

Analysis of the Legal Aspects of Illegal Asset Recovery in Slovenia¹

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Purpose:

The aim of the study was to analyse the legal aspects of asset recovery in Slovenia through a five-stage asset-recovery process: financial investigation; freezing or seizure of assets; confiscation; enforcement of the confiscation order; and asset disposal.

Design/Methods/Approach:

EU and Slovenian legislation in the area of illegal asset recovery was analysed and compared. Using legal analysis, gaps and inconsistencies were discovered and discussed.

Findings:

The Slovenian legal order provides relevant bodies with several avenues to recover 'proceeds' and illegally acquired assets. There is the traditional confiscation of proceeds, *in personam* confiscation in criminal proceedings, extended confiscation in criminal proceedings, and civil forfeiture pursuant to the Forfeiture of Assets of Illegal Origin Act. One problem is the related provisions are dispersed across both substantive and procedural law. Another problem is that some provisions are formulated in such a way that makes them impossible to apply in practice. It would be necessary to introduce a category of financial investigation in criminal proceedings. It is inappropriate that financial investigations are carried out under the provisions of civil law. Financial investigation must, therefore, become an essential part of all police criminal investigations of relevant offences, and holds the potential to generate proceeds. However, at the same time, law enforcement authorities must obtain a clear mandate that in the particular conditions they may investigate all assets of a suspect and not simply the concrete proceeds of crime.

Practical Implications:

The study findings are useful for preparing systemic changes in relation to the seizure of assets of illegal origin, also because the changes can be used to help establish an efficient way of organising the work of state bodies in this area.

Originality/Value:

The purpose of the paper is to comprehensively analyse all aspects of the seizure of assets of illegal origin. The results of the analysis substantially complement existing knowledge in the analysed field.

¹ The paper presents an extended and in-depth version of an article on illegal asset recovery first published in the contribution of Rejec Longar, Šugman Stubbs, & Lobnikar (2018).

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Keywords: illegal asset recovery, law, Forfeiture of Assets of Illegal Origin Act, Slovenia

Analiza pravnih vidikov odvzema premoženja nezakonitega izvora

Namen:

Namen študije je analizirati pravne vidike odvzema premoženja nezakonitega izvora v Sloveniji skozi prizmo petstopenjskega procesa odvzema nezakonitega premoženja: finančna preiskava, zamrznitev oziroma zavarovanje premoženja, odvzem premoženja, izvršitev odločbe o odvzemu ter upravljanja z odvzetim premoženjem.

Metode:

V prispevku smo s pomočjo pravne analize primerjali evropsko in slovensko zakonodajo na področju odvzema premoženja nezakonitega izvora. S pomočjo primerjave pravnih dokumentov smo ocenili razkorake in nedorečenosti med želeno in dejansko ureditvijo tega področja v Sloveniji.

Ugotovitve:

Slovenski pravni red pristojnim organom ponuja več možnosti odvzema premoženja nezakonitega izvora. Uporabijo lahko klasični odvzem premoženjskih koristi v okviru kazenskega postopka, razširjeni odvzem po kazenski zakonodaji ter civilni odvzem preko tožbe v skladu z zakonom o odvzemu premoženja nezakonitega izvora. V analizi smo ugotovili težave pri jasnosti materialnih določb materialnega in procesnega prava. Nadaljnja težava je, da so nekatere določbe v slovenski zakonodaji oblikovane tako, da jih ni mogoče izvajati v praksi. Avtorji menimo, da bi bilo nujno opredeliti finančno preiskavo v okviru kazenske zakonodaje. Ni primerno, da se finančna preiskava izvaja po določbah civilnega prava. Poleg tega mora finančna preiskava postati ključni del vseh kriminalističnih preiskav kaznivih dejanj, kjer je mogoče uveljavljati odvzem premoženja nezakonitega izvora, pri tem pa mora biti v zakonu nedvoumno zapisan mandat in odgovornosti za izvedbo finančne preiskave.

Praktična uporabnost:

Ugotovitve študije so koristne pri pripravi sistemskih sprememb na področju zasega premoženja nezakonitega izvora, mogoče pa jih je uporabiti tudi pri vzpostavitvi učinkovite organizacije dela državnih organov na analiziranem območju.

Izvirnost/pomembnost prispevka:

Namen prispevka je celostno analizirati vse vidike zasega premoženja nezakonitega izvora. Rezultati analize bistveno dopolnjujejo obstoječe znanje na analiziranem področju.

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Ključne besede: odvzem premoženja nezakonitega izvora, zakon o odvzemu premoženja nezakonitega izvora, finančne preiskave, Slovenija

1 INTRODUCTION

In recent years, Europe has adopted the American idea that illegal asset recovery is a particularly effective tool for tackling organised crime. Namely, long prison sentences for individuals from organised crime groups have proved ineffective, mainly by not being handed out to the heads of illegal business and that the illegally acquired assets are left intact (Jensson, 2011). The idea of the asset recovery being important goes back to the 1980s. Faced with Colombian drug barons, US law enforcement found the traditional law enforcement strategies were unsuccessful, primarily because they did not strike at the revenues of the illegal trafficking, which generated extremely high profits (Jensson, 2011). Further, the revenue drug trafficking gave organised crime groups considerable financial strength and influence, allowing them to start penetrating the licit economy (Vettori, 2006). Prison sentences for committing these types of criminal offences were no longer effective, especially since groups with substantial financial resources took to corruption and influenced the decisions of law enforcement agencies, the judiciary, as financial institutions, even legislators. Tools for dealing with organised crime had to be adapted to the specifics of this type of crime. Williams (2001) argues one can investigate criminal networks only with networks, i.e. with less bureaucratic structures and by using more innovative organisational models. Similarly, Dobovšek (2008) underlines the importance of a multidisciplinary approach in the cooperation of institutions at both national and international levels. The aim of organised crime is not only to generate and misappropriate the proceeds of crime or criminal assets, but also to gain power in society (Levi, 2015). Criminal networks invest their funds and rely on corrupt practices to obtain access to decision-makers, who in turn give them access to important information and decision-making powers. The concealment of criminal proceeds usually involves professionals and practitioners, such as lawyers, accountants and financial experts (Middleton & Levi, 2015), who apply their expertise to enable the transfer of 'ill-gotten gains' into legitimate business environments. Authors have long discussed the term "state capture", which denotes organised networks taking control over state mechanisms in order to manage and control policy-making and the economy, thus undermining the basic democratic foundations of society and hijacking the state. Therefore, this type of crime is particularly problematic and dangerous for society (Rejec Longar, Šugman Stubbs, & Lobnikar, 2018).

Another element adding to the complexity of prosecuting organised crime is globalisation. Globalisation has caused a certain openness of borders which, due to insufficiently effective cooperation among the authorities of different states, makes it easy to hide illegally obtained assets and launder money. Jager and Šugman Stubbs (2013) stress the importance of preventive measures for reducing crime rates and believe the state should support various preventive actions like education and situational crime prevention while simultaneously implementing criminal law repression. The authors conclude that criminal law repression is neither a miracle cure for addressing accumulated social problems nor a fundamental instrument regulating people's behaviour – criminal law can only be the *ultima ratio* of action in society. The tools to combat organised crime

had to be adapted, and one (probably the most effective) of them was to introduce the recovery of criminal assets into the legal system. On this basis, the aim of this paper is to analyse the acts proclaimed by international organisations (with an emphasis on EU legislation) and make a comparative legal analysis of the asset-recovery systems with that existing in Slovenia.

2 RECOVERY OF ILLEGAL ASSETS

We must first define the recovery of illegal assets before considering whether it is an effective tool in the fight against organised crime. The limited literature on the subject and the masses of related international documents allow the conclusion that the terminology in the area of asset recovery is quite confusing. Especially within national systems, the concepts of asset recovery, confiscation and forfeiture are often confused. Vettori (2006) defines the confiscation of the proceeds of crime as the permanent withdrawal by the court or other competent authority of any property which originates from or is in any way connected to a criminal offense. However, to ensure illegally gained assets that have been recovered really end up in the state's coffers, many more steps both pre- and post- confiscation are needed. More broadly, illegal asset recovery is defined as a process with the following steps (Council of the EU, 2012):

- Financial investigation, an investigative technique that interlinks actors, locations and events through financial facts. This phase is important for determining the full range of assets that potentially have an illegal origin.
- Freezing or seizing of assets; when all assets suspected of being of illegal origin are identified, they must be secured. This phase generally already contains a court's decision on the provisional measures.
- Confiscation, which is underpinned by a court decision (order) and means the permanent transfer of ownership rights to assets from the asset holder to the state.
- Enforcement of the confiscation order; this is the phase in which the assets are actually passed on to the state.
- Asset disposal; the phase that decides how the state will make use of the assets. This phase is closely linked to asset management.

The question is whether the Slovenian regulatory framework is established systematically by wholesomely considering all asset-recovery process phases or whether it is more the case there are only partial solutions in place, leaving the phases not dealt with coherently. In this context, it is important to stress that the legislative system (or norms) in society stems from the need for a static record of certain commitments with a view to resolving certain social problems (Kratochwil, 1995). Therefore, assuming that people are guided by rules which directly impact human lives (Kratochwil, 1995), we can logically conclude that rules must be clear and comprehensible or systematic if they are to be well understood and efficient. In our case, this means the law must enable a comprehensive view of the entire process and its stages (financial investigation, freezing or seizing, confiscation, enforcement, and disposal) supported by adequate substantive laws and effective reference to other procedural laws and procedures (e.g. the tax procedure).

3 ILLEGAL ASSET RECOVERY IN SLOVENIA

The five-stage procedure described above serves as a basis for examining the legal framework governing the recovery of assets of illicit origin in Slovenia in what follows. Nowadays, the field of asset recovery in Slovenia is regulated by the Criminal Code (Kazenski zakonik, 2012), the Criminal Procedure Code (Zakon o kazenskem postopku, 2012) and the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011). The legal system in Slovenia thus foresees confiscation in both criminal and civil law contexts. Starting with the first phase of the illegal asset recovery procedure, i.e. financial investigation, we can see that it is not defined in the Criminal Procedure Code (Zakon o kazenskem postopku, 2012). For this phase, general provisions on investigation may apply. Article 499 of the Criminal Procedure Code (Zakon o kazenskem postopku, 2012) binds the court and other agencies to gather evidence and inquire into circumstances material to the determination of proceeds of crime. Paragraph 3 of Article 507 of the same law *mutatis mutandis* expands this stipulation to the pre-trial and investigation procedure. Therefore, financial investigation is not systematically defined and shall be carried out according to the general provisions, except for *in personam* confiscation in criminal proceedings (Zakon o kazenskem postopku, 2012, Article 498.a), which applies only to offences of corruption and money laundering. In the case of *in personam* confiscation, the financial investigation is carried out *ex-post facto*. This is probably an additional financial investigation which complements that already done when investigating the offence. In contrast, in civil proceedings, financial investigation is well defined, and this unbalanced approach in the legislation could result in the tendency of law enforcement authorities to prioritise the civil procedure for asset recovery from criminals.

After the investigation phase, if the law enforcement authorities find that an individual does hold proceeds of crime, the prosecutor can propose the freezing or seizure of the said assets to the court. More specifically, Article 502 of the Criminal Procedure Code (Zakon o kazenskem postopku, 2012) provides that the court may, upon the proposal of the State Prosecutor, issue a freezing or seizing order where there is a risk the defendant could use these proceeds for further criminal activities or could conceal, alienate, destroy or otherwise make use of the proceeds. This provision is from a substantial point of view simple and logical, especially when the procedure is about an uncomplicated classical confiscation or the confiscation of instrumentalities of crime. Namely, in this case, the police can – when encountering certain assets during an investigation – easily identify them as proceeds of crime, even more so when the proceeds are an element of the criminal offence. But the case can be quite different if the crime is committed by a criminal organisation where the material law distinguishes between the proceeds of crime and illegally acquired assets, with the latter having a much broader meaning. The key question is whether Article 502 of the Criminal Procedure Code (Zakon o kazenskem postopku, 2012) gives the legal basis for the court to secure illegally acquired assets in the broad sense. The problem is already initially with the financial investigation because the Criminal Procedure Code (Zakon o

kazenskem postopku, 2012) does not extend it beyond investigating a concrete offence and does not allow the investigation of all assets of an individual. This questions whether such property can be identified in the criminal investigation in the first place. But even if we assume that in the financial investigation all assets were identified and that the prosecutor by a literal interpretation of Article 77.a of the Criminal Code (Kazenski zakonik, 2012) identified them as proceeds of crime, this situation may not be upheld by the Constitutional Court of the Republic of Slovenia. Namely, Constitutional Court decision U-I-296/02 (Constitutional Court of the Republic of Slovenia, 2002) found that a confiscation pursues two constitutionally permissible objectives while seeking to secure proceeds: to prevent criminal activity, and to ensure the effective confiscation of proceeds with a view to preventing unjust enrichment. In addition, they performed the proportionality test and held that the state can secure only assets that match the estimated value of the proceeds, which derive from the actual criminal offence in question. Yet such an interpretation does not prevent law enforcement authorities conducting an extensive investigation of a suspect's assets. However, when sufficient assets have been found, they cannot secure more than the concrete proceeds of the alleged crime. Further, in a later decision Up-6/14 dated 5 March 2015 the Constitutional Court of the Republic of Slovenia (2015) specifically stated that assets have to be secured up to the value that corresponds to the estimated amount of proceeds derived from the criminal offence. According to the Constitutional Court, it is therefore inadmissible to secure more assets than it would be permitted to take (see para. 13 of the decision on p. 5). Based on this, we may conclude that the legislator did not adjust the provisions of the Criminal Procedure Code (Zakon o kazenskem postopku, 2012) on freezing and seizure to the subsequent amendment of the Criminal Code (Kazenski zakonik, 2012), which as introduced in Article 77.a extends confiscation.

From a procedural perspective, a freezing or seizure order is issued by the court upon a proposal by the prosecutor. The order is then served on all parties participating in the proceedings. This is quite a common procedure, but from here on the Slovenian procedure becomes more complicated compared to most other countries. This is partly due to numerous rulings of the Constitutional Court of the Republic of Slovenia, which has dealt with the problem of the time limitation for securing assets. Namely, the legislation limits the duration of a seizure or freezing order to three months maximum in the pre-trial stage or six months after the indictment. When this period has elapsed, the court may on a reasoned proposal from the public prosecutor extend the measure, but it must allow all other participants to voice their opinions. From the indictment till final judgment of the court at first instance, the total duration of a temporary measure may not exceed three years. Three- or six-month intervals at which the prosecutor must extend the securing of assets are extremely short and at the same time require the considerable commitment of both the prosecutor and the court (court hearings, justification for proposing an extension, etc.).

The inadequacy of the freezing and seizure provisions in criminal proceedings seems to be compensated by civil proceedings in Articles 20 to 24 of the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega

izvora, 2011). In civil proceedings, a seizure or freezing order can be issued if there is a reasonable suspicion that a catalogue crime was committed and there is a disparity between the suspect's income and the value of assets they have available and, further, that there is a risk the owner will hide or destroy the assets. These conditions allow the national prosecutor a much easier burden of proof because there is no need to prove there is a certain degree of suspicion that the proceeds were obtained from crime. The court in civil proceedings also does not deal with the legality of the acquisition of the assets, but only assesses the proportionality of the gained wealth based on the data submitted. The freezing and seizure order cannot be appealed against but, on the other hand, grounds for giving it must be given. Further, there are no additional court hearings, nor is the judge obliged to inform the participants about the case file, like in criminal proceedings. The duration of the order in civil proceedings is limited to one month after completion of the financial investigation if the prosecutor does not file an action. Yet, if an action is filed, the prosecutor may apply for an extension of the validity of the order. However, the law is not clear on the maximum length of this extension. We can easily conclude that with the civil procedure for securing assets being uncomplicated compared to the criminal, the prosecutor will certainly not be so motivated to pursue a freezing and seizing order under the Criminal Procedure Code (Zakon o kazenskem postopku, 2012) provisions and will prefer to apply under the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011).

From a historical point of view, the rule on traditional confiscation in criminal law, i.e. the principle that no one may gain from crime, has been found in the Slovenian system from the beginning. The provision on classic confiscation is contained in Article 74 of the Criminal Code (Kazenski zakonik, 2012). The difference between classic confiscation and the recovery of illicit assets is that the latter is much broader and also covers the benefit obtained by other unlawful manner, and is not necessarily derived from committing a criminal offence (Gorkič, 2011). Slovenian theory and jurisprudence do not define the confiscation of proceeds of crime as a criminal sanction, even though it affects the assets of a convicted person or any other person the confiscation order is addressed to (Plešec, 2014). That the benefit was obtained from crime is merely a circumstance or precondition for this measure to be imposed. Similarly, the Constitutional Court divides the phase up until the conviction and the phase of confiscating the proceeds of crime.

In the Slovenian legal system, an amendment to the Criminal Code in 2012 (Kazenski zakonik, 2012) introduced extended confiscation when the offence is committed by a criminal organisation. Therefore, under Article 77.a of the Criminal Code (Kazenski zakonik, 2012) it is sufficient that a criminal group has these assets at their disposal. This provision stipulates that an offender who commits a crime within a criminal organisation is also subject to the confiscation of all assets resulting from the criminal activity engaged in by this organisation. This means the provisions of the first paragraph of Article 77.a of the Criminal Code (Kazenski zakonik, 2012) distinguish between a pecuniary benefit or proceeds of crime (a narrower term) and illicit assets acquired by a criminal activity within

a criminal organisation (broader term). However, the Criminal Code (Kazenski zakonik, 2012) does not define the difference between illicit assets and proceeds, except when it comes to assets the criminal organisation disposes of. Proceeds derived from a crime that individual members of a criminal organisation were convicted for are dealt by the traditional confiscation provisions found in Article 74 of the Criminal Code (Kazenski zakonik, 2012). Still, the second paragraph of Article 77.a of the Criminal Code (Kazenski zakonik, 2012) also provides for the confiscation of assets gained through criminal activity, and we may conclude the Criminal Code (Kazenski zakonik, 2012) is quite inconsistent when applying the concepts of illicit assets and proceeds. Further, since the recipient of the proceeds is a criminal group, it may be questioned to whom the confiscation order should be addressed. Since confiscation orders are enforced according to civil law provisions, it would be very difficult to execute one addressed to a criminal organisation without recognising its legality, and that would mean infringing the public order. This provision is therefore very difficult to apply in practice and, in fact, leaves the prosecutor only with the classic confiscation path. As an example, in a decision made in 2006 the Supreme Court of the Republic of Slovenia (2006) noted that in the case of organised criminal activity it is very difficult, if not impossible, to obtain direct evidence on direct recipients of the proceeds (Judgment I PSP 281/2005 of 26 10 2006). Therefore, in such cases, the court considers members of organised groups as accomplices and, for proceeds to be confiscated, the court is allowed a discretion by considering the circumstances of the case, including the importance of the role of each accomplice in the group (Supreme Court of the Republic of Slovenia, 2006). In other words, while the old Criminal Code allowed only the confiscation of proceeds derived from a concrete offence, the current alternative offers no progress. In practice, it is impossible to recover illicit assets within the criminal procedure as the case law counts members of organised crime group as accomplices in the offence. Moreover, if one of the organised group members, i.e. accomplices, is acquitted and if the court issues a confiscation order for illicit assets of the organised group, this would in fact constitute a new indictment (Gorkič, 2014). Taking account of this, we may conclude the procedural provisions in Article 499 of the Criminal Procedure Code (Zakon o kazenskem postopku, 2012) are inappropriate.

After a final confiscation order is issued, a new phase of the procedure starts, i.e. the enforcement of the order. This phase is extremely important because it is only if this phase is successfully concluded that the proceeds and illicit assets actually become the property of the state. As regards execution in civil proceedings, Jenull (2014) notes the provisions of the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011) in this phase are confusing and contradictory. Jenull (2014) highlights one aspect that is problematic, namely the law refers to tax enforcement, but does not distinguish between enforcement of movable and immovable property. Namely, in the first paragraph of Article 35 of the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011) there is reference to other laws upon which the competent authorities carry out their tasks, depending on the type of property. Then, in the second paragraph, the provision applies *mutatis*

mutandis to the Law on Execution and Interim Protection of Claims (Zakon o izvršbi in zavarovanju, 2007) for the enforcement of these orders. However, in the third paragraph of the same article, the law sets Financial Administration as the competent authority for the purpose of the enforcement. The problem of this provision is that the Law on Execution sets the court as the competent authority for execution, while the Financial Administration is competent for enforcement only under the Tax Procedure Act (Zakon o davčnem postopku, 2011). Further, tax enforcement is limited solely to monetary claims because under the tax procedure it is impossible to execute on immovable property or company shares. The Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011) is hence completely unclear on the question of whether the Financial Administration can carry out enforcement on immovable property. This dilemma is quite problematic because the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011) governs *in rem* confiscation, which aims at confiscating concrete assets. The Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011) otherwise defines assets as property and rights which may be the subject of enforcement, in particular immovable property, movable property and all other assets that have a monetary value, as well as assets which derive directly or indirectly from such assets (item 1 of Article 4 of the Forfeiture of Assets of Illegal Origin Act). This definition leads us to conclude that the assets which are to be the subject to enforcement under the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011) will mostly be assets which cannot be the subject of monetary enforcement. Therefore, the law will have to be amended in this part, something also proposed by Jenull (2014). In criminal proceedings, there is no such dilemma. Namely, Article 131 of the Criminal Procedure Code (Zakon o kazenskem postopku, 2012) covers both situations, i.e. enforcement under the provisions of the tax procedure law and the option of using the law on enforcement.

The management phase offers flexible legal solutions for the disposal of the secured and confiscated assets. Yet, one may question whether the system works in practice. The most pertinent problem, among others, is surely the issue of determining the value of seized assets. The fact is that, especially in cases of value confiscation, determining the value of assets brings some problems (Selinšek, 2007).

The Slovenian system also faces some issues with the organisational aspects of the asset recovery regime. In the pre-trial procedure, the organisational structure for conducting investigations is extremely varied and complex (Dežman & Erbežnik, 2003). In this phase, Slovenian law intertwines the competence of the police and prosecutors, but without the clarity needed as to which of the two holds primary responsibility for conducting investigations in the pre-trial procedure (Vrtačnik & Hostnik, 2015). This raises very important questions about responsibility for a proper investigation: is it the responsibility of the police, the prosecutor, or the two bodies together? The state prosecutor is responsible for directing the investigation, while the police are responsible for the correct implementation of investigative measures. From the laws dealing with the

responsible authorities for an investigation, we may assume that if an offence which generated proceeds is detected by the police, the police conducted the initial investigative steps while, if the offence was brought directly before the prosecutor, the prosecutor's office will carry out the investigation by properly directing the police. As financial investigations are conducted under the general rules on investigation, the dispersed responsibility naturally applies to this phase, too.

The law gives an opportunity to set up specialised investigative teams under Article 160 a. of the Criminal Procedure Code (*Zakon o kazenskem postopku*, 2012). These teams are directed by a public prosecutor, and combine various bodies and institutions, with the aim to provide a multidisciplinary approach to the investigation of criminal offences. The duration of such a group's operation is questionable because the law is silent on this matter; however, logically the duration should be limited with the procedural powers of the prosecutor. Therefore, it is very dubious if the investigative team can engage in any action regarding the seeking of property after the final conviction has been secured. This is particularly important in matters of organised and economic crime where the perpetrators use sophisticated ways to hide criminal assets. It would therefore be very important for a multidisciplinary financial investigation to be extended to the enforcement phase of recovery. Another problem of specialised teams is they do not have a permanent structure. Under the legislation, teams consist of members of all competent national authorities and institutions whose powers and tasks are connected to investigating the offence. But this does not necessarily mean that members have the experience required for work on financial investigations. Further, for members of the team this is just extra work on top of their regular tasks, and they cannot be fully dedicated to the financial investigation only. A financial investigative team can also be established in civil proceedings pursuant to Article 14 of the Forfeiture of Assets of Illegal Origin Act (*Zakon o odvzemu premoženja nezakonitega izvora*, 2011). Yet the organisational structure is clearer in the phase of financial investigations within civil proceedings. In this case, the police do not have their own competences and depend entirely on the directions of the prosecutor. But the same problem arises with the duration of financial investigation teams' operations, which is limited to the phase of financial investigation and does not extend to the final execution or payment to the state budget.

In the stage of securing assets, Article 506 of the Criminal Procedure Code (*Zakon o kazenskem postopku*, 2012) gives the court powers to manage the assets and it must act with due diligence and take very quick action in these cases. In practice, determining when the storage of the assets is associated with excessive costs has proven very problematic for the courts. Judges often do not have the required knowledge and are unable to estimate the value of certain property types or decide on the ways of storage and all associated costs. External contractors, on the other hand, do not have any interest in selling the assets further as their storage retention is a very profitable business. A very similar situation occurs later in criminal proceedings after the conviction has been declared, and the proceeds have to be determined *ex officio* or independently of the will of the state prosecutor.

Under Article 501 of the Criminal Procedure Code (Zakon o kazenskem postopku, 2012), the court can use its discretion to determine the amount of proceeds if its determination would cause disproportionate difficulties or if the procedure would be unduly protracted. Although the court must substantiate its decision and justify it by reference to facts, such a legal solution is inappropriate. Namely, it is impossible for the judge to hold all this knowledge and skills, in particular when a complex matter is entailed, such as managing larger companies, exotic animals and the like.

For asset management, the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011) authorises different institutions and refers to different laws. It is obvious that by using such general blanket references to other provisions the legislator wished to avoid various problems (Jenuš, 2014), especially the establishment of new institutions that might during the deepest economic crisis in 2010 have been viewed as considerably unpopular. Altogether, it is illogical that the management of assets is left to two different regimes: first in criminal proceedings where management is assigned to the court, and second in the civil procedure, where such management is left to different institutions, depending on the asset types.

4 CONCLUSION

Through analysis of legal acts, we may conclude that only a systematically formed legislative framework can ensure an effective system for confiscating proceeds and illegal asset recovery. For Slovenia, this would initially mean it would be necessary to define financial investigation in criminal proceedings (Zakon o kazenskem postopku [Criminal Procedure Code], 2012). Namely, a financial investigation is the starting point for the whole asset-recovery process. And that includes financial investigation in the civil procedure because the trigger for launching the procedure is a suspicion that certain assets were acquired by committing an offence. It is therefore inappropriate for a financial investigation to be carried out under the provisions of civil law. We believe that, already in this stage, the legislator should give a clear message that the primary attempt to confiscate proceeds and illegal assets should occur through criminal proceedings and, only if this proves impossible, should the law enforcement use civil forfeiture proceedings. Financial investigation must therefore become an essential part of all police criminal investigations of offences which could generate any proceeds. However, at the same time, law enforcement authorities must obtain a clear mandate that in certain conditions they can investigate all assets of the suspect, not only the concrete proceeds of crime. Such a mandate would also make the financial investigation useful for extended confiscation in criminal proceedings and civil forfeiture. In this phase, it is also necessary to very clearly define the responsibility of the leading actors in the investigation and, in our opinion, this must be the prosecutor because immediately after a financial investigation has been concluded the prosecutor may propose the seizure or freezing of assets. The prosecutor should also be given a mandate to secure assets in urgent and exceptional circumstances with only the subsequent confirmation of the court,

while at the same time the procedural provisions for securing assets in criminal proceedings must be simplified in the same way as they are in civil proceedings under the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011). From the institutional point of view, it would make sense to set up a multidisciplinary body – an Asset Recovery Office (ARO) – which would enable investigators to have easy access to data both at home and internationally. The ARO could act as a think-tank and would ensure through training that, where relevant, financial investigations become part of all police investigations.

On a positive side, Slovenia's legal order provides the competent authorities with several avenues for recovering proceeds and illegally acquired assets. There is the traditional confiscation of proceeds, *in personam* confiscation in criminal proceedings (Article 498.a of the Criminal Procedure Code) (Zakon o kazenskem postopku, 2012), extended confiscation in criminal proceedings (Article 77.a of the Criminal Code) (Kazenski zakonik, 2012) and civil forfeiture after the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011). One problem is that the relevant provisions are dispersed across both substantive and procedural law. Another problem is that some provisions are formulated in such a way that they are impossible to implement in practice. In particular, we showed that Article 77.a of the Criminal Code (Kazenski zakonik, 2012) *de facto* does not bring any changes with respect to classical confiscation since the assets of a criminal organisation, which has no legal personality, are impossible to confiscate. Further, contrary to some other legal systems, the Slovenian legislation does not define the concept of criminal activity that should be the basis for applying extended confiscation. It is thus necessary to introduce extended confiscation with a reversed burden of proof into the Criminal Code (Kazenski zakonik, 2012) and link it with criminal activity, which would be best defined as the implementation of certain elements of a criminal offence in a given period.

The enforcement phase should be stipulated in a completely different way in both the criminal and civil procedure. Chiefly, it is a question of organisation because, at the moment, especially following the Forfeiture of Assets of Illegal Origin Act (Zakon o odvzemu premoženja nezakonitega izvora, 2011), it is unclear which institution is responsible for enforcing confiscation orders. Moreover, it is necessary to establish a record of how many confiscation orders have in fact been enforced and the exact amount sent into the state budget. This record will show how cost-effective the asset recovery system in Slovenia is and whether proper criteria and methods for evaluating assets are in place. The evaluation of assets is a particularly problematic aspect of the Slovenian system because, as a general rule, it is performed by judges who often do not possess adequate knowledge and skills. The creation of a centralised body to manage the assets would be a good solution: it would take care of assets from the time of their valuation, deal with their freezing and seizure until they are finally disposed.

REFERENCES

- Council of the EU. (2012). *Accompanying document to the proposal for a Directive of the EP and Council on the freezing and confiscation of proceeds of crime in the EU – Impact Assessment*. Brussels: Council of the EU.
- Constitutional Court of the Republic of Slovenia. (2002). U-I-296/02. Retrieved from <http://odlocitve.us-rs.si/sl/odlocitev/US23565>
- Constitutional Court of the Republic of Slovenia. (2015). Up-6/14. Retrieved from <https://www.us-rs.si/aktualno/novice/odlocba-ustavnega-sodisca-st-up-614-z-dne-5-3-2015/>
- Dežman, Z., & Erbežnik, A. (2003). *Kazensko procesno pravo Republike Slovenije* [Criminal procedural law of the Republic of Slovenia]. Ljubljana: GV Založba.
- Dobovšek, B. (2008). Economic organized crime networks in emerging democracies. *International Journal of Social Economics*, 35(9/10), 679–690.
- Gorkič, P. (2011). Stranske žrtve uvedbe odvzema premoženja z obrnjenim dokaznim bremenom [Secondary victims of introducing deprivation of property by reversal burden of proof]. *Podjetje in delo*, 37(6/7), 1031–1037.
- Gorkič, P. (2014). Dokazovanje v postopku odločanja o odvzemu premoženjske koristi in premoženja [The evidence procedure of illegal asset recovery]. *Pravnik*, 69(9/10), 575–601.
- Jager, M., & Šugman Stubbs, K. (2013). Za več preventive pri obvladovanju gospodarske kriminalitete [For more prevention in dealing with economic crime]. *Revija za kriminalistiko in kriminologijo*, 64(2), 154–162.
- Jensson, A. (2011). *Crime should not pay: Iceland and the international developments of criminal assets recovery* (Master thesis). Haskoli Islands: School of Social Sciences.
- Jenull, H. (2014). Izvršitev odvzema premoženja po ZOPNI [Enforcement of the asset seizure according to the FAIOA]. *Pravna praksa*, 33(49–50), 8–9.
- Kazenski zakonik [Criminal Code] (KZ-1-UPB2). (2012, 2015, 2016, 2017). *Uradni list RS*, (50/12, 54/15, 6/16, 38/16, 27/17).
- Kratochwil, F. V. (1995). *Rules, norms and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs*. Melbourne: Cambridge University Press
- Levi, M. (2015). Money for crime and money from crime: Financing crime and laundering crime proceeds. *European Journal on Criminal Policy and Research*, 21(2), 275–297.
- Middleton, D., & Levi, M. (2015). Let sleeping lawyers lie: Organized crime, lawyers and the regulation of legal services. *British Journal of Criminology*, 55(4), 647–668.
- Plesec, P. (2014). Pravna narava odvzema po Zakonu o odvzemu premoženja nezakonitega izvora [Legal nature of the confiscation of property by FAIOA]. *Pravnik*, 69(11/12), 809–838.
- Rejec Longar, K., Šugman Stubbs, K., & Lobnikar, B. (2018). Effectiveness of asset recovery in Slovenia – comparison of police officers’ and prosecutors’ opinions. In G. Meško, B. Lobnikar, K. Prislán, & R. Hacin (Eds.), *Criminal justice and security in Central and Eastern Europe: From common sense to evidence-based*

- policy-making: Conference proceedings* (pp. 598–615). Maribor: University of Maribor Press; Ljubljana: Faculty of Criminal Justice and Security.
- Selinšek, L. (2007). *Kazensko pravo – splošni del in osnove posebnega dela*. [Criminal law - the general part and the basics of special part]. Ljubljana: GV Založba. Supreme Court of the Republic of Slovenia. (2006). I PSP 281/2005. Retrieved from [http://www.sodnapraksa.si/?q=id:26307&database\[SOVS\]=SOVS&database\[IESP\]=IESP&database\[VDSS\]=VDSS&database\[UPRS\]=UPRS&_submit=i%C5%A1%C4%8Di&page=0&id=26307](http://www.sodnapraksa.si/?q=id:26307&database[SOVS]=SOVS&database[IESP]=IESP&database[VDSS]=VDSS&database[UPRS]=UPRS&_submit=i%C5%A1%C4%8Di&page=0&id=26307)
- Vettori, B. (2006). *Tough on criminal wealth: Exploring the practice of proceeds from crime confiscation in the EU*. Doordrecht: Springer.
- Vrtačnik, M., & Hostnik, M. (2015). *Državno tožilstvo v Republiki Sloveniji* [State Prosecutor's Office in the Republic of Slovenia]. Ljubljana: Vrhovno državno tožilstvo.
- Williams, P. (2001). Transnational criminal networks. V J. Arquilla, & D. Ronfeldt (Eds.), *Networks and netwars: The future of terror, crime, and militancy* (pp. 61–97). Santa Monica: RAND Corporation.
- Zakon o davčnem postopku [Tax Procedure Act] (ZDavP-2-UPB4). (2011). *Uradni list RS*, (13/11).
- Zakon o izvršbi in zavarovanju [Law on Execution and Interim Protection of Claims] (ZIZ-UPB4). (2007, 2009, 2010, 2011, 2014, 2015, 2018). *Uradni list RS*, (3/07, 93/07, 28/, 09, 51/10, 26/11, 53/14, 54/15, 11/18).
- Zakon o kazenskem postopku [Criminal Procedure Code] (ZKP-UPB8). (2012, 2013, 2014). *Uradni list RS*, (32/12, 47/13, 87/14).
- Zakon o odvzemu premoženja nezakonitega izvora [Forfeiture of Assets of Illegal Origin Act] (ZOPNI). (2011, 2014). *Uradni list RS*, (91/11, 25/14).

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