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THE IMPACT OF THE EU DIRECTIVE 2014/42/ EU ON FREEZING AND CONFISCATION OF INSTRUMENTALITIES AND PROCEEDS OF CRIME TO THE MACEDONIAN CRIMINAL JUSTICE SYSTEM

ABSTRACT

Republic of Macedonia is the candidate-member state of the EU and has started its High Level Accession Dialogue (HLAD), therefore it is of essential interest to harmonize its national criminal legal system to the EU law. In this article the author elaborates the impact of the EU's Directive 2014/42/EU considering the European framework for freezing and confiscation of instrumentalities and proceeds of crime in the European Union to the Macedonian criminal justice system.

The level of transposition and harmonization of this EU Directive into Macedonian legal system is evaluated through the steps from the ongoing reform of the Macedonian criminal justice system. Hence, the author will examine the current Macedonian legal framework together with the Macedonian courts' practice regarding the implementation of the existing legal provisions for freezing, confiscation and recovery of the assets, together with the elaboration of the possible limitations and reasons for infrequent use of these measures by the Macedonian courts. In this fashion the author will detect the most common problems particularly with the question of the impact of the time limitation of the freezing of the assets during the criminal procedure, and will provide possible solutions for improvement of the national legal framework.

Keywords: *freezing and confiscation of assets, criminal procedure, EU Directive 2014/42/EU, Macedonia*

1. GENERAL REMARKS

The EU's integration process of the Republic of Macedonia is having its own *sui generis* pace due to the specific political milieu in which Macedonian society is wedged within the past several years¹. Due to this, instead of commencing the

¹ See the issues determined in so-called “Priebe Report for Macedonia” in 2015 and 2017: The former Yugoslav Republic of Macedonia: Assessment and Recommendations of the Senior Experts' Group on

regular procedure for accessing to the EU, Republic of Macedonia has started specific High Level Accession Dialogue (HLAD) with the EU.² Within this process Macedonian criminal justice system is in perpetual reform in order to reach EU's standards and to adapt to the EU *aquis communautaire*, but above all to increase its level of efficiency, democracy, protection of the human rights and its overall just and fairness.³

In this sense, confiscation of the proceeds and instrumentalities from the crime is seen as one of the tools which can be useful in reaching of the above mentioned goals by the Macedonian criminal justice system.⁴

Macedonian criminal justice system, recognizing the utmost importance of the confiscation, as previously determined in several international legal documents, has introduced several improvements within the Criminal Code and Criminal Procedure Code. One of the biggest reform in the field of substantive criminal law were the Amendments to the Criminal Code in 2009⁵, while in the field of the criminal procedure law was enactment of the completely new with strong adversarial elements Criminal Procedure Code of 2010.⁶

Although the confiscation of the proceeds and instrumentalities from crime or simply “confiscation” – was familiar to most criminal justice systems, it was almost completely abandoned for two hundreds years and rediscovered only in the

Systemic Rule of Law Issues 2017, available at:

[https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf] Accessed 15 February 2018

² See:

[https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/former-yugoslav-republic-of-macedonia_e] Accessed 15 February 2018 or Karadjoski, M. The High Level Accession Dialogue for Macedonia: Advantages and Disadvantages, *Journal of Liberty and International Affairs*, Vol. 1, No. 1, 2015 available at: [www.e-jlia.com]

³ See the latest Strategy for Reform of the Judiciary, from 2017, available at:

[<http://www.pravda.gov.mk/documents/%D1%F2%F0%E0%F2%E5%E3%E8%BC%E0%20%E7%E0%20%F0%E5%F4%EE%F0%EC%E0%20%ED%E0%20%EF%F0%E0%E2%EE%F1%F3%E4%ED%E8%EE%F2%20%F1%E5%EA%F2%EE%F0%202017-2022.pdf>] Accessed 15 February 2018

⁴ *Ibid*, page 5-9; Also see the goals set up by the European Commission in its Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans, COM(2018) 65 from 6.2.2018

⁵ See: Official Gazette, No. 114/2009 from 14.09.2009, available at:

[<http://www.slvesnik.com.mk/Issues/2A2D5314C418A34EA5D597CC923695D2.pdf>] Accessed 15 February 2018

⁶ See: Official Gazette, No. 150/2010 from 18.11.2010, available at:

[<http://www.slvesnik.com.mk/Issues/BDBF29F810D5E9468FC65FA542B857B3.pdf>] Accessed 15 February 2018

last quarter of the twentieth century.⁷ Today it is seen as one of the most effective tools for establishing the principle that “crime does not pay”, meaning permanent deprivation, by order of a court, of any property derived or obtained, directly or indirectly, through the commission of a crime.⁸

As a reaction to widespread concern about the flow of illegal drugs and of the increased financial power of organised crime, as Gallant⁹ states in the 80’s began the so called “age of proceeds”. The traditional approach to crime control – based on arrest and imprisonment – was deemed inadequate to combat illicit behaviours intended to produce and accumulate exorbitant wealth.¹⁰ Due to this confiscation of the proceeds and instrumentalities of the crime is seen as a key element in any modern strategy to fight organised crime.

The importance of the confiscation can be seen in several closely related principles. One of the most important principle is based upon the fact the confiscation satisfies the retributive principles that “crime does not pay” and that “no-one should profit from an illegal act”. Another principle is that confiscation can serve as an effective tool for protection of the damaged party, whose elementary right is to be indemnified for the damage suffered from the crime.¹¹ Furthermore, effective confiscation reduces the attractiveness of crime by decreasing its expected monetary benefits and finally on a longer terms limits the criminal organisations by removing their working capital for investment in further criminal activities and infiltration of the legitimate economy.¹²

⁷ See: Pieth, M., ed., *Financing Terrorism*, 2002 Springer, Netherlands, p.118

⁸ See: Albrecht, H., „*Money Laundering and the Confiscation of the Proceeds of Crime - A Comparative View on Different Models of the Control of Money Laundering and Confiscation*”, in Watkin, T. G. (ed.), *The Europeanisation of Law*. United Kingdom Comparative Law Series, 18, Oxford, Alden Press, 1998, pp. 166-207; or Hawkins, C. W., Payne, T. E. ‘*Civil forfeiture in law enforcement: an effective tool or cash register justice?*’, in Sewell, J.D., (ed.) *Controversial Issues in Policing*. Boston, MA: Allyn and Bacon, 1999

⁹ See: Gallant, M., “*Money Laundering, Criminal Assets and the 1998 Proposed Reforms*”, *Journal of Financial Crime*, Vol. 6 Issue: 4, 1999, pp.325-332 or Goldsmith, M., Linderman, M. J., *Asset forfeiture and third party rights: The need for further law reform*, *Duke Law Journal* 39, 1253–1301. Greenburg, J. C., 1995

¹⁰ See: Vettori, B., *Tough on Criminal Wealth, Exploring the Practice of Proceeds from Crime Confiscation in the EU*, Springer, 2005, pp. 2-5

¹¹ See: Kambovski, V., *Organiziran kriminal*, 2-ri Avgust, Shtip, 2005 (in Macedonian), or Lajic, O., *Comparative Review of the Investigation and Confiscation of Criminal Assets*, 46 *Zbornik Radova* 207, 2012; or Levi, M., Osofsky, L., *Investigating, Seizing and Confiscating the Proceeds of Crime, Crime Detection & Prevention Series*, Paper 61, London, Home Office Police Research Group, 1995

¹² See: Vettori, B., Kambovski, V., Misoski, B., *Practitioners guide: Implementing Confiscation of the Proceeds from Crime in the Aftermath of the 2009 Criminal Code Reform*, OSCE, 2011

The importance of these principles has been also recognized by the EU Parliament and Council, who has developed several legal documents related to foster the use of the confiscation as useful tool in protection of the EU financial interest and as a support to the fight against the corruption and other serious crimes within the EU member states. Latest development of the law in this field has moved one step forward with the enactment of the EU's Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union.¹³

Having on mind Macedonian utmost political and societal interest – joining the EU and sharing same values regarding the fight against the crime, it is important to evaluate how far have Macedonian criminal justice system reached in addressing this Directive as part of its EU law harmonization process.

The following text will evaluate the level of harmonization of this Directive with Macedonian criminal justice system and will portray the current situation with the implementation of the confiscation of the proceeds and instrumentalities of the crime within the Macedonian criminal justice system. Finally, this article will detect several weak points of the national legislation due to which the courts do not or rarely use this measure in the effective fight against the crime in Republic of Macedonia.

At the beginning of this text we will evaluate the current post of the Macedonian criminal justice system considering the confiscation of the proceeds and instrumentalities of the crime, following with the analysis of the EU Directive's provisions and finish with determining the reasons for such poor implementation in practice of this measure by the Macedonian Courts.

2. REGULATION OF THE CONFISCATION OF THE PROCEEDS AND INSTRUMENTALITIES FROM CRIME IN MACEDONIAN CRIMINAL CODE AND CRIMINAL PROCEDURE CODE

Confiscation of the proceeds and instrumentalities from crime in Republic of Macedonia, as regulated in the first Criminal Code in Republic of Macedonia from 1996, has had diverse character. The confiscation of the proceeds from crime has been treated as special criminal law measure, while the confiscation or more

¹³ See: Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, OJ of the EU L127/39-50. Considering the EU experience, see also: Tofangsaz, H., *Confiscation of Terrorist Funds: Can the EU Be a Useful Model for ASEAN*, 34 UCLA Pac. Basin L.J. 149, 2017

appropriate “seizure” of the instrumentalities from crime has been regulated as a security measure.¹⁴

Within the Novelties of the Criminal Code from 2004, these two measures were regulated as separate criminal law measures, differing from the criminal law system of sanctions as defined within the Criminal Code. This meant that these measures were not treated as sanctions merely respecting the principle that no right can be derived from a crime. This legislative framework has appeared to be inefficient and it was necessary to be improved. In addition, following the international trends, together with the requirements contained in international conventions and EU standards the Novelties of the Criminal Code from 2009 have included extensive changes in the legal regime for confiscation. These changes of the Criminal Code from 2009 have included improvement of legal framework for confiscation of the proceeds from the crime, with additional definition of direct and indirect property gain obtained from crime, introduction of the extended confiscation and establishment of a specific crime related to the Illicit enrichment and concealment of property.¹⁵

These changes of the Criminal Code rested upon the principles set in the several international Conventions and EU Framework decisions. On international level the provisions from these Conventions have obliged the Macedonian legislator to promulgate Criminal code provisions regarding the use of confiscation as an effective tool in the fight against organized crime and fight against drug related crimes.¹⁶

¹⁴ See: Kambovski, V., *Criminal Law, General Part*, Kultura, Skopje, 2005 (in Macedonian)

¹⁵ See: Kambovski, V., *Commentary to the Criminal Code*, 2-nd ed., Matica, Skopje, 2016 (in Macedonian)

¹⁶ These principles were set in the following international documents ratified by the Macedonian Parliament: The UN’s “Vienna” Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed by Republic of Macedonia on 13 October 1993; The Council of Europe’s “Strasbourg” Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed by Republic of Macedonia on 19 May 2000; The UN’s “Palermo” Convention against Transnational Organized Crime, signed by Republic of Macedonia on 12 January 2005; The UN’s Convention against Corruption, signed by Republic of Macedonia on 13 April 2007 and The Council of Europe’s “Warsaw” Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, signed and ratified by Republic of Macedonia on 27 May 2009. While, the following European Union’s Framework decisions were motivation to Republic of Macedonia to enact criminal law provisions regarding the confiscation as determined in: the Framework Decision of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of the Instruments of and the Proceeds from Crime; Framework Decision of 22 July 2003 on the Execution in the European Union of Orders Freezing Property or Evidence; Framework Decision of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property and Framework Decision of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders. See: Vettori, Kambovski, Misoski, *op. cit.* note 12, pp.10-25

However, the latest EU Directive regarding the confiscation of the proceeds and instrumentalities from the crime have moved the legislative base on a higher level in regard to the regulation of the confiscation, clarity of the legal provisions together with the procedural aspects of these measures. Due to this we think that it is necessary to provide a transposition type of analysis of this directive in the Macedonian Criminal Justice system in order to determine whether the Macedonian provisions are up to date to this EU directive or whether there are significant changes which should be undertaken by the Macedonian legislator in order to accept this EU directive into the national law.

3. ANALYSIS OF THE PROVISIONS OF THE DIRECTIVE 2014/42/EU OF 3 APRIL 2014 ON THE FREEZING AND CONFISCATION OF INSTRUMENTALITIES AND PROCEEDS OF CRIME IN THE EUROPEAN UNION

This article-to-article transposition analysis will be performed by direct correlation of the provisions of the Directive 2014/42/EU with the provisions of the Macedonian Criminal Code and Criminal Procedure Code.

3.1. Legal definitions

At the beginning of the analysis we will evaluate the level of harmonization between the legal definitions set up in the Directive 2014/42/EU and in the Macedonian Criminal Code. Considering the legal definitions in the Article 2 of the Directive 2014/42/EU we can conclude that Macedonian Criminal Code is up to date to the legal definitions for “proceeds”, “property” and “instrumentalities”, since Macedonian Criminal Code is having the same or similar definitions for these legal terms.

Hence, Macedonian legislator has defined within the Article 122 paragraph 16 of the Criminal Code¹⁷ that the proceeds from crime shall imply to any property or benefit obtained directly or indirectly by committing the crime. This also includes proceeds of crime committed abroad, under the condition that at the time when the crime was committed, it was considered a crime under the laws of the country where it was committed and a crime under the laws of the Republic of Macedonia.

Unfortunately, Macedonian Criminal Code does not have clear definition regarding the proceeds for subsequent reinvestment or transformation of the direct proceeds from the crime, and this part is covered within the Article 97-a where the

¹⁷ Official Gazette, No. 114/2009, *op. cit.* note 5

indirect confiscation is regulated. Due to this we think that Macedonian definition of “proceed” should be amended to the provision of the Directive of the Article 2, paragraph 2. In this fashion the legal definition would be more precise and distinct.

Macedonian legislator, has defined “property” more broadly, where unlike to the Directive’s definition, Macedonian solution is as follows: “The term “property” shall mean money or other instruments for payment, securities, deposits, other property of any kind, tangible or non-tangible, movable or immovable, other rights to items, claims, as well as public documents and legal documents for ownership and operational assets in written or electronic form, or instruments which prove the right to ownership or interest in such property”.¹⁸ Since Macedonian definition is broader, we do not think that there is necessity for additional amendments to the Criminal Code regarding the acceptance of the legal definition from the Directive.

Finally, the “instrumentalities” of the crime are defined as: The term “instrumentalities” shall mean movable or immovable items, which are fully or partially used or intended to be used or resulted from committing a crime¹⁹. Difference from the legal definition of the Directive is in the part where Macedonian legislator uses the same word “instrumentalities” for the items which are result from the crime. Macedonian definition might deliver a dose of inconsistencies due to the fact that the items which have resulted of the crime might be considered as proceeds of the crime. Due to this we deem that this part of the Macedonian legal definition is obsolete and should be deleted.

3.2. Scope of confiscation

Considering the Scope of the Directive as regulated in the Article 3 it is expectable to have limited scope while the national provisions for confiscation have extended reach upon any increase in the property as result from a crime such as: stolen objects, money obtained from selling drugs, award for committed crime, received bribe, etc, together with the perpetrator’s property, which has not been reduced because of the committed crime (tax evasion, forged documents for acceptance of debt, etc.), as well as illegally acquired rights and factual possibilities for realization of the proceeds of the crime.²⁰

¹⁸ See Article 122, paragraph 38, Criminal Code, Official Gazette, No. 114/2009, with latest amendments from 2017, Official Gazette 97/2017 from 31.07.2017. The Criminal Code from its enactment in 1996 has been amended more than 20 times

¹⁹ See: *Ibid*, Article 122, paragraph 39

²⁰ See: Article 98 of the Criminal Code, *op. cit.* note 18

However, Macedonian Legislator, upon accession to the EU should take additional legislative action regarding the crimes of counterfeiting in connection with the introduction of the Euro as regulated within the Council Framework Decision 2000/383/JHA of 29 of May, 2000 or Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment. Together with this, Macedonian legislator should provide additional training to the public officials in exercising the confiscation related to the crimes which are already existing in the Criminal Code, in relation to the Council Framework Decisions: 2001/500/JHA, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; 2002/475/JHA on combating terrorism; 2003/568/JHA on combating corruption in the private sector; 2004/757/JHA on laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking; 2008/841/JHA on the fight against organized crime; and Directives of the European Parliament and of the Council: 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography; 2013/40/EU on attacks against information systems.²¹

3.3. Type of confiscation

Considering the types of the confiscation the Directive has more legally advanced solution where within the legal definitions the types of confiscation are explained. Namely direct, indirect and value confiscation are explained within the Article 2 of this Directive, while Macedonian legislator, besides providing the legal definition of these types of confiscation within the Article 122 of the Criminal Code, provides extensive explanation of this types of confiscation are regulated with the Articles 97 and 97-a of the Criminal Code.²²

This is understandable, since these provisions are older than the provisions from the Directive and they contain vast explanation in order to serve as a commentary to the Macedonian courts for proper legal implementation of the confiscation. Hence, considering the Macedonian level of legal culture, we do not deem that these types of explanatory provisions within the Criminal code are redundant. With regard to this, we can distinct two types of confiscation.

²¹ See: Article 3 of the Directive, *op. cit.* note 13, p. 45-46

²² See: Criminal Code, *op. cit.* note 18

First type is property confiscation as elementary form of confiscation²³, where the Criminal Code's provision regulates the confiscation in general. While the second type is covered with a new provision,²⁴ which was introduced with the Law on changes and amendments to the Criminal Code from 2009,²⁵ and this type is practically the confiscation of indirect property gain which implies the property in which the indirect proceeds has been transformed, as well as the proceeds mixed with the lawfully obtained property and any other proceeds from the transformed or mixed asset.

In this sense similarly to the provisions of the Article 4 of the Directive, Macedonian legislator has regulated that the subject of confiscation can be both: property, proceeds or instrumentalities and value of these assets when the confiscation can't be conducted in a natural sense.²⁶ Value confiscation should be implemented in the cases when the actual property which is the true gain from the crime can't be confiscated (for instance, the perpetrator spent the stolen items or sold them, or even gave them as a gift, and the confiscation cannot be made from a third party!), but the appropriate value for this property can serve as and sufficient replace of this property.²⁷

Theoretically this means that both types of confiscation are covered within the Macedonian Criminal Code, similarly to the provisions of the Directive: natural or so called property confiscation and value confiscation.

However, within the Article 97 of the Macedonian Criminal Code²⁸, Macedonian legislator has omitted to regulate the possibility for confiscation in the cases of trial in absentia, as regulated within the Article 4 paragraph 1 of the Directive. While within the Article 97, paragraph 3, same as the paragraph 2 of the Article 4 of the Directive, Macedonian Criminal Code covers the possibility for confiscation in cases when it is impossible to commence the criminal procedure.

This means that Macedonian Criminal Code should be amended in order to accept the possibilities to use the confiscation in cases when the defendant is tried in absentia.

²³ See: Article 97 of the Criminal Code, *op. cit.* note 18

²⁴ See: *Ibid.*, Article 97-a

²⁵ See: Official Gazette, No. 114/2009, *op. cit.* note 5

²⁶ See: Article 98 of the Criminal Code, *op. cit.* note 18

²⁷ See: Vettori, Kambovski, Misoski, *op. cit.* note 12, pp. 27-30

²⁸ See: Official Gazette, No. 114/2009, *op. cit.* note 5

3.4. Confiscation from a third party

Macedonian Legislator has legal provisions which are regulating the confiscation from the third party. As regulated within the Article 98, paragraph 2 of the Criminal Code,²⁹ the property can be confiscated not only from the perpetrator, but also from third persons to whom the property was transferred without appropriate compensation. Within this paragraph the conditions for confiscation from a third party are set in manner where the confiscation is carried out for indirect and direct property or proceeds or instrumentalities, realized for a third party or are transferred to family members or third parties, if these people do not prove that they have provided adequate counter-value for the value of property gain/use.

In fact these provisions are in correlation with the provisions of the Article 6 of the Directive.

In addition, Macedonian legislator has provided one additional paragraph 4 of the Article 98 where it is stipulated that objects, which have been proclaimed to be cultural inheritance and natural rarity, as well as objects to which the damaged party has personal connection, are confiscated regardless if the third party had provided adequate counter-value.

Through these provisions, Macedonian legislator has introduced the transfer of the burden of proof³⁰ to the third parties in order to prove that they were in *bona fide* relationship with the perpetrator of the crime/seller of the assets. Furthermore, considering the paragraph 2 of the Article 6 from the Directive, Macedonian Criminal Code has the same legal solution, which states that in bona fide relationship only the value confiscation will be applied to the property of the defendant/seller while the bona fide parties can and will acquire the right to proprietorship to these assets. Due to this, we can conclude that considering the confiscation from a third party provisions from the Macedonian Criminal Code are fully compatible with the provisions of the Directive.

²⁹ *Ibid.*

³⁰ See: Kambovski, *op. cit.* note 14, pp. 570. Also on the concept of the reversal or transfer of the burden of proof to the defendant in the cases of confiscation or extended confiscation as particularly complex theoretical concept see: Pasca, V., *Extended Confiscation Theory and Case Law*, Analele Universitatii din Bucuresti: Seria Drept 78 2014, or Levi, M., *Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey*, available at: <https://www.coe.int/t/dg1/legalcooperation/economiccrime/specialfiles/BestPractice2E.pdf> Accessed 15 February 2018 or - Simonato, M., *Confiscation and fundamental rights across criminal and non-criminal domains* Published online: 19 September 2017, ERA Forum (2017) 18:365–379 DOI 10.1007/s12027-017-0485-0, available at: [\[https://link.springer.com/content/pdf/10.1007%2Fs12027-017-0485-0.pdf\]](https://link.springer.com/content/pdf/10.1007%2Fs12027-017-0485-0.pdf) Accessed 15 February 2018

3.5. EXTENDED CONFISCATION

One of the most important novelties in the Criminal Code from 2009 introduced by Macedonian legislator has been the extended confiscation.³¹ As regulated within the Article 98-a of the Criminal Code extended confiscation is applied only for several categories of crimes as regulated within the Criminal Code. First category is consisted of crimes committed as part of a criminal enterprise which is subject to imprisonment of at least 4 years. Second category is consisted of crimes related to terrorism and punishable with sentence of at least 5 years of imprisonment. The third category is consisted of crimes related to money laundering punishable with sentence of at least 4 years of imprisonment.

Additional condition for implementation of the extended confiscation is that the court must be convinced, in accordance to the specific circumstances and the evidence of the crime, that the asset is a result from the criminal activity and a criminal lifestyle of the defendant and is disproportional to the defendant's legal income. Subject of the extended confiscation is the property for which the perpetrator can't prove its legal origin and if it was acquired within a certain period of time before the court's conviction, but not longer than 5 years before committing the crime.

This Macedonian legal solution is on line with the older legal solutions, where the reversal of the burden of proof of the defendant was connected to specific time³² line prior to the committed crime.³³ Instead of this, the Directive contains only the standard that the court is convinced based upon the facts and available evidence from the case that the property is disproportionate to the lawful income of the convicted person, together with the assertion that this disproportion is based upon the defendant's criminal conduct.³⁴ It is needless to mention that this legal provision is more precise and diminish the need for additional legal information about the standards of proof, reversal of the burden of proof to the defendant and similar problems that might rise with the practical implementation of this Directive into the member states national legal systems.

Due to the fact that the concept of the reversal of the burden of proof is already established into the Macedonian criminal justice system with these amendments to the Criminal Code of 2009, we do not think that there should be additional

³¹ See: Article 98-a, Criminal Code, *op. cit.* note 18

³² See further readings at: Boucht, J., *Extended Confiscation and the Proposed Directive on Freezing and Confiscation of Criminal Proceeds in the EU: On Striking a Balance between Efficiency, Fairness and Legal Certainty*, 21 Eur. J. Crime Crim. L. & Crim. Just. 127, 2013

³³ See: Vettori, Kambovski, Misoski, *op. cit.* note 12, pp. 35-38

³⁴ See: Article 5, paragraph 1 of the Directive, *op. cit.* note 13

amendments to the Criminal Code in order to accept the exact legal wording from the Directive. However, we think that the period of 5 years should be reevaluated in the spirit of the Directive's provisions, since sometimes it is really difficult to establish the exact time frame when the crime has been committed, particularly in the cases when the defendant has a criminal lifestyle. In addition, this period might be problematic in some cases considering the stand point of the Macedonian legal culture and legal mentality particularly regarding the acquisition of the assets and the frequent nonbank payments.

Furthermore, Macedonian Criminal Code should update the list of the crimes for which extended confiscation is possible in coordination to the crimes listed within the paragraph 2, specifically lines (a) to (d) of the Article 5 of the Directive.

3.6. Freezing

Freezing of the property in Macedonian Criminal Justice system is generally considered as a procedural measure. This measure is regulated within the Criminal Procedure Code.

Freezing of the property is regulated within the measures for preserving the property during the criminal procedure within the Articles 194 till 204.³⁵ Particularly important article in this part is the Article 202 in connection with the Article 535 of the Criminal Procedure Code³⁶ which directly regulates the freezing of the property during the criminal procedure in order to secure the property for any subsequent confiscation. Macedonian Criminal Procedure Code has provided sufficient guarantees regarding the protection of the assets itself³⁷ and the defendant's rights regarding the protection of the assets together with sufficient guarantees regarding the third parties if the confiscation is from a third party³⁸ and in accordance to the safeguards provided in the Article 8 of the Directive. This is due to the fact that Macedonian Criminal Procedure Code has been enacted in 2010, and consist several improvements, particularly addressed to the EU Directives for protection of the defendants' rights.³⁹

³⁵ See: Criminal Procedure Code, Official Gazette, No 150/2010

³⁶ *Ibid.*

³⁷ See particularly provisions of the Article 194 and subsequent articles from Criminal Procedure Code, *op. cit.* note 35

³⁸ See Articles 525 till 541 of the Criminal Procedure Code, in coordination to the paragraph 2 of the Article 7, *Ibid.*

³⁹ See: such as Directive 2010/64/EU on the Right to Interpretation and Translation; Directive 2012/13/EU on the Right to Information in Criminal Proceedings and Directive 2013/48/EU on the Right of Access to a Lawyer

Henceforward, Macedonian Criminal Procedure Code has additional amendments which are in final legal drafting procedure, which would provide additional improvements to these legal provisions, particularly to the provisions from the Article 194 of the Criminal Procedure Code⁴⁰ considering the improvement of the role of the specific state body for dealing with frozen assets. The legal position and the jurisdiction of the State Agency for Management of the Frozen Assets, at least on a legislative level, are compliant with the provisions of the Article 10 of the Directive.

4. PRACTICAL IMPLEMENTATION OF THE CONFISCATION AND FREEZING OF THE PROPERTY, PROCEEDS AND INSTRUMENTALITIES FROM CRIME IN REPUBLIC OF MACEDONIA

When analyzing the practical implementation of the confiscation and freezing of the property, proceeds and instrumentalities which have derived from crimes in Republic of Macedonia one must bear on mind that there are insufficient data and no available statistics which will depict the implementation of these measures into the criminal justice system.

Due to this fact in most cases the conclusions are questionable and not consistent with the actual situation. For example in some high profile cases, the courts provides press release that the court in the concrete case has confiscated assets from the defendants in net worth more than 9 million euros⁴¹, and on the other hand there is no available data to confirm this information through the State Statistical Bureau, nor through the Agency for managing of the confiscated assets.⁴² Furthermore we do not have any available statistical information regarding whether this confiscated assets were partly used for the indemnification requests by the damaged parties or they are simply confiscated and considered as an income to

⁴⁰ See: Criminal Procedure Code, *op. cit.* note 35

⁴¹ See for example the press release for the confiscation for 1 million euros in assets from only one of several co-defendants in the high-profile case “Bachilo”:

https://faktor.mk/archives/18424?utm_source=rss&utm_medium=rss&utm_campaign=%25d1%2581%25d0%25bb%25d1%2583%25d1%2587%25d0%25b0%25d1%2598-%25d0%25b1%25d0%25b0%25d1%2587%25d0%25b8%25d0%25bb%25d0%25be-%25d1%259c%25d0%25b5-%25d1%2581%25d0%25b5-%25d0%25bf%25d1%2580%25d0%25be%25d0%25b4%25d0%25b0%25d0%25b2%25d0%25b0-%25d0%25b8%25d0%25bc%25d0%25be%25d1%2582%25d0%25be%25d1%2582] Accessed 15 February 2018

⁴² See: Annual reports from these state bodies available on: [www.stat.gov.mk] and [www.odzemenimot.gov.mk]

the state budget. Since there are no statistical data from the courts,⁴³ or from the other state agencies, we can only guess the number of cases where the confiscation has been used.

In this fashion it is interesting to note that on the web site of the Agency for managing of the confiscated asset, which by the provisions of the Law on Management of the Confiscated Assets⁴⁴ is obliged to manage this asset, to sell it and to provide revenue for the State, there no official data, or Annual Reports for the work performance of this Agency. Furthermore in one publicly available document – called Strategy for the period 2014-2016 there is information that the Agency has provided income to the State budget for over 2 million euros.⁴⁵ However in the subsequent document – Strategy for the period 2018-2020 there is no information regarding the previous period, similar to the previous report.⁴⁶

From the overall impressions of the judges, we can conclude that that the confiscation is not a very popular measure, since most of the judges when answering why doesn't use confiscation more frequently provide several similar answers, such as: they do not have sufficient information regarding the defendant's assets, do not know the epilogue of the confiscated asset and/or they are not sure who is the real owner of the asset which should be confiscated.⁴⁷

Due to these circumstances, in most of the cases judges use confiscation only in cases when the facts are undisputed that the asset is product from a crime, while they rarely use the provisions for extended confiscation or confiscation from a third parties. This means that the confiscation is usually present in cases when for the court it is obvious or without any hardship easy to determine the property, pro-

⁴³ See: Annual report of the biggest criminal Court in Republic of Macedonia, Basic Court Skopje 1, available at:

[<http://www.vsrn.mk/wps/portal/oskopje1/>] Accessed 15 February 2018

⁴⁴ See: Law on management with confiscated property, property gain and seized objects in criminal and misdemeanour procedure, Official Gazette, No. 98/2008 of 4.8.2008, available at:

[<http://www.slvesnik.com.mk/Issues/BE79420C2BA6AF4DA6B3A9F3E3DDC87F.pdf>] Accessed 15 February 2018

⁴⁵ See on the web page of the Agency:

[<http://www.odzemenimot.gov.mk/VPP/Documents/%D0%A1%D1%82%D1%80%D0%B0%D1%82%D0%B5%D0%B3%D0%B8%D1%81%D0%BA%D0%B8%20%D0%BF%D0%BB%D0%B0%D0%BD%20%D0%BD%D0%B0%20%D0%90%D0%A3%D0%9E%D0%98%202012-2014.pdf>] Accessed 15 February 2018

⁴⁶ See: [<http://www.odzemenimot.gov.mk/str%D0%B0t%D0%B5gii.aspx>] Accessed 15 February 2018

⁴⁷ Detected problems were raised by the Focus Groups consisted of judges and prosecutors for Evaluation and Presentation of the Toolkit for the Practitioners, Vettori, Kambovski, Misoski, *op. cit.* note 12, also see: Misoski, B., Petrovska, N., *Implementation of the Fair Trial Standards*, "Coalition All for Fair Trials", Skopje, Macedonia, 2017, pp. 34-36

ceeds or instrumentalities and that the concrete asset is in possession of the defendant. Reason for this is that in these cases judges do not enter into the complicated schemes of determining the proceeds of crime if they are mixed or transformed with the legally obtained asset, since they do not have proper evidence provided from the state institutions (or they are missing) such as extensive financial expert's opinions regarding these circumstances of the case. Furthermore the elaborate financial investigations are not very common in the court cases, and courts do not often deal with the determination of the property in these fraudulent crimes cases.⁴⁸ This conclusion can indirectly be drawn from the available statistical data for the cases which were adjudicated in front of the Macedonian courts available both from the State Statistical Bureau⁴⁹ and Court's Annual Reports⁵⁰.

Considering the epilogue of the confiscated asset, judges often use confiscation of asset which is easily transformed or given to the state institutions for further use, such as instrumentalities of the crime (particularly vehicles) which can be transferred and used *pro futuro* by the state bodies, while they are not very keen on use the confiscation in cases of real estate, due to the fact that in most of the cases it is not easy to establish the real value of the estate, and upon this to execute value confiscation. In some cases this situation is improved with the work of the State agency for Management of the Confiscated Asset, which usually sells these properties on public auctions.⁵¹

And finally, in many cases reason for infrequent use of confiscation is the determination of the ownership of the assets. In some cases judges do not have sufficient information regarding the real owner of the asset which should be confiscated. This is due to the fact that in some cases there are mortgages, multiple owners or other relations between the defendant and third parties which overburdens the possibility for confiscation of the asset by the court. In addition to these cases,

⁴⁸ However, in several high profile cases undertaken by the Prosecution for Organized Crime and Corruption, several multimillion assets were confiscated. See informational PPT from Macedonian Ministry of Justice:

[www.pravda.gov.mk/documents/konfiskacija_nova_0209010_2.ppt] Accessed 15 February 2018

⁴⁹ See: [<http://www.stat.gov.mk/PrikaziSoopstenie.aspx?rbtxt=14>] Accessed 15 February 2018

⁵⁰ See: [http://www.vsrn.mk/wps/portal/osskopje1/sud/izvestai/svi!/ut/p/z1/pVJBbsIwEHxLDz4GLyWxnd4CpagQVImCSH1BieOEIbCHxEDb19dQLpWKhdS97WpmZzxezHGEeRUfijzWhari0vRvnKx8eCTd_gDClwlIEEwXw3AxeH6HnouXZwBcqQAWt_Dn3oVPRq4LbAIhe531IRgCZXM_ABjS2_gWAL_F_xV9Rsn_9I0At8czPgMs7zc_ULzvdjzAXKhKyw-No3q-fIIYbTcI2n2KofZC6ipGcJcTlHckWer5wqWOK6HnuMQnTsx05nhdQTORycRPyWnxfT-MdTHPM61ivnaLKFI5uoi4xt9kePcEFYLSL24ZT8CaZvFTJzxEGVdJjxmkjM9nIprNvzHitdd0-IEBwPB47uVJ5KTrCbRH8RVmr1kT3G4nr7cJU9BXXkpbOZsc9emd99A7r7MFE!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?uri=nm%3Aoid%3AZ6_90D61BC0LOK780AMUELUGIJL54] Accessed 15 February 2018

⁵¹ See: [<http://www.odzemenimot.gov.mk/%D0%BEgl%D0%B0si.aspx>] Accessed 15 February 2018

when there is request for indemnification from the damaged party from the confiscated asset, then this asset is rarely used for indemnification for the damaged party and instead to this the damaged party is instructed to exercise his/hers right in a civil litigation procedure⁵².

Additional problems within the practical implementation of the Criminal Code's provisions for confiscation can be based upon the normative clarity of the legal provisions. In this fashion it is highly notable the standards of grounded belief that the property was obtained from crime in the case of extended confiscation used in the Criminal Code. This is due to the fact that "grounded belief" is not common standard of suspicion or proof used in Macedonian Criminal Code and Criminal Procedure Code which operates with the standards: "grounds for suspicion", "grounded suspicion" and proof "beyond reasonable doubt"⁵³.

Bearing on mind the above mentioned reasons and problematic experience regarding the implementation of the confiscation it is of essential importance to introduce into the national criminal justice system the last set of the provisions of the Directive. This means that in order to increase not only the implementation of the confiscation by the Macedonian courts but also to increase its visibility by the public it is necessary to establish proper rules for statistical evaluation of these measures by the Macedonian courts.

Besides gathering of these statistical data it is also important to provide higher visibility of the work of the Agency for Management of the Confiscated Assets in order to show to the public that the crime does not pay and that the Macedonian law enforcement agencies are effective and efficient in cutting or eliminating financial profits derived from crime to criminals. This means that in the next period Macedonian legal system must introduce strict rules regarding the implementation or transposition of the Article 11 of the Directive.

However even if we establish effective tools for statistical reporting and data gathering regarding the implementation of the confiscation, these legislative changes will not provide immediate result, but will improve the overall perception by the public regarding the effectiveness and fairness of the Macedonian criminal justice system on longer stages. Hence, these tools on longer terms, comparatively speaking, should provide multilateral benefit to Macedonian society.

⁵² See further readings at: Kalajdizev, G., Misoski, B., Ilikj, D., *Effective Defence in Criminal Proceedings in the Republic of Macedonia*, Foundation Open Society – Macedonia, 2014

⁵³ See: Kalajdizev G., Buzarovska G., Misoski B., Ilikj, D., *Criminal Procedure Law*, Faculty of Law Iustinianus Primus, Skopje, 2015

On one hand these tools will increase the efficiency of the criminal justice system, due to the fact that actors in the criminal justice process, particularly judges, will have clear vision where the confiscated asset has finished and what is the societal benefit from their work. This fact should endow judges and other law enforcement agencies to put additional effort in investigating the proceeds from crime and ultimately to use the confiscation more frequently. While, the second benefit would be through the fact that the message will be sent to the criminals that in most of the cases crime will not pay, which might be detrimental for undertaking their future criminal activities.

Finally, in most of the cases if the criminal assets is discovered during the criminal procedure and later on confiscated from the defendants, from this asset, property of proceeds from the crime is also possible to indemnify the damaged persons from the crimes. In this sense these persons would increase their trust into the criminal justice system and consider it as just, effective and efficient.

5. CONCLUSION

As a candidate-member state to the EU Republic of Macedonia is in ongoing process of harmonization and adaptation of the national legal system to the EU law. In this process, one of the essential stapes is building strong democratic capacities and institutions and structural and organized reaction to the fight against the crime and its prevention. Confiscation of the instrumentalities and assets derived from a crime has shown to be one of the most effective tools in reaching the above mention goals. Even more, these benefits from the confiscation has been recognized by the EU, through enactment of several legal texts, of which, the latest and most important one is the Directive 2014/42/EU for establishment of the European Framework for Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union.

As we have analyzed in the text, this Directive is partially implemented into the Macedonian criminal justice system. In order to reach its goals, Macedonian legislator needs to provide several amendments to the Criminal Code, particularly addressing to the scope of the Directive. Furthermore, Macedonian Criminal Code should be amended in order to accept the possibilities to use the confiscation in cases when the defendant is tried in absentia, together with the update of the list of the crimes for which extended confiscation is possible in coordination to the crimes listed within the paragraph 2, specifically lines (a) to (d) of the Article 5 of the Directive.

From the practical stand point of the implementation of the confiscation into the Macedonian criminal justice system we can conclude that there are insufficient or improper legal provisions considering the data gathering for the implementation of this measure by the courts. Furthermore, due to poor data gathering and reporting process for the future use of the confiscated assets or proceeds or instrumentalities from the crimes we can't conclude whether this measure is efficient. Henceforward we can't provide proper assumptions for the effects of the implementation of this measure by the courts, how frequently they use this measure, or whether the implementation is properly conveyed.

Hence, we deem that is of utmost importance to improve both legal framework and the operational capacity of the Agency for dealing with confiscated assets. Addressing to these issues, Macedonian criminal justice system will not only accept the provisions from the Directive, but also should increase the implementation of the confiscation by the courts, and by this, ultimately, will increase the effectiveness and efficiency of the criminal justice process and would improve its determination towards reaching the standard that "crime does not pay" which should provide detrimental effects to the perpetrators of the crimes while considering undertaking specific criminal activity.

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