



Monitoring Report on Confiscation of Unlawfully Acquired Property in Bosnia and Herzegovina

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Introduction

United Nations Convention against Corruption¹ defines freezing or seizure as: “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority²”, while the notion of confiscation is defined as “the permanent deprivation of property by order of a court or other competent authority, which includes forfeiture where applicable³”. Within the legal system of Bosnia and Herzegovina, those notions are covered by the principle that “nobody may keep the material gain acquired by criminal offence”, and by legal instruments of temporary or permanent confiscation of the material gain acquired by criminal offence.

This principle is established by all four criminal codes in Bosnia and Herzegovina, in the Chapter XII of the BiH Criminal Code⁴, Criminal Code of FBiH⁵ and Criminal Code of BD⁶, and in the Chapter VII of the RS Criminal Code⁷. The procedure of confiscation of material gain acquired by criminal offence is determined by criminal procedure codes⁸, in the Chapter XXVIII of the BiH Criminal Procedure Code and BD Criminal Procedure Code, in the Chapter XXIX of the FBiH Criminal Procedure Code, and Chapter XXVI of the RS Criminal Procedure Code. This principle was the integral part of the criminal legislative since 1959, long before the latest reform of the criminal legislative.

After ratification, Bosnia and Herzegovina took additional steps to improve the legal framework in accordance with Convention standards related to freezing, seizure and confiscation of the property. In that regard, criminal codes were amended and special laws on confiscation of property were brought, at the level of entities: in 2010, the Law on Confiscation of Property Acquired by Criminal Offence in Republika Srpska⁹; in 2014, the Law on Confiscation of Unlawfully Acquired Property by Criminal Offence in Federation BiH¹⁰, and recently adopted the

¹ It was adopted on October 31, 2003 at the UN General Assembly, Resolution number 58/4 I Decision on the consent to ratification of United Nations Convention against Corruption (“BiH Official Gazette” No. 3/06)

² Article 2, paragraph (1), item (f)

³ Article 2, paragraph (1), item (g)

⁴ Criminal Code of Federation of BiH, “BiH Official Gazette” No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15

⁵ Criminal Code of Federation of BiH, “FBiH Official Gazette” No. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14

⁶ Criminal Code of BD – consolidated version, “BD BiH Official Gazette” No. 33/13

⁷ RS Criminal Code, “RS Official Gazette” No. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13

⁸ BiH Criminal Procedure Code, “BiH Official Gazette” No. 3/03, 32/03, 36/03, 36/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13; Criminal Procedure Code, “FBiH Official Gazette” No. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14; Criminal Procedure Code, “RS Official Gazette” No. 53/12, and BD BiH Criminal Procedure Code – consolidated version, “Brcko District Official Gazette” No. 33/13

⁹ Republika Srpska Law on Confiscation of Property Acquired by Criminal Offence, “RS Official Gazette” No. 12/10

¹⁰ Law on Confiscation of Unlawfully Acquired Property by Criminal Offence, “Federation BiH Official Gazette” No. 71/14

Draft Law on Confiscation of Unlawfully Acquired Property in Brcko District. These laws represent additional efforts to regulate issues related to freezing, seizure and confiscation of the proceeds of crime. These laws are in agreement with criminal legislative provisions, and in some areas they regulate practical activities during the confiscation procedure and handling of the confiscated property. The application scope of the new law should be taken into consideration here, for these laws are applied in procedures of confiscation of material gain acquired by criminal offence that is stipulated by criminal codes and for which the penalty is 3 years of imprisonment or a more severe penalty in FBiH, or when material gain exceeds 50,000 BAM in the RS, so for all other crimes the provisions of criminal legislative are applied. Similar law is still not brought at the level of BiH, so it presents the additional challenge that Bosnia and Herzegovina would have to overcome with the aim of harmonizing its legal system with obligations from the Convention.

Since this area is regulated by four different groups of legal regulations, this review of compatibility with the Convention will hereafter consider the compatibility of BiH legal system as the generic term, while the differences between the different government levels would be especially emphasized.

In the first part, this analysis will focus on legal and institutional framework of Bosnia and Herzegovina in regard to implementation of obligations from Article 31 of the Convention, regarding every item of the Convention.

In the second part, the analysis will cover statistical data on court decisions by which confiscation of material gain acquired by criminal offences was determined in the period 2013-2015. The data were delivered by High Judicial and Prosecutorial Council of BiH for the purpose of this analysis by Transparency International BiH.

Other relevant international documents in the area of confiscation of material gain acquired by criminal offences

European Council regulated the issue of confiscation of unlawfully acquired property by several documents and especially by the **Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime** from 1990, which was signed by Bosnia and Herzegovina in 2006¹¹. This Convention is one of the first documents determining the basis for criminalization and standards of permanent confiscation of the proceeds from crime. The Convention determines the notion of unlawful income as the material gain acquired by criminal offence, and it may consist of any type of property. The notion of property means either items (movable and real property) or rights (it may include either legal acts or documents by which the title or the right to such property is proved).

The notion of confiscation is also precisely defined as “a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences”, resulting in the final

¹¹ BiH Official Gazette – International treaties, No. 04/06

deprivation of property that was acquired by criminal offence, and such confiscation may be ordered only in relation to determining that the criminal offence was actually committed. By signing the convention, Bosnia and Herzegovina obliged to “adopt necessary legislative and other measures based on which it would be possible to perform the confiscation of means and unlawful income or material value that corresponds to such unlawful income”.

Criminal Law Convention on Corruption of the Council of Europe from 1999, signed by Bosnia and Herzegovina in 2006¹², is aimed to repress and protect the society from corruption, including adoption of legislative and preventive measures. Besides the series of obligations put upon the member states by this Convention, Article 19 stipulates bringing of legislative and other measures that will enable confiscation or in some other way deprivation of instrumentalities and proceeds from criminal offences, or property the value of which corresponds to such proceeds.

Besides, it stipulates the obligation of adopting legislative and other necessary measures in order to empower courts or other competent authorities to order that bank, financial and commercial documentation be made available, or be seized in order to carry out collecting evidence and confiscation of the proceeds.

European Parliament and the European Union Council brought the series of significant documents during the development of European Community Law related to confiscation of unlawfully acquired property. These include documents such as Joint Action 98/699/JHA of December 3, 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, Council Framework Decision 2001/500/JHA of June 26, 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime¹³, Council Framework Decision 2003/577/JHA from July 22, 2003 on the execution in the European Union of orders freezing property or evidence¹⁴, Council Framework Decision 2005/212/JHA from February 24, 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property¹⁵, Council Framework Decision 2006/783/JHA from October 6, 2006 on the application of the principle of mutual recognition to confiscation orders¹⁶ and other.

Still, only by adopting the **Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union**¹⁷ from April 2014, legal prerequisites for harmonization of legislatives in member states in regard to confiscation of the proceeds from crime were created. Material gain according to this directive represents the direct material gain acquired by committing criminal offence, but it also includes all other benefits, like subsequent reinvesting or transformation of the direct material gain. Procedure of material gain confiscation

¹² BiH Official Gazette – International treaties, No. 02/01

¹³ The Official Journal of the European Union, L182, 7/5/2001, p. 1

¹⁴ The Official Journal of the European Union, L196, 8/2/2003, p. 45

¹⁵ The Official Journal of the European Union, L 68, 3/15/2005, p. 49

¹⁶ The Official Journal of the European Union, L 328, 11/24/2006, p. 59

¹⁷ The Official Journal of the European Union, L 127/39, 4/29/2014, p. 39

may include any property, such as the property that was transformed or converted, fully or in part, into other property, one that was intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds, and also it may include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.

Legal and Institutional Framework in Bosnia and Herzegovina for confiscation of unlawful material gain in relation to obligations from the United Nations Convention against Corruption

Confiscation of the proceeds from crime of corruption and of the property, equipment or other instrumentalities that are used or are destined to be used in criminal offences (Article 31, paragraph 1, item a) and b)).

Criminal legislative determines the basis and the manner of confiscating proceeds from crime, the way to protect the aggrieved party, and the general principle that “nobody may keep the proceeds from crime” and that the benefit may be confiscated by the court decision that also determined the crime was committed.

Criminal codes determine that the prosecutor has the right and obligation to determine facts necessary for deciding on confiscation of the proceeds from crime. These articles stipulate that proceeds from crime are being determined within the criminal procedure *ex officio*¹⁸, and emphasize the prosecutor’s obligation to collect evidence and examine the circumstances that are important for establishment of the material gain acquired by criminal offence¹⁹. The prosecutor in this procedure has the right and obligation to determine the material gain that is not covered by the property claim, if such claim has been submitted by the aggrieved party²⁰.

The prosecutor is obliged to collect evidence and examine the circumstances that are relevant for determination of the acquired material gain. The court may also establish the value of material gain based on the free estimate, if the estimation in some other way would cause disproportionate difficulties or significant delay of the procedure. Provisions of the criminal legislative imply the active obligation of the court to determine the material gain in any case, except if it is obvious that by committing the criminal offence no material gain has been acquired, and to rule on the confiscation.

The Law on Confiscation of Property Acquired by Criminal Offence in the Republika Srpska and the Law on Confiscation of Unlawfully Acquired Property by Criminal Offence in BiH Federation confirm the principle of banning the keeping of material gain acquired by criminal offence. Although these laws in their procedural parts represent *lex specialis*, for they additionally regulate actions of relevant institutions, they confirm that provisions of entities’ criminal codes and of codes on criminal procedure are primarily applied to confiscation. Still, in relation to criminal legislative, these laws introduce qualifying element in relation to procedures led according to those laws, for confiscation of material gain acquired by criminal offence that are stipulated by criminal codes. According to the Law on Confiscation of Property Acquired by Criminal Offence in the Republika

¹⁸ Article 392 (1), BiH Criminal Procedure Code

¹⁹ Article 392 (2), BiH Criminal Procedure Code

²⁰ Article 392 (3), BiH Criminal Procedure Code

Srpska, this qualifying element relates to the amount of the acquired material gain, so provisions of this law apply only to criminal offences with more than 50,000 BAM worth of material gain.

On the other hand, the Law on Confiscation of Unlawfully Acquired Property by Criminal Offence in BiH Federation determines the qualifying element by the stipulated penalty, so this law is to be applied to procedures of confiscation of proceeds from crimes, where the crimes are stipulated by the FBiH Criminal Code, and are punishable by 3-year imprisonment or by more severe penalty. Besides, these laws regulate other issues related to confiscation of material gain acquired by criminal offences, like conditions and the procedure of confiscation of material gain acquired by criminal offence, managing temporarily and permanently confiscated property, and in FBiH, the establishment of the relevant authority for management of confiscated property. As already emphasized, the provisions of criminal legislative are applied to all other criminal offences that do not meet these criteria from laws in the RS and FBiH.

2. Every contracting state shall take measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

General rules on confiscation of items, which are contained in the criminal procedure laws in BiH, determine the principles of identification, tracing, freezing or seizure of the property that is contained in Convention provisions. Although these laws do not use identical terminology, it is clear, for instance, that orders to the bank or telecommunications operator (as well as other measures and activities, including special investigative activities) have to be regarded as identification or tracing measures, while the measure of property confiscation and temporary property confiscation are measures of freezing and seizure. According to this concept, items that are to be confiscated or that might serve as evidence in criminal procedure according to BiH Criminal Code will be temporarily confiscated and their keeping will be ensured by the court decision. The order to confiscate items is given by the Court, according to the request of the Prosecutor or other authorized official that was approved by the Prosecutor. Items may be temporarily confiscated without Court's order if there is any danger in delaying. Besides, the Court may at any time during the procedure and upon the Prosecutor's request, bring the temporary measure of confiscation of property that is to be confiscated according to BiH Criminal Code, measure of seizing or other necessary temporary measure in order to prevent the use, alienation and disposal of that property.

Criminal procedure codes in Bosnia and Herzegovina do not define individual phases of confiscation of material gain procedure, do not stipulate individual security measures, do not define the financial investigation, execution procedure and other issues related to procedure of identifying of such property, its securing and confiscation. These laws also do not determine the duty of the prosecutor to fully collect the evidence on disproportion of income and property value that the suspect, accused or related party possesses.

For that reason, provisions of the Law on Confiscation of Property Acquired by Criminal Offence in the Republika Srpska and the Law on Confiscation of Unlawfully Acquired Property by Criminal Offence in BiH Federation are especially significant, for these laws emphasize the active role of the Prosecutor in the investigation phase. It especially applies to the phase of financial investigation that is performed with the aim of comprehensive determination of real origin, value and structure of material gain for which there is a reasonable doubt that it has been acquired by the criminal offence. This is especially important, for if the suspect's property has not been timely determined and secured, the execution of this measure will remain uncertain. That is why it is very important that adopting of those laws made the financial investigation the formal legal phase in procedures of determination and confiscation of unlawfully acquired property, and prosecutors, being the key players, should initiate and lead financial investigations.

Although it is stipulated that the court brings the decision on confiscation of the property *ex officio*, if the prosecutor does not collect enough evidence, the court will not easily decide to do so.

The aim of financial investigation is to collect all evidence that show the scope, amount, type, real value and other circumstances related to legal income of the suspect or the accused, the related parties, real daily expenses and real possibilities of legal acquiring of the property for which there is a reasonable doubt that it has been acquired by the criminal offence. All institutions, bodies and public services are obliged to cooperate with the prosecutor, and they shall, within their competencies, act in accordance with orders of the prosecutor, who ordered the financial investigation according to this law. Upon prosecutor's request, the court might order state agencies, banks, financial institutions and other legal and natural persons to deliver the data and information necessary for deciding according to this law. Special obligations of banks will be discussed later on, within the discussion on the paragraph 7 of the Article 31.

Within financial investigation, the prosecutor has the right to cooperate with other agencies that assist him in evidence collection, and the prosecutor also coordinates the work of law enforcement agencies, which according to the FBiH Criminal Procedure Code (2014, Article 21, item g), have the status of authorized official, and these are: State Investigation and Protection Agency, Ministry of the Interior, Financial Police, tax administrations. Besides those agencies, all other government bodies and institutions are obliged to act according to the prosecutor's order, like Securities Commission of the FBiH, banking agencies, courts (land registry), public attorney offices, municipalities (cadaster) and others. The law in the RS stipulates establishing of the separate organizational unit, with discovering of the property acquired by committing the criminal offence and other tasks according to this law being within its competence.

It is the obligation of all agencies and persons who participate in financial investigation to act in a special urgency. This obligation is especially important in the procedure of temporary confiscation of the property, for it enables realization of this measure's aim.

These laws elaborate two procedures in confiscation of unlawfully acquired property: the procedure of permanent confiscation and the procedure of temporary confiscation of the property. Material gain acquired by criminal offence is determined by the court decision. According to the Law in FBiH, courts as a general rule decide on this issue by declaring the accused guilty. According to both laws, the prosecutor submits the request to confiscate the property, in FBiH the request being submitted at the indictment, while in the RS it is done after the indictment has been confirmed, and the latest within one year after the criminal procedure is validly terminated.

Novelty in the BiH legal system is the separate procedure for confiscation of material gain that may be initiated only in the FBiH, and which is initiated when there is a reasonable doubt that material gain has been acquired by perpetrating criminal offence, and conditions for criminal procedure have not been met. This relates to situations like the death of the suspect or the accused, or the escape of the suspect or the accused, and in situations when there is the danger of statute of limitations on criminal prosecution. This procedure is initiated upon the request of the prosecutor to the court in whose jurisdiction the trial for the criminal offence would be, and that request contains the explanation for the existence of procedural obstacles of such nature that regular procedure for confiscation of material gain acquired by criminal offence cannot be led. The court brings the decision in this procedure. After the decision goes into effect, a separate procedure to confiscate the material gain acquired by criminal offence is led. During the main hearing of the separate procedure, the court will present the evidence and question the related party if needed, in order to determine if the material gain was acquired by criminal offence and what constitutes material gain, and upon completion the court will pass the judgment by which it determines that the material gain was acquired by unlawful act which contains legal elements of criminal offence.

These laws also elaborate the procedure of deciding on temporary confiscation of the property. In the sense of terminology, these laws make a difference in temporary confiscation of the property that has characteristics of freezing and seizing, according to the Convention. The law in the RS deals with temporary confiscation (articles 21-27), while the law in FBiH deals with measures of securing the confiscation of material gain (articles 16-22). Under both laws the procedure is initiated in cases when there is the danger of putting the later confiscation into question if temporary measure is not brought.

In his request for temporary confiscation of property/securing the confiscation of material gain, the prosecutor is obliged to justify the reasons for deciding according to his request, and to suggest the security. The law in the FBiH determines the open list of possible measures, like measure of banning alienation and encumbrance of the property or the real rights registered on the property, with recording the ban within the land registry, confiscation of the property and its committing to the Agency for keeping and managing, and banning the debtor of the suspect, of the accused or of related party to deliver the items, transfer the right or perform other financial transaction. The law in the RS does not list measures individually, but this fact does not prevent the prosecutor from requesting any of the mentioned or some other measures. Deadlines for

temporary confiscation of the property are short, and are determined by the court within seven work days from the date of request according to the law in FBiH, or according to the law in the RS the court has to schedule the hearing to decide on the prosecutor's request within five days from the day of request. Both laws stipulate appeal to court's decision, but the appeal does not delay the execution of this measure. The decision is in both cases delivered to the agency for property management, whose establishment is determined by these laws. The law in the RS stipulates an alternative way to seize or freeze the property. Namely, Article 21 of the Law determines that if there is the danger of disposing of the property acquired by committing criminal offence by the owner before the court decides on the prosecutor's request, the prosecutor may file the request for temporary measure in accordance with the Law on Civil Procedure. In this way, the combination of criminal and civil approach is enabled in freezing and seizing the property, while it is up to the prosecutor to estimate which of the two approaches would be more efficient in realizing the aim.

These laws also stipulate that the enforcement procedure over the confiscated property be performed in accordance with provisions of the law on enforcement procedure, and the law in FBiH specifies that the enforcement is performed upon the suggestion of the Federal Public Attorney's Office of the Federation of Bosnia and Herzegovina.

Laws of Bosnia and Herzegovina on execution of criminal sanctions, detention and other measures generally regulate the issue of handling the confiscated property. According to the law at the level of BiH, confiscated material gain expressed as the money, securities etc. is taken into the Budget of BiH institutions and it is used according to the Budget Execution Law, while movable and/or real property is sold according to the current regulations and the realized revenue is paid to the Budget, or the property will be given to organizations in the area of social politics, education, state agencies, etc. for use. Entities' laws on confiscation of the property acquired by criminal offence also regulate for the confiscated property to become the part of the RS budget or the FBiH budget. Those laws additionally elaborate the issue of management and sale of confiscated property.

3. Each party shall, in accordance with its domestic legislation, adopt legislative and other measures as may be necessary to regulate the management of frozen, seized or confiscated property contained in items 1 and 2 of this article by relevant agencies.

The issue of management of frozen, seized or confiscated property by relevant authorities that is contained within items 1 and 2 of the Article 31 of the Convention is not covered by the criminal legislative. At the level of entities, this issue is regulated by the Law on Confiscation of Property Acquired by Criminal Offence in the Republika Srpska and the Law on Confiscation of Unlawfully Acquired Property by Criminal Offence in BiH Federation. These laws define legal requirements for realization of this obligation from the Convention. Nevertheless, there is no authority that might manage temporarily or permanently confiscated property in procedures that are led in accordance with BiH criminal legislative.

One of the goals of both laws on confiscation of unlawfully acquired property is the management of the frozen, seized or confiscated property contained in items 1 and 2 of the Convention by relevant authorities. The law in the RS stipulates establishment of the Agency for Management of the Confiscated Property as the administrative organization within the RS Ministry of Justice. Its establishment is confirmed by the Law on Republic Administration, in the Article 47a. According to both laws, the Agency for Management of the Confiscated Property manages the confiscated property acquired by committing of criminal offence, proceeds from crime from the Article 62 of the Criminal Code of the Republika Srpska, material gain acquired by committing criminal offence from articles 94, 95 and 96 and the property given as security in the criminal procedure; the Agency performs the official evaluation of the confiscated property acquired by committing of criminal offence; it stores, keeps and sells the confiscated property acquired by committing of criminal offence and dispose of the gained revenue; it keeps records of the property it manages and of the court procedures in which it has been decided on such property; it participates in providing of legal aid; it also participates in training of public servants related to confiscation of the property acquired by committing of criminal offence, as well as in previously mentioned tasks related to the property acquired by offence and other tasks in accordance with the Law on Confiscation of the Property Acquired by Committing Criminal Offence and other laws. Reports of this Agency are not publicly available, so it is impossible to estimate the influence of this Agency in regard of management of the confiscated property in practice.

The similar is stipulated by the Law on Confiscation of the Unlawfully Acquired Property by Criminal Offence in BiH Federation, by which the separate administrative body of Federal Agency for Management of Confiscated Property was established. The Agency has the status of independent administrative organization that reports to the Government and Parliament of BiH Federation. Federal Agency's competences are related to management of temporary confiscated and confiscated property according to provisions of this and other laws, performing of analyses in the area of confiscation of material gain acquired by criminal offences, professional education in the area of financial investigations and confiscation of material gain acquired by criminal offences, and other tasks stipulated by this law. In September 2016, the Federal Agency has been working, but its influence in regard of confiscated property management is still unknown. Important provision of the law in FBiH is the obligation of the Agency regarding the drafting of Strategy for Confiscation of Material Gain Acquired by Criminal Offence in Federation of Bosnia and Herzegovina and Action Plan for its realization. Nevertheless, these documents have not been adopted yet.

In July 2016, the Law on Confiscation of Unlawfully Acquired Property²¹ was adopted in Brcko District. The law stipulates that the Public Property Administration Office of the District is the authority competent for keeping and managing the permanently confiscated property. This Office is the institution of Brcko District and it was established according to the Law on Public Property in Brcko District of Bosnia and Herzegovina ("BiH Brcko District Official Gazette" No. 28/06 and

²¹ Brcko District Official Gazette No. 29/16

19/07). This Office is in charge of storing, keeping, selling and leasing of the permanently confiscated property, and in case of justified need, the Office may entrust some other institution with keeping of this property and with other functions related to these tasks, by concluding the special contract, upon mayor's consent. Like Federal Agency, the Office has the obligation of drafting the Strategy for Confiscation of Material Gain Acquired by Criminal Offence in Brcko District and Action Plan for its realization, but since the law has been adopted immediately before creation of this report, the mentioned has not yet been adopted.

The key function of those bodies is management of the temporarily and permanently confiscated property, and providing support to courts that brought such decisions (decisions and rulings) within procedures of material gain confiscation. This is of especial importance when dealing with different types of property that are subject to the procedure and the keeping of which requires special capacities, resources, knowledge and procedures for preservation of such property's value.

These bodies may sell temporarily and permanently confiscated property through public auction. According to the law in FBiH, temporarily confiscated movable property may be **sold** without previously announced public auction if its keeping represents danger, if there is immediate danger of its deterioration or significant loss of value, or if the ownership of the property cannot be reliably determined. According to the law in the RS, only perishable goods and animals may be sold without public auction. The property may also be destroyed according to these laws.

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

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

The principle determined in the Article 31.4 regarding transformed, converted or intermingled unlawfully acquired property represents the principle of BiH criminal legislative. Only the RS Criminal Code does not define this issue in a special way according to the Convention standards. According to criminal codes, except for the RS case, it is stipulated that when material gain acquired by criminal offence is intermingled with the property acquired from legitimate sources, such property will be subject to confiscation, but to the level that does not exceed assessed value of material gain acquired by criminal offence. For the RS territory, this issue is regulated by the Law on Confiscation of Property Acquired by Criminal Offence in the Republika Srpska, which in its Article 3 extends the defining of the notion of property also to asset to which the property was transformed or with which it is intermingled.

Nevertheless, what is stipulated by all four laws is the situation when it is not possible to confiscate the material gain acquired by criminal offence from the perpetrator. In such situation, it is

determined that the perpetrator will be obliged to pay the amount of money that corresponds to the acquired material gain.

It may be concluded from this review of legal norms that if the material gain from criminal offence is transformed into some other type of property or if it is intermingled with the property acquired from legitimate sources, such property may be the subject to confiscation up to the assessed value of the material gain. In that case, such property may be liable to confiscation in part that corresponds to the determined gain. Still, it is assumed that the court would use this instrument only when that "intermingled property" may be divided in such a way to obtain the part that corresponds to the assessed value. When that is not possible, the court shall order the confiscation of the equivalent value of the gain through ordering the payment of the amount of money corresponding to the acquired material gain.

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

The principle determined in the Article 31.6 regarding the income from unlawfully acquired property represents the principle of BiH criminal legislative. Only the RS Criminal Code does not define this issue in a special way according to the Convention standards. According to criminal codes, except for the RS, income or other fruits of material gain acquired by criminal offence, or the property to which the material gain acquired by criminal offence was transferred to or the property with which the material gain acquired by criminal offence was intermingled, may be the subject to confiscation measures in the same manner and to the same extent as material gain acquired by criminal offence. For the RS, this issue is regulated by the Law on Confiscation of the Property Acquired by Criminal Offence in the Republika Srpska, which in its Article 3 extends the defining of the notion of property also to income or other benefit that was realized directly or indirectly from the criminal offence.

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

BiH criminal legislative recognizes the possibility of courts ordering bank, financial and commercial data delivery for the purpose of investigation. Actively authorized body for submitting requests for such decision is the prosecutor, who may request such action if there is reasonable doubt that some person committed criminal offence that is related to the acquiring of material gain. In such cases, the court may order the bank or some other legal person performing financial business activities to deliver the data on bank deposits and other financial transactions and

business activities of that person, data related to that person and other persons whom are justifiably believed to be included in financial transactions or business activities of the suspect, if such data might be the evidence in criminal procedure.

Entities' laws on confiscation of the property acquired by criminal offence also confirm this possibility²². According to Federal regulations, non-compliance with this order within the given deadline or incomplete compliance are punishable by the court decision with 200,000.00 BAM for legal persons and up to 50,000.00 BAM for physical person and responsible person within the legal person. If physical person and responsible person within the legal person sentenced with such penalty still do not obey the court's order, they might be sanctioned by imprisonment until the order is executed, and not longer than 3 months.

In urgent cases measures might be determined by the prosecutor's order. In such cases, the prosecutor shall immediately inform the preliminary proceedings judge, who may issue an order within 72 hours. The prosecutor will seal the obtained data until the court order is issued. In case the preliminary proceedings judge does not issue an order, the prosecutor shall return the data without opening it.

Criminal legislative also determines the possibility of freezing and seizing of financial assets with banks and other financial institutions. Criminal procedure codes determined that the court may by its decision order the legal or physical person to temporarily suspend execution of financial transaction that is suspected to represent the criminal offence, or to be intended for criminal offence, to serve to conceal criminal offence or material gain acquired from criminal offence, or the court may order for financial assets and cash amounts in domestic and foreign currency to be temporarily confiscated, deposited on a special account and kept there until the termination of proceedings, or until the conditions for their return are met.

8. State Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds from crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

The concept of extended confiscation of material gain acquired by criminal offence was first introduced into Bosnian-Herzegovinian legislative by the reform of criminal legislative in 2003, and it was regulated in more detail by amendments to criminal legislative of Bosnia and Herzegovina in 2010. This concept is not determined by the RS Criminal Code, but by the Law on Confiscation of the Property Acquired by Criminal Offence in the Republika Srpska. Although this represents deviation from the basic principle of criminal code that the burden of proving is on the prosecutor, Bosnia and Herzegovina decided to introduce this principle from Article 31, item (8) into its legal system, according to which the perpetrator shall be obliged to demonstrate the lawful origin of the alleged proceeds from crime or other property that is liable for confiscation.

²² Article 13, item (1) of the law in FBiH, and article 20 of the law in the RS

According to this rule, the Court may, by such a decision, confiscate the material gain for which the prosecutor presented sufficient evidence to be justifiably considered as acquired by committing certain criminal offences.

Criminal offences on which it is possible to apply the provision of extended confiscation are listed, and those are offences in which the acquiring of material gain is the legal characteristic of the offence or they are committed with the exclusive aim of acquiring unlawful material gain. Offences this provision applies to in accordance with BiH Criminal Code are the following: criminal offences against humanity and values protected by international law, criminal offences against the economy and unique market and criminal offences involving customs duties, criminal offences of corruption and criminal offences against official and other liable duties, criminal offences of copyright infringement, criminal offences against armed forces of Bosnia and Herzegovina, and agreement, preparation, association and organized crime. As it may be seen, the application of this concept is especially related to the application of the extended confiscation of **material gain** and to corruption criminal offences that are covered by provisions of BiH Criminal Code.

According to this concept, the burden of proving the origin of the property is divided between the prosecutor and perpetrator. The prosecutor should present sufficient evidence leading to conclusion that it may be justifiably believed that such material gain was acquired by committing those criminal offences. If the prosecutor succeeds to prove the justification of his statements, the burden of proving is on the perpetrator, who should present evidence that material gain was lawfully acquired. If he is not able to do so, the court will confiscate the material gain from the perpetrator by the decision by which it determined the committing of the criminal offence.

Entities' laws on confiscation of the property acquired by committing criminal offence determine that it is prosecutor's obligation to submit, within his request to the court, the evidence on the circumstances that show obvious discrepancy between the property and the income of that person²³. In that way the issue of burden of proving the legitimate source of the property is additionally defined.

The court may, by its decision and in accordance with criminal codes, but also with entities' laws on confiscation of the property acquired by committing criminal offence, confiscate the material gain acquired by criminal offence for which the prosecutor present sufficient evidence as to justifiably believe that such material gain has been acquired by committing criminal offence, and for which the perpetrator did not present the evidence of legitimate acquiring of the benefit.

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

Entities' laws on confiscation of the property acquired by committing criminal offence especially regulate the issue of bona fide third persons. Both laws define the third person as the person, natural or legal, to whom the property was transferred. During the investigation procedure, the

²³ Article 10, item (3) of the FBiH law, and article 28, item (2) of the RS law.

prosecutor is obliged to also determine the property acquired by criminal offence and in his request against the third person to offer the evidence that the property, acquired by committing criminal offence, was transferred without any compensation or with compensation that does not correspond to the real value, with the aim of preventing confiscation.

Regarding the rights of third persons, these laws give procedural rights to third persons to dispute the prosecutor's charges, or to appeal against decision on confiscation of the property that has been transferred to them. Therefore, the third person is entitled to claim that, in respect to the property that is the subject of procedure under this law, he/she has the right that prevents the application of that law and to ask that securing or execution be declared unpermitted.

Conclusion related to legal and institutional framework in Bosnia and Herzegovina

Bosnia and Herzegovina carried out number of activities in harmonizing the criminal legislative with UNCAC. Criminal legislative determines the basis and manner of confiscation of material gain acquired by criminal offence, the way of protecting the aggrieved party, and the general principle that "nobody can keep the proceeds from crime" and that it may be confiscated by the court decision that determined that the crime was committed.

According to laws on criminal procedure, the prosecutor has very important role in the process of determining the facts necessary for deciding on confiscation of material gain acquired by criminal offence. The efficiency of the procedure of identification and confiscation of the material gain acquired by criminal offence depends on the role of the prosecutor. The prosecutor has numerous authorizations at his/her disposal, and they include for instance the order to banks or the telecommunication operator, as well as other measures and actions, including special investigative actions.

Besides, laws on confiscation of proceeds from crime in the Republika Srpska, Federation BiH and BD additionally emphasize the active role of the prosecutor in the investigation phase. It is especially relevant for the phase of financial investigation that is undertaken when necessary for comprehensive determination of real origin, value and structure of the material gain for which there is grounds for suspicion it was acquired by criminal offence. It is extremely important that by these laws financial investigation became the formal legal phase in procedures of determination and confiscation of the proceeds from crime, and prosecutors, being key activity holders, should initiate carrying out of financial investigations. Special challenge is represented by the fact that at the level of BiH there is no similar procedure determined as at lower levels of government.

One of the goals of both laws on confiscation of the proceeds from crime is the management by competent authorities of the frozen, seized or confiscated property included in items 1 and 2 of the Article 31 of the Convention. The law in the RS stipulated establishment of the Agency for

Management of the Confiscated Property as the administrative organization within the RS Ministry of Justice, while the law in FBiH established the separate administrative body of Federal Agency for Management of Confiscated Property. At BiH level, for procedures that are led in accordance with BiH criminal legislative, there is no agency that could manage temporarily or permanently confiscated property. In BD the law was brought in July 2016, and the role of management was given to the existing Public Property Administration Office. Regarding the relevant regulations, those bodies have competences that correspond to Convention requirements, but it is not possible to entirely evaluate if they have adequate capacities to carry out their competences.

Review of court decisions that ordered confiscation of material gain acquired by criminal offence in the period 2013-2015

For the purpose of analyzing the practice of confiscation of proceeds from crime, Transparency International submitted the request to BiH High Judicial and Prosecutorial Council to deliver statistical data on court decisions on confiscation of the proceeds from crime in the period 2013-2015. The requested data covered the data on temporary or permanent confiscation of material gain, as well as the value and type of the property that was temporarily or permanently confiscated, including the number and amount of penalties.

The data requested from the BiH High Judicial and Prosecutorial Council are the following:

- a) Number of final criminal decisions in which courts decided on confiscation of proceeds from crime (available);
- b) Value of the material gain acquired by criminal offences (available);
- c) Number of criminal cases in which the penalty was imposed (available);
- d) Number of misdemeanor cases in which the penalty was imposed (available);
- e) Number of cases in which the decision on permanent confiscation of material gain was brought in separate procedure on confiscation of the proceeds from crime (not recorded in CMS);
- f) Type of property that was permanently confiscated (data is not statistically processable);
- g) Number of cases in which the measure of temporary confiscation of material gain was requested (not recorded in CMS);
- h) Type of temporarily confiscated property (not recorded in CMS);
- i) Value of the temporarily confiscated proceeds from crime according to court decisions (not recorded in CMS).

BiH High Judicial and Prosecutorial Council stated in its Decision²⁴ that they can deliver only the data requested in items a), b), c) and d), i.e. data on final court decisions in which courts ordered confiscation of the material gain acquired by criminal offence, and value of such material gain. They also delivered the data on the number and amounts of imposed penalties, in both criminal and misdemeanor cases. These data does not necessarily mean that these decisions were executed and material gain really confiscated, they represent only the final court decisions.

Data related to cases that were carried out in separate procedures on confiscation of unlawful gain and data on the type of the property that is to be confiscated according to the final court decision are not statistically processable. Also, the system for automatic case management in courts (CMS) technically does not support the possibility of entering and processing the data related to number, type and value of the temporary confiscated material gain.

In further text there is a table of trends of available data from courts at all levels of judicial government, for the period 2013-2015.

²⁴ Decision No. 01-07-10-24-138/2016 from October 17, 2016

Comparative view of statistical data on the number of cases and amounts of confiscated material gain and imposed penalties

COURT	No. of cases in which material gain was confiscated			Total value of the confiscated property			No. of cases in which the penalty was imposed			Total amount of penalties		
	2013	2014	2015	2013	2014	2015	2013	2014	2015	2013	2014	2015
BiH Court	27	26	20	552,871	429,788	915,205	22	24	23	166,500	166,400	221,600
FBiH Supreme Court	NA	NA	NA	0	0	0	NA	NA	NA	0	0	0
RS Supreme Court	NA	NA	NA	0	0	0	NA	NA	NA	0	0	0
BD Appeal Court	NA	NA	NA	0	0	0	NA	NA	NA	0	0	0
Cantonal courts (FBiH)	6	3	0	16,355	69,799	NA	27	9	15	85,800	197,700	125,700
District courts (RS)	3	1	5	24,220	740	22,750	12	13	11	44,800	43,500	61,000
Municipal courts (FBiH)	10	21	42	68,772	984,597	389,836	109	106	155	140,500	94,000	148,152
Basic courts (RS)	1	1	1	176	352	675	1,250	1,299	1,286	1,988,149	1,982,974	1,763,692
BD Basic Court	NA	1	NA	0	33,049	0	40	41	37	68,750	60,100	65,600
Total	47	53	68	662,394	1,518,325	1,328,466	1,460	1,492	1,527	2,494,499	2,544,674	2,385,744

Analyzing the data delivered by BiH High Judicial and Prosecutorial Council on the number of final court decisions on confiscation of the proceeds from crime, it may be concluded that in general, trends were similar in the past three years, except in the period 2013-2014, when the total value of the property confiscated by court decisions increased from 662,394 BAM to 1,518,325 BAM.

There is a slight trend of decreasing number of decisions on confiscation of the proceeds from crime before the **BiH Court**. In 2013, there were 27 final decisions on confiscation of the proceeds from crime. In 2014, the number of such decisions was 26, while during 2015 that number was the lowest, i.e. there were 20 final decisions on the confiscation of the unlawfully acquired property. Still, the decreasing number of final court decisions did not negatively impacted the value of the property that is to be confiscated.

According to the delivered and available data, the property value trend increased significantly year after year before the BiH Court. In 2013, the total value of confiscated property was 552,871 BAM, in 2014 it was 429,788 BAM, and in 2015 it was 915,205 BAM.

Besides, almost the same number of penalties was imposed (22, 24 and 23 imposed penalties as criminal-legal sanctions) during the same period before the BiH Court. The total amount of the mentioned penalties was 166,500 BAM in 2013, 166,400 BAM in 2014, and 221,600 BAM in 2015.

FBiH and RS supreme courts and Brcko District Appeal Court had no final decisions on confiscation of unlawfully acquired property and no decisions on penalties, which makes sense since there are no first instance proceedings before these courts.

FBiH cantonal courts had significantly less cases of confiscation of the proceeds from crime by the final court decision according to the data delivered by BiH High Judicial and Prosecutorial Council. There were 6 final decisions in 2013 on confiscation of the proceeds from crime, with the total value of 16,355 BAM. That number was lower in 2014, when there were 3 final court decisions of the total value of 69,799 BAM, and in 2015 there were none final decisions on confiscation of the property acquired by criminal offence, according to the available data.

Before cantonal courts there were imposed penalties in the total amount of 85,800 BAM in 27 decisions in 2013, 9 decisions of total value of 197,700 BAM in 2014, and 15 decisions of the total value of 125,700 BAM during 2015.

RS district courts brought a small number of final decisions on confiscation of the proceeds from crime. There were only 3 final decisions on confiscation of the property of value 24,700 BAM during 2013, 1 court decision on confiscation of 740 BAM value of the property in 2014, and 5 final decisions of value of 22,750 BAM in 2015.

Trends of the penalties imposed before district courts are approximately the same, with 12 decisions on 44,800 BAM worth of penalties in 2013, 13 decisions with 43,500 BAM worth of penalties, and 11 decisions with a bit higher amount of 61,000 BAM worth of penalties.

FBiH municipal courts brought the highest number of court decisions on confiscation of the proceeds from crime, and the number of such decisions is in a constant rise. During 2013, there were 10 final decisions on confiscation of 68,772 BAM of the material gain acquired by criminal offences. During 2014, the number of decisions doubled – there were 21 decisions with 984,597 BAM confiscated, the amount being significantly and multiply higher than in the previous year. In 2015, the number of decisions also doubled compared to 2014, and there were 42 final court decisions, but the total value of the property to be confiscated was lower than in 2014, amounting to 389,836 BAM.

Regarding penalties, municipal courts in FBiH imposed 109 penalties in 2013, the total value being 140,500 BAM. In 2014, there were 106 penalties of the total value of 94,000 BAM, and during 2015 the number of penalties was the highest – 155, with the total value of 148,252 BAM.

RS basic courts brought only one decision on confiscation of the proceeds from crime per year in the period 2013-2015, none exceeding 1,000 BAM. This is very low number of decisions and very low value of the confiscated property.

Regarding penalties, basic courts imposed large number of such sanctions: in 2013 there were 1,250 penalties of the total value of 1,988,149 BAM; in 2014, there were 1,299 penalties of value of 1,982,974 BAM; in 2015 there were 1,286 penalties of the total value of 1,763,692 BAM.

Brcko District Basic Court brought only one final decision on confiscation of unlawful material gain acquired by criminal offence in the period 2013-2015, and that was in 2014, the value of the confiscated property being 33,049 BAM.

During the period 2012-2015, Brcko District Basic Court imposed in total 118 penalties of the total value of 194,700 BAM for those three years.

Conclusion on the practice of confiscation of the proceeds from crime before BiH courts

After the analysis of the available statistical data delivered by BiH High Judicial and Prosecutorial Council, it may be concluded in general that during the period 2013-2015 there were no significant results in confiscating property acquired by criminal offences that were determined by final court decisions. Besides, there is the evident lack of processability of all important data on the confiscated proceeds from crime by CMS. Data related to information on special procedures in which the decision on permanent confiscation was brought are not available and statistically processable. Further on, data on the type of property that is to be confiscated were also unavailable and not statistically processable, as were the data on the temporarily confiscated property (number of items, type and value of the temporarily confiscated property). These data should be very important to police and judicial institutions in further planning and analysis of the realized results, within the very powerful concept of corruption crime prevention, but also for the prevention of all other crimes with the aim of acquiring material gain, so the availability of such data would be of multiple benefit. Analysis of all indicators of material gain confiscation during 2013-2015 and their mutual comparison produced the following special conclusions by the level of BiH judicial government:

- BiH Court, as a separate institution, brought the decision on the highest value of the property that is to be confiscated in comparison to the whole BiH judicial system, although the number of cases of property confiscation in 2015 was the lowest compared to the previous two years – the measure of property confiscation was decided on in only 20 final decisions.
- FBiH courts (cantonal and municipal) have the highest number of cases with final court decision on confiscation of proceeds from crime, and especially encouraging is the fact that during 2015 municipal courts brought the most final decisions on property confiscation – 42 cases. Such a rise in number of cases may be possibly linked to the fact that in March 2015 *lex specialis* law on confiscation of proceeds from crime went into effect in FBiH.

Since the Law went into effect in 2015, the number of final court decisions and the value of the confiscated property are expected to be significantly higher in the following years.

- Courts (district and basic) in the Republika Srpska brought extremely small number of final court decisions on confiscation of material gain, and in 2015 there were only 6 final decisions on confiscation of material gain acquired by criminal offence, while in the previous years the number of final court decisions was even smaller. Since the Law on Confiscation of the Property Acquired by Criminal Offence has been into effect for several years now, it may be concluded that it is inefficient. Still, the courts in the Republika Srpska brought the highest number and the highest value of penalties, which does not necessarily mean that penalties were related to gain acquired by criminal offences.
- Brcko District Basic Court brought only one final court decision on confiscation of the property acquired by criminal offence in the mentioned three-year period. It is very mild result, so drastic improvements of trends are expected from the newly adopted lex specialis the Law on Confiscation of the Proceeds from Crime in Brcko District.