have been launched at the national and international levels. These point to the need to establish more efficient models of confiscation of material benefit and harmonization thereof, with the aim of more successful international cooperation in this field.

Having in mind all the above, the reform of the system of confiscation of material benefit derived from criminal activities, which introduces a model of confiscation without a previous criminal conviction, is not only necessary but also an integral part of the new concept at the EU level.

**III. COMPLIANCE WITH THE ACQUIS COMMUNAUTAIRE AND RATIFIED INTERNATIONAL CONVENTIONS**

The most important documents of the Council of Europe and the United Nations, which contain international standards in this field, taken into account during the drafting of this law are:

* The European Convention for the Protection of Human Rights and Fundamental Freedoms;
* Criminal Law Convention on Corruption;
* Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism;
* International Convention for the Suppression of the Financing of Terrorism;
* United Nations Convention against Transnational Organized Crime;
* United Nations Convention against Corruption;
* United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

European Union standards are contained in the founding treaties, the Charter of Fundamental Rights of the European Union and the acquis. The standards contained in the secondary legislation of the European Union in this field are:

* Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union;
* Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime;
* Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

**IV. EXPLANATION OF THE BASIC LEGAL CONCEPTS**

Article 1 of the Draft Law on Amendments to the Law on Confiscation of Material Benefit Derived from Criminal Activities also introduces the notion of property of illegal origin in the title of the Article.

Article 2 specifies that the law regulates financial investigation and conditions for confiscation of material benefit derived from criminal activities and property of illegal origin, but also the procedure of confiscation of property of illegal origin.

Article 3 introduces into the catalogue of criminal offences prescribed by law other criminal offences committed with wrongful intent punishable by five years of imprisonment or more if material benefit derived from criminal activities or property of illegal origin result from it.

Article 4 determines the conditions and mode of confiscation of property of illegal origin.

Article 5 introduces alignment of terminology in the title of Article 3.

Article 6 defines the notion of property of illegal origin, when it is considered that the property was not acquired lawfully, as well as which property is taken into consideration to determine the disproportion.

Article 7 sets forth the procedure of confiscation of property of illegal origin, the competence of the state prosecutor’s office, and of the Protector of Property Interests.

Article 8 amends Article 5 in order to specify the competent authorities.

Article 9 specifies the terms used in the law and adds the meaning of the terms property and state body.

Article 10 performs terminological alignment in the entire the law in such a way that the words *material benefit derived from criminal activities* in different case forms are replaced by the words *material benefit derived from criminal activities, or property of illegal origin*.

Article 11 introduces confiscation from a suspect, which means that property of illegal origin may be confiscated from a suspect, if acquired in the period before and/or after the commission of the criminal offence until the bringing of an action for confiscation of property of illegal origin, when the court finds that there is a temporal connection between the period during which the property was acquired and other circumstances of the specific case that justify the confiscation of such property.

Article 12 amends Articles 9 and 10 of the current law in order to expand the scope of persons who are considered family members, i.e., the procedure in case of death of the person against whom criminal proceedings are being conducted or when instituted proceedings cannot be continued due to circumstances that permanently preclude criminal prosecution.

Article 13 amends Articles 11 and 12 of the law in force. In explanation, Article 11 which prescribes the conditions for initiating a financial investigation, is being amended. It stipulates that financial investigations in view of confiscating property of illegal origin may be instituted under an order of the state prosecutor, if: there are reasonable grounds for suspicion that the criminal offence referred to in Article 2 para. 1 of this Law has been committed; property of illegal origin was not acquired by committing a criminal offence; the value of the property of illegal origin exceeds the total assessed value of €50,000; and there is a reasonable suspicion that property was acquired illegally. It is also prescribed that the order for confiscation of property of illegal origin may be issued by the state prosecutor against the accused person even after the finality of the judgment for the criminal offence referred to in Article 2 para. 1 of this Law, within one year from the finality thereof. In relation to the purpose and scope of the financial investigation, the obligation of state bodies, banks and other financial institutions to submit data requested by the state prosecutor’s office is introduced, regardless of data confidentiality (classified information, personal data, business, banking or professional secret), without delay and without the obligation to pay a fee.

Article 14 adds two new Articles which will regulate the confidentiality of data and the duration of financial investigation. To explain, it is prescribed that the data obtained during the financial investigation are confidential. It also stipulates that the financial investigation may last for a maximum of one year, with the possibility of extending its duration, for justifiable reasons, for another six months.

Article 15 amends Article 18 of the currently valid law, which regulates the mode of completing a financial investigation. A summons is also introduced by the state prosecutor before the conclusion of the financial investigation, with the aim of giving the accused or suspect the opportunity to make a statement and submit evidence on the lawful acquisition of property that was the subject of the financial investigation.

Article 16 adds two new articles relating to the discontinuance of the financial investigation and the report on the statement of the accused or suspect. Specifically, if the state prosecutor finds that there are no conditions to bring an action for confiscation of property of illegal origin, he will issue an order discontinuing the financial investigation, and submit the notification with the financial investigation case files to the administrative body in charge of taxes in view of conducting the tax assessment procedure. However, if he finds that there are conditions to bring an action for confiscation of property of illegal origin, he will conclude the financial investigation and develop a Report on the financial investigation and submit it to the Protector.

Articles 17, 18 and 19 introduce terminological alignment in Article 30 para. 4 item 2 of the valid law, Article 32 paragraphs 1, 2 and 3 and Article 35 para. 2.

Article 20 regulates the procedure of initiating proceedings for confiscation of property of illegal origin. In other words, it is prescribed that the Protector, after the completion of the financial investigation, will bring an action for confiscation of property of illegal origin within 60 days, in accordance with the Law on Civil Procedure. It also stipulates that the action is to be accompanied by a written record of the respondent’s statement during the financial investigation, a written report of the state prosecutor on the financial investigation, evidence of the holder’s property and of his legal income and a court decision ordering a provisional measure to preserve assets. Where a provisional measure was imposed in the financial investigation, its prolongation must be requested in the action. Furthermore, the issue of a public invitation addressed to unidentified third persons is regulated, as well as the contents and mode of publishing the invitation in question. As regards the burden of proof, it is stipulated that the Protector would present facts and evidence of the respondent’s property, his legal income and circumstances that point to the existence of an obvious disproportion between the value of property after deduction for taxes and other duties paid and legal income, and that the respondent, legal successor, family member, third person, or their legal representative may challenge this presumption if they prove that the property is not of illegal origin. If the court upholds the claim, it determines in the judgment upholding it that certain property is of illegal origin, to be confiscated from the respondent and that it is to become the property of Montenegro. It is also envisaged that the Protector may modify the claim until the end of the main hearing, without the consent of the respondent, by requiring the confiscation of property corresponding to the value of property of illegal origin or that the respondent pay an appropriate amount due to impossibility to confiscate property of illegal origin on account of circumstances which arose after the bringing of the action. However, if the claim is not upheld, the court may not abolish the provisional measure before the expiration of the period of 30 days of the date when the final judgment was served on the competent tax authority.

Article 21 regulates actions to be taken in procedures instituted according to the valid law.

Article 22 stipulates that the Law will enter into force on the eighth day following that of its publication in the Official Gazette of Montenegro.

**V. FUNDS NEEDED TO IMPLEMENT THIS LAW**

Additional funds are not needed in the budget of Montenegro for the enforcement of this Law.

**OVERVIEW OF PROVISIONS OF THE LAW ON CONFISCATION OF MATERIAL BENEFIT DERIVED FROM CRIMINAL ACTIVITIES THAT ARE BEING AMENDED**

Scope of the Law

Article 1

This Law shall govern the conditions for confiscation of material benefit derived from criminal activities, confiscation procedure and other matters of importance for the confiscation of such benefit, as well as the management of confiscated material benefit derived from criminal activities or confiscated material benefit obtained from a criminal offence (hereinafter referred to as the "confiscated benefit"), of instrumentalities of crime and items seized in criminal and misdemeanour proceedings, as well as of property pledged to the court as bail.

Conditions and the Mode of Confiscating Material Benefit Derived from Criminal Activities

Article 2

Material benefit may be confiscated from a criminal offender where reasonable suspicion exists that it has been derived from criminal activities, whereby the offender fails to make plausible the legal origin thereof (extended confiscation) and if the offender was convicted by a final judgment for a crime set forth by the Criminal Code of Montenegro, as follows:

1) Abduction under Article 164;

2) Criminal offences against sexual freedom under Articles 206, 208, 209, 210, 211, 211a and 211b;

3) Criminal offences against property under Articles 240, 241, 242, 243, 244, 244a, 249, 250, 251 and 252;

4) Criminal offences against payment transactions and business operations under Articles 258, 259, 260, 261, 262, 263, 264, 265, 268, 270, 272, 273, 274, 276, 276a, 276b, 281 and 281a;

5) Unauthorized production, possession and distribution of illegal drugs under Article 300;

6) Criminal offences against environment and spatial development under Articles 303, 305 and 307;

7) Criminal offences against security of computer data under Articles 350, 352, 353 and 354;

8) Criminal offences against public law and order under Articles 401, 401a, 402,404 and 405;

9) Criminal offences against legal transactions under Articles 412, 413 and 414;

10) Criminal offences against official duty under Articles 416, 419, 420, 422, 422a, 423 and 424;

11) Criminal offences against humanity and other values guaranteed by international law under Articles 444, 445, 446, 447, 447a, 447b, 447c, 447d, 449, 449a and 449b.

The material benefit referred to in paragraph 1 of this Article shall also be confiscated from legal predecessors, legal successors and family members of the offender referred to in paragraph 1 of this Article, as well as from third persons.

If the material benefit was derived from criminal activities for another person, such benefit shall be confiscated.

Where the confiscation referred to in paragraph 1 of this Article is not possible, other assets corresponding to the value of the material benefit derived from criminal activities shall be confiscated.

Definitions

Article 3

Material benefit derived from criminal activities means each increase or prevention of decrease of criminal assets, as well as revenues or other benefit acquired directly or indirectly from criminal activities, as well as the estate it has been converted into or merged with.

Property implies property rights of all types, irrespective of whether they relate to assets of tangible or intangible nature, movables or immovables, securities and other documents which serve to prove property rights.

Competent Authorities

Article 5

Courts shall decide on the confiscation of material benefit derived from criminal activities.

The tasks of tracing material benefit derived from criminal activities shall be carried out by the state prosecutor’s office and the administrative body in charge of police work (hereinafter referred to as "the police").

The tasks of managing confiscated benefit, instrumentalities of a crime and items seized in criminal and misdemeanour proceedings, as well as of property pledged to the court as bail shall be performed by the administrative body in charge of state property management (hereinafter referred to as "the competent body").

The competence of the state prosecutor's office and of the court in proceedings referred to in paras. 1 and 2 of this Article shall be determined according to the competence to conduct proceedings for the criminal offence referred to in Article 2, para. 1 of this Law.

Bodies referred to in paragraphs 1 and 2 of this Article shall act with urgency.

Definition of Terms

Article 7

The terms used herein shall have the following meanings:

1) Instrumentality of a crime means the actual item which was used or intended for use, in whole or in part, in the commission of a criminal offence, or an item arising out of the commission of a criminal offence;

2) Accused person means a suspect, a person against whom criminal proceedings have been instituted or a person convicted of a crime under Article 2 para. 1 of this Law;

3) Holder means the accused person, legal predecessor, legal successor or family member of the accused person or a third person;

4) Third person means a natural or a legal person to whom material benefit derived from criminal activities have been transferred without remuneration or for remuneration which manifestly does not correspond to the actual value of the material benefit and who knew or could have known that the material benefit has been derived from criminal activity or who ought to have known that;

5) Legal predecessor means a natural or legal person whose property rights have been transferred to the holder;

6) Legal successor is heir of the accused person, of a third person or his heirs, or a natural or a legal person to whom property rights have been transferred by means of a legal transaction;

7) Injured party means the person whose personal or property right was infringed or threatened by the criminal offence;

8) Defence counsel means the attorney representing the accused person in the material benefit derived from criminal activities confiscation procedure;

9) Legal representative means the lawyer authorized to represent the legal predecessor, legal successor, or accused person’s family member, or a third person;

10) Bona fide third party means the person that has been demonstrated to have a right in relation to the material benefit subject to confiscation which prevents the confiscation thereof or who at the time of acquisition of such rights did not know, could not have known or was not obliged to know that the material benefit has been derived from criminal activities.

Confiscation from Family Members

Article 9

Material benefit derived from criminal activities shall be confiscated from the offender's family member referred to in Article 2 para. 1 of this Law, irrespective of whether he lives in a joint household with the offender.

Family member referred to in paragraph 1 of this Article shall be deemed to mean a spouse or a common-law partner of the offender referred to in Article 2 para. 1 of this Law, his blood relative in the direct line of descent onto any degree, collateral relative onto the fourth degree of kinship or a relative by marriage ending with the second degree of kinship.

Non-Conviction Based Confiscation

Article 10

If the person against whom criminal procedure has been instituted of a criminal offence referred to in Article 2 para. 1 of this Law dies or when instituted proceedings can not be continued due to the presence of circumstances which permanently preclude prosecution, material benefit derived from criminal activities shall be confiscated in the material benefit confiscation procedure pursuant to this Law.

If the person against whom criminal procedure has been instituted of a criminal offence referred to in Article 2 para. 1 of this Law dies, material benefit derived from criminal activities shall be confiscated from his legal successors or from the person against whom criminal proceedings can not be continued due to the presence of circumstances which permanently preclude prosecution.

In cases referred to in paragraphs 1 and 2 of this Article, material benefit derived from criminal activities may be confiscated if it arises on the merit of evidence that instituted proceedings would have ended in a conviction had the person not died or had the circumstances permanently precluding prosecution not arisen.

III. FINANCIAL INVESTIGATION

Initiating Financial Investigations

Article 11 ﻿

Financial investigations may be instituted under an order of the state prosecutor, provided the following exists:

1) Reasonable suspicion that material benefit was derived from criminal activities; and

2) Reasonable grounds for suspicion that the criminal offence referred to in Article 2 para. 1 of this Law has been committed.

The order referred to in paragraph 1 of this Article shall designate the person against whom financial investigation is to be conducted.

Purpose and Scope of Financial Investigation

Article 12

Data and evidence of property, lawful income and costs of living of the holder, which the state prosecutor needs to submit a request to confiscate material benefit shall be collected during the financial investigation, as follows:

1) Data and evidence of the holder's property or lawful income after the deduction of taxes and other dues paid and data and evidence of the relation between the holder's income and property;

2) Data and evidence on the property transferred to third persons or to the legal successor and on the mode of acquiring and transferring property;

3) Other data and evidence of importance for confiscating material benefit derived from criminal activities.

At the request of the state prosecutor, the investigative judge may issue a decision obliging a bank or another financial institution to deliver data necessary to trace and identify material benefit derived from criminal activities.

In cases of failure to act upon the decision referred to in paragraph 2 of this Article, the investigative judge may punish the responsible officer within a bank or another financial institution with a fine amounting up to €5,000 and the bank or another financial institution itself up to €50,000.

Should the bank or another financial institution fail to enforce the decision of the investigative judge even after the imposition of the fine referred to in paragraph 3 of this Article, the responsible officer within a bank or another financial institution may be imposed a prison term until the enforcement of the decision, at the longest for two months.

Should the bank or another financial institution not enforce the decision of the investigative judge even after imposing the prison term referred to in paragraph 4 of this Article, the investigative judge shall enforce the decision referred to in paragraph 2 of this Article coercively.

An appeal may be lodged against the decision referred to in paragraphs 2, 3, 4 and 5 of this Article within 48 hours of receiving the decision.

The appeal referred to in paragraph 6 of this Article shall be decided by the panel of the competent court referred to in Article 24 para. 7 of the Criminal Procedure Code. An appeal against the decision imposing a prison term shall not stay the enforcement of the decision.

Managing Financial Investigations

Article 13

Financial investigations shall be managed by state prosecutors.

The state prosecutor shall issue orders or personally manage the financial investigation thus directing the actions of the police, military police, administrative bodes in charge of taxation, customs, and prevention of money laundering and terrorist financing, as well as of other authorities performing tasks they are competent for, in order to trace material benefit derived from criminal activities and prove that material benefit has been derived from criminal activities.

Taking Measures and Actions to Trace and Identify Material Benefit Derived from Criminal Activities

Article 14

The police shall take measures and actions of their own initiative or under an order of the state prosecutor aimed at tracing and identifying material benefit derived from criminal activities.

State bodies, public administration bodies, local self-government authorities, legal entities exercising public authorizations and other entities shall immediately deliver to the police the requested data needed for tracing and identifying material benefit derived from criminal activities.

Extension of Financial Investigation

Article 17

Where data and evidence obtained during the financial investigation indicate to reasonable grounds for suspicion that material benefit derived from criminal activities have been transferred to another person that is not covered by the order to conduct an investigation, the state prosecutor shall order to extend the financial investigation so as to conduct it against that person as well.

Completion of Financial Investigation

Article 18

The state prosecutor shall complete the financial investigation when he has established that the facts of the matter have been clarified sufficiently to file a request for confiscation of material benefit or to discontinue the financial investigation.

The state prosecutor shall issue an order to discontinue the financial investigation if he finds during the financial investigation or after its completion that the conditions to file a request to confiscate material benefit are not fulfilled.

Types of Provisional Measures to Preserve Assets and Seizure of Movables

Article 19

In view of preserving material benefit derived from criminal activities and in view of a possible subsequent confiscation of such material benefit, the state prosecutor may propose the imposition of a provisional measure to preserve assets (asset freezing), as follows:

1) Prohibition to dispose of and use immovable property, with an annotation of prohibition in the real estate cadastre;

2) Order to the bank to refuse the payment of an amount of money against which a provisional measure to preserve assets is being imposed;

3) Prohibition to dispose of a claim arising from a contractual relation;

4) Prohibition to dispose of and encumber shares or stakes in a company, with a registration of prohibition in public records;

5) Prohibition to use or dispose of the rights stemming from shares or stakes in a company and other securities;

6) Introduction of interim administration into the company.

In view of preserving the material benefit derived from criminal activities and in view of enabling confiscation of such material benefit, the court may order movables to be seized (seizure), under a proposal by the state prosecutor.

Conditions for Imposing the Provisional Measure to Preserve Assets

Article 20

Provisional measures to preserve assets shall be imposed where there is reasonable suspicion that the material benefit has been derived from criminal activities and threat that the confiscation of such material benefit would be prevented or protracted.

Provisional measures to preserve assets shall be imposed if, in addition to the conditions referred to in paragraph 1 of this Article, one of the following risks also exists:

- That value of the material benefit referred to in paragraph 1 of this Article would depreciate;

- That the holder would use the material benefit referred to in paragraph 1 of this Article himself or via other persons to commit a crime;

- That the holder would use the material benefit referred to in paragraph 1 of this Article himself or via other persons to prevent or significantly protract its confiscation.

Interim administration may be introduced into a company with the prohibition to dispose of and encumber shares or stakes in the company, along with entry of prohibition into public records or along with the prohibition to use and dispose of the rights stemming from shares or stakes in the company if, in addition to the conditions referred to in paragraphs 1 and 2 of this Article, the following conditions are also fulfilled:

- The holder owns shares or stakes in the amount of at least 25% of all shares or stakes in the company or controls the company on the basis of a dominant position in the management of the company;

- There is a need to protect the assets of the company.

When imposing a provisional measure to preserve assets, the court shall limit itself to establishing a manifest disproportion between the value of the property reduced by taxes and other duties paid and the lawful income of the holder.

Ruling

Article 25

The ruling imposing a provisional measure to preserve assets shall contain:

1. Data on the holder;

2. Statutory title of the criminal offence referred to in Article 2 para. 1 of this Law;

3. Name of the provisional measure to preserve assets being imposed;

4. Data on the material benefit subject to the provisional measure to preserve assets;

5. Circumstances affording reasonable suspicion that the material benefit has been derived from criminal activities;

6. Reasons to impose a provisional measure to preserve assets;

7. Period for which the provisional measure to preserve assets is being imposed;

8. Instruction of the right of appeal and that the appeal does not suspend enforcement of the ruling.

Delivery of the Ruling

Article 26

The ruling imposing a provisional measure to preserve assets shall be delivered to the holder, defence counsel or legal representative, state prosecutor and the competent body.

To protect the rights and interests of bona fide third parties, the ruling imposing a provisional measure to preserve assets shall be published in the Official Gazette of Montenegro and posted on the court's bulletin board, and it may be published in one of the print media in Montenegro.

Together with the ruling imposing a provisional measure to preserve assets an invitation shall be published to bona fide third parties to join the procedure under this Law before the judgment confiscating material benefit derived from criminal activities becomes final.

Bona fide third parties shall have procedural rights that the injured party has in accordance with this Law and the Criminal Procedure Code.

Article 30

The panel referred to in Article 21 para. 2 of this Law shall dismiss the appeal against the ruling referred to in Article 27 paras. 1 and 2 of this Law if it is belated, incomplete or lodged by an unauthorized person.

The panel referred to in Article 21 para. 2 of this Law shall reject the appeal by means of its ruling, if it finds it to be unfounded.

When deciding on the appeal of the state prosecutor referred to in Article 27 para. 1 of this Law, if the panel referred to in Art. 21 para. 2 of this Law finds that conditions have been fulfilled to impose a provisional measure to preserve assets, it shall uphold state prosecutor's appeal and impose a provisional measure to preserve assets.

The panel referred to in Article 21 para. 2 of this Law shall uphold, by means of its ruling, the appeal of the holder referred to in Article 27 para. 2 of this Law and abolish the provisional measure to preserve assets if:

1) There is no threat that subsequent confiscation would be prevented or protracted;

2) There is insufficient evidence affording reasonable suspicion that the material benefit subject to a provisional measure to preserve assets has been derived from criminal activities;

3) The holder proves that he is not the owner of the entire or part of the material benefit subject to a provisional measure to preserve assets.

Time Limit to File a Request to Confiscate

Article 35 ﻿

After the finality of the judgment declaring the accused person guilty of the criminal offence referred to in Article 2 para. 1 of this Law, the state prosecutor shall file a request, at the latest within two years, to confiscate material benefit derived from criminal activities from the holder who does not make plausible, by means of authentic documents or otherwise, that the origin of material benefit is lawful (confiscation).

In the case referred to in Article 10 of this Law, the request to confiscate material benefit derived from criminal activities may be filed at the latest within two years from the finality of the decision establishing the presence of circumstances which permanently preclude prosecution or from the date of establishing that criminal proceedings may not be continued due to the death of the criminal offender.

The panel referred to in Article 21 para. 2 of this Law shall decide on the request referred to in paragraphs 1 and 2 of this Article, at the main hearing referred to in Article 38 of this Law.