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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MONTENEGRO

URGENT OPINION

ON THE DRAFT AMENDMENTS TO THE LAW ON SEIZURE AND CONFISCATION OF MATERIAL BENEFIT DERIVED FROM CRIMINAL ACTIVITY

Issued on 22 May 2024 pursuant to Article 14a of the Venice Commission's Revised Rules of Procedure

on the basis of comments by

Mr James HAMILTON (Former Member, Expert, Ireland)
Ms Angelika NUSSBERGER (Member, Germany)
Mr Cesare PINELLI (Substitute Member, Italy)

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I. Introduction

1. By letter of 10 April 2024, the Minister of Justice of Montenegro, Mr Andrej Milović, requested an Urgent Opinion of the Venice Commission on the draft amendments to the Law on seizure and confiscation of material benefit derived from criminal activity (hereinafter the consolidated version of the law is referred to as: "the Law") (CDL-REF(2024)017).

2. Mr James Hamilton, Ms Angelika Nussberger and Mr Cesare Pinelli acted as rapporteurs for this opinion.

3. On 15 April 2024, the Bureau of the Venice Commission, acting on the basis of Article 14a of the Revised Rules of Procedure, authorised the rapporteurs to prepare an Urgent Opinion.

4. On 30 April 2024, the rapporteurs, assisted by Mr Domenico Vallario and Mr Nikolaos Sitaropoulos from the Secretariat, held online meetings with the State Secretary and other officials of the Ministry of Justice, representatives of the Supreme Court, and MPs from the parliamentary majority and the opposition. Online meetings were also held with the civil society organisation MANS and representatives of the European Union. The Venice Commission is grateful to the Ministry of Justice and the Council of Europe Programme Office in Podgorica for the excellent organisation of these online meetings.

5. This Urgent Opinion was prepared in reliance on the English translation of the law. The translation may not accurately reflect the original version on all points.

6. The Urgent Opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings held on 30 April 2024. In line with paragraph 10 of the Venice Commission's Protocol on the preparation of urgent Opinions (CDL-AD(2018)019), the draft Urgent Opinion was transmitted to the authorities of Montenegro on 21 May 2024 for comments. It was issued on 22 May 2024, pursuant to the Venice Commission's Protocol on the preparation of urgent opinions. It will be submitted for endorsement by the Venice Commission at its 139th Plenary Session (Venice, 21-22 June 2024).

II. Background and scope of the Urgent Opinion

7. The request for this Urgent Opinion is linked to Montenegro's EU accession process and, in particular, the need to meet interim benchmarks in Negotiation Chapter 23 – Judiciary and Fundamental Rights, before the issuance of the Interim Benchmark Assessment Report (IBAR) in June 2024. In his aforementioned letter to the Commission, the Minister of Justice explained that this amended Law, along with others, is extremely important for the fulfilment of Montenegro's obligations in the process of integration into the European Union, and, at the same time, necessary to address the shortcomings which arose during the implementation of the Law in its original version and align the latter with relevant European standards.

8. During the online meetings, interlocutors noted that there had been no comprehensive public debate on the amendments. Indeed, given the urgency, the Venice Commission learned that public debate on the amendments was being conducted in parallel to the Venice Commission's preparation of the Urgent Opinion. Moreover, the draft amendments were planned to be adopted by Parliament under an urgent procedure by the end of May or early June 2024 – hence very limited time would be available for public discussion with stakeholders. This is troubling as there seems to be no clear consensus on the scope of the amendments among political forces, while certain interlocutors, including members of the parliamentary majority, characterised them as "cosmetic" or "unimpactful".

9. While the Venice Commission understands the willingness of the authorities to improve legislation in order to fulfil the requirements arising from the EU interim benchmarks and pursuing

their accession process, it wishes to recall that a transparent, accountable, inclusive and democratic law-making process is paramount to the thriving of the rule of law.[1] It believes that a more thorough and comprehensive discussion, both in public and in Parliament, would have enhanced the quality of the amendments. The Venice Commission therefore regrets the limited time afforded to the finalisation and adoption of the amendments.

10. In addition, an issue that was repeatedly raised during the online meetings was the practical implementation of the Law. Despite being tailored, *in abstracto*, to allow for an effective system of asset seizure and confiscation, a number of reportedly long-pending shortcomings seriously risk hampering the law's practical implementation. Among these reported shortcomings the following may be noted: poor functioning of the judiciary and the prosecution, coupled with the lack of financial resources and staffing, information and communication technology, access of prosecutors to relevant databases, case and infrastructure management, which in turn lead to lengthy and cumbersome proceedings.

11. It is noted that the European Commission has consistently raised these issues, lastly in its 2023 Report on Montenegro.[2] For example, despite the temporary seizures of movable and immovable assets worth tens of millions of euro which were conducted in 2022, there was only one final court decision on asset confiscation in the same year, for an amount of EUR 805.[3] The Venice Commission takes note of the commitment expressed also during the online meeting by the representatives of the Ministry of Justice to strengthen the independence and impartiality of the judiciary and the prosecution by, among others, planning and implementing the Judicial Reform Strategy for 2024-2027. It encourages the authorities to redouble their efforts in this domain. The Commission shares the view that the effective realisation of the principles of independence and separation of powers as well as the efficient implementation of laws such as the present one presupposes that the judiciary and the prosecution service are provided with adequate resources to enable them to properly perform their functions.[4]

12. It is for the first time that the Venice Commission is requested to analyse this piece of legislation. Therefore, even though the request only concerns the amendments to the Law, the Venice Commission will incidentally comment on (crucial) provisions of the Law which were not amended in the framework of this reform. Given the scope of the amendments and the urgency of the request, and in the interest of conciseness, the urgent opinion will focus on the most relevant changes and issues arising. The absence of comments on other provisions of the Law should not be seen as tacit approval of these provisions.

III. Analysis

A. General overview

13. The Law provides for two types of confiscation: (i) an "extended confiscation"[5] against a person who was convicted of one of the crimes mentioned in Article 2 of the Law and who fails to demonstrate the legal origin of his/her assets; and (ii) a "non-conviction based confiscation", i.e. a

[1] Venice Commission, CDL-AD(2016)007, *Rule of Law Checklist*, II.A.5.iii-iv; *see also* CDL-AD(2019)015, *Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist*, § 79.
[2] European Commission, Montenegro 2023 Report, 8 November 2023, pp. 5, 21, 30 and 38. See also United Nations Special Rapporteur on the independence of judges and lawyers, *Preliminary observations on the official visit to Montenegro,* 19-26/09/2023.
[3] Montenegro 2023 Report, cited above, p. 57.
[4] Preliminary observations on the official visit to Montenegro, cited above.
[5] Confiscation following a criminal conviction targeting not only the property associated with a specific crime, including proceeds of crime or its instrumentalities, but also additional property which the court determines as being derived from criminal conduct, *see* Recital 29 of Directive (EU) 2024/1260 on asset recovery and confiscation (adopted by the European Parliament and the European Council on 12 April 2024), which will replace Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

confiscation measure taken in the absence of a conviction and directed against assets of illicit origin of the person. This second type of confiscation, regulated by Article 10 of the Law, can be triggered when proceedings conducted against an individual for one of the crimes mentioned in Article 2 of the Law cannot be continued due to illness, flight, immunity, amnesty, pardon, statute of limitations or the existence of other circumstances that permanently exclude criminal prosecution. The Law further regulates the conduct of the financial (pre-)investigation (Chapters IIa and III),[6] the procedures regulating the temporary freezing of assets (Chapter IV), the procedure regulating the permanent confiscation of assets (Chapter V), the protection of *bona fide* third parties (Chapter VI), the management of the seized and confiscated material benefit (Chapter VII), and international cooperation (Chapter VIII). The prosecution has the competence to manage the financial investigation (Article 13), to file orders for provisional measures/freezing of assets (Article 21) or motions to confiscate assets (Article 35).

14. It is not the task of the Venice Commission to comment on the chosen model of confiscation. Noting that there are several models and approaches in member States as to how to confiscate illegal assets, the Venice Commission recalls that in implementing policies aimed at the prevention and eradication of corruption, States are given a wide margin of appreciation with regard to what constitutes the appropriate means of applying measures to control the use of illegally obtained property, such as the confiscation of all types of proceeds of crime.[7] This is important in particular with respect to measures to combat corruption in a context where corruption has been long-lasting and widespread and considered a major obstacle to closer cooperation with and accession to the European Union. The Venice Commission will assess to what extent the provisions of the Law are in line with the standards of the European Convention on Human Rights (ECHR) and its additional protocols as upheld by the European Court of Human Rights (ECtHR), the rule of law standards developed by the Venice Commission as well as other relevant norms of international law.[8]

15. Seizure and confiscation measures by definition impinge upon property rights as protected by Article 1 of Protocol No. 1 to the ECHR. In order to be compatible with the ECHR, an interference with the right to the peaceful enjoyment of "possessions", apart from being prescribed by law and in the public interest, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[9]

B. Definitions and scope of the law

1. Scope *ratione materiae* of seizure and confiscation measures

16. Amended Article 2 of the Law provides for an expanded list of crimes for which it is possible to proceed to seizure and confiscation of assets.[10] In particular, in addition to enumerating a list of

[6] A new chapter IIa which covers the Financial pre-investigation has been added in the Law.
[7] ECtHR, *Gogitidze and Others v. Georgia*, no. 36862/05, §§ 97 and 108, 12 May 2015; see also ECtHR, *Yordanov and Others v. Bulgaria*, nos. 265/17 and 26473/18, § 115, 26 September 2023.
[8] The relevant international standards have been listed in Venice Commission, CDL-AD(2022)048, *Amicus curiae brief for the Constitutional Court of Armenia on certain questions relating to the law on the forfeiture of assets of illicit origin*, § 9.
[9] See, among many others, ECtHR, *Beyeler v. Italy* [GC], no. 33202/96, § 107, 5 January 2000.
[10] Article 2 § 1 of the Law reads: "*Proceeds of crime may be seized from the perpetrator where well-grounded suspicion exists that such proceeds of crime have been derived from criminal activities, whereby the perpetrator fails to make plausible the legal origin of such proceeds of crime (extended confiscation) and if the perpetrator was convicted by a final judgment for a crime stipulated down in the Criminal Code of Montenegro, as follows:*
1) abduction referred to in Article 164;
2) criminal offences against sexual freedom referred to in Articles 206, 208, 209, 210, 211, 211a and 211b;
3) criminal offences against property referred to in Articles 240, 241, 242, 243, 244, 244a, 249, 250, 251, 252 and 253b;
4) criminal offences against payment transactions and business operations referred to in Articles 258, 259, 260, 261, 262, 263, 264, 265, 268, 270, 272, 272a, 272b, 272c, 272d, 273, 274, 276, 276a, 276b, 281, 281a and 283;
5) criminal offences against the health of people;
6) criminal offences against environment and spatial planning;

specific crimes as codified in the Criminal Code of Montenegro, Article 2 § 1 (12) provides for a catch-all clause: "*another criminal offence committed with intent for which a prison sentence of three or more years may be imposed*". The expanded list is, in the intention on the drafters, meant to align with provisions of EU Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime ("the 2014 EU Directive")[11] and EU Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders ("the 2018 EU Regulation").[12] The 2014 EU Directive provides at its Article 5 § 1 (e) that "extended confiscation" shall indeed apply to certain criminal offences (those covered by the legal instruments in Article 3 of the Directive) that are punishable by a custodial sentence of a maximum of at least four years. Such an approach has been confirmed in Article 14 § 3 of the newly approved EU Directive 2024/1260 of 24 April 2024 on asset recovery and confiscation ("the 2024 EU Directive"), which will replace the 2014 EU Directive as of 22 May 2024.[13] The 2018 EU Regulation provides that in the context of the execution of freezing or confiscation orders issued by a member State, these orders shall be executed without verification of the double criminality of the acts giving rise to such orders, where those acts are punishable in the issuing State by a custodial sentence of a maximum of at least three years and (emphasis added) constitute one or more of the crimes listed in Article 3 § 1 of the Regulation.[14] Such specific regulation must therefore be read in the light of the EU-specific waiver of the double criminality test.

17. From a point of view of legislative technique, the approach chosen by the drafters of the Law is difficult to understand. On the one hand there is a long enumeration of the relevant articles or chapters of the criminal code, on the other hand there is a general catch-all clause related to the length of the foreseen prison sentence. The "quantitative" criteria seem to be independent from the "qualitative" criteria of the crime. In that scenario, it is unclear what is the added value of the enumeration of the crimes. If only very serious crimes should be targeted, it would be sufficient to use a general clause referring to the length of the prison sentence, adding, if deemed necessary, some typical cases.

18. In this respect, the Venice Commission draws attention to the case of *Todorov and Others v. Bulgaria*, in which the European Court of Human Rights noted that, under the domestic law under examination "*forfeiture proceedings […] could be triggered by numerous offences […], and not just, as in the majority of the cases considered by the Court and reviewed above, by particularly serious offences as Mafia-related offences, drug-trafficking, corruption in the public service or money laundering*", and considered that the wide scope of application of the Bulgarian law was an element to consider when weighing the interests at stake. It found that, taken cumulatively with other factors, the long list of offences capable of triggering forfeiture proceedings placed a "considerable burden on the applicants" and legal "uncertainty and imprecision".[15]

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7) criminal offences against security of computer data referred to in Articles 350, 352, 353 and 354;
8) criminal offences against public order and peace referred to in Articles 401, 401a, 402, 403, 403a, 403b, 403c, 404 and 405;
9) criminal offences against legal procedures referred to in Articles 412, 413 and 414;
10) criminal offences against official duty referred to in Articles 416, 417, 419, 420, 422, 422a, 423 and 424;
11) criminal offences against humanity and other values guaranteed by international law referred to in Articles 444, 445, 446, 447, 447a, 447b, 447c, 447d, 449, 449a and 449b;
12) another criminal offense committed with intent for which a prison sentence of three or more years may be imposed."

[11] 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.

[12] Regulation (EU) 2018/1805 of the European Parliament and the Council on the mutual recognition of freezing orders and confiscation order.

[13] Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation, *see in particular* Recital 62.

[14] Article 3 of the 2018 EU Regulation.

[15] ECtHR, *Todorov and Others v. Bulgaria*, nos 50705/11 and 6 others, §§ 200, 210-211, 13 July 2021 ; see also *Yordanov and Others v. Bulgaria*, cited above, § 115: "*Proceedings under the 2012 Act could thus be triggered not only by particularly serious offences such as those related to organised crime, drug-trafficking, corruption in the public*

19. In conclusion, the Venice Commission acknowledges that the tendency in Europe is to widen the scope of extended confiscation (Article 14 of the new 2024 EU Directive provides that "criminal offence" shall include at least (emphasis added) the offences listed in Article 2, paragraphs 1 to 3, where such offences are punishable by deprivation of liberty of a maximum of at least four years). This notwithstanding, for the sake of legislative clarity and legal certainty, the Commission recommends that the drafters provide for cumulative criteria, i.e. a qualitative criterion, based on the economic aspects of certain categories of crimes as recommended in the EU Directives, to be applied in conjunction with (and not as alternative to) a quantitative criterion (based on the length of the foreseen prison sentence).

2. Definitions

20. The Law contains several definitions, some of which deserve particular attention in order to uphold legal certainty.

21. Firstly, the Law regulates "seizure" and "confiscation". Yet, some Articles only refer to seizure while others refer to both. For example, in Article 2 the verb "to seize" is used while describing the extended confiscation. The Venice Commission understands that, in the Law, the term "seizure" is meant to cover the provisional measures regulated in Chapter IV of the Law (temporary measures which precede the confiscation) and that the term "confiscation" covers the two categories of "extended" and "non-conviction based" confiscations. The Commission recommends that the drafters clarify these terms, possibly in Article 7 of the Law concerning definitions.

22. The Venice Commission further notes that Article 2 provides that proceeds of crimes shall be seized also from the "legal predecessor" and "legal successor" of the "perpetrator", as well as from third parties. Legal predecessor is defined in Article 7 § 1(5) the Law as "a natural or legal person whose property rights have been transferred to the holder", whereas the legal successor (Article 7 § 1(6)) is the "heir of the accused person, of a third person or his heirs, or a natural or a legal person to whom property rights have been transferred by means of a legal transaction". The Law then provides for a different definition of "third party"[16] and "*bona fide* third party".[17] Contrary to the latter, the Law does not make a difference as to the good or bad faith of the legal predecessor and successors.

23. As there is a whole chapter in the Law on the protection of *bona fide* third parties, it is therefore not clear whether legal predecessors and successors can be at the same time *bona fide* third parties or not. The Venice Commission recommends clarifying this issue in the Law by providing that all *bona fide* third parties should enjoy the guarantees afforded to them in the law. In that regard, it is worth mentioning that the amendments provided for the elimination of "family member" as a separate category of individuals. Family members are now considered "third parties".[18]

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service or money laundering, or other offences which could be assumed to always generate income, but by a variety of other offences as well[…]."

[16] Article 7 § 1(4): "*A natural or a legal person to whom material benefit derived from criminal activities has been transferred without remuneration or for remuneration which manifestly does not correspond to the real value of the material benefit or a person who knew or could have known that the material benefit has been derived from criminal activities*".

[17] Article 7 § 1(10): "*bona fide third party means the person who claims to have a right in relation to the material benefit subject to seizure or confiscation which prevents the seizure or confiscation of material benefit or who at the time of acquisition of such rights did not know or was not obliged to know that the material benefit has been derived from criminal activities*".

[18] A similar recommendation was made in Venice Commission, CDL-AD(2022)014, *Kosovo – Opinion on the draft law no. 08/L-121 on the State Bureau for verification and confiscation of unjustified assets*, § 33

24. Lastly, amended Article 3 of the Law provides for a double definition of "proceeds of crime":[19] in the first paragraph, the link to the criminal activity is made dependent on the inability for the owner to prove their legal acquisition; the second has rather to do with allegedly objective situations regarding someone's assets ("increase or prevention of decrease in assets resulting from criminal activity" etc.). The two paragraphs of Article 3 are formulated in a way that does not prevent from interpreting each one as *per se* sufficient to define the notion of "proceeds of crime". The Venice Commission considers that logically the two criteria should be applied in a cumulative manner. Accordingly, it recommends redrafting this paragraph to combine the two definitions in one.[20]

3. Burden of proof

25. In defining proceeds of crime, Article 3 implicitly reveals the distribution of the burden of proof in seizure and confiscation proceedings: relevant assets are presumed to be proceeds of crime *unless* the owner can prove that they were legally acquired. The question is in how far such a shift in the burden of proof is compatible with European standards. The Venice Commission has previously held that civil forfeiture of assets may be based on the application of a presumption of illicit origin of certain property. Such a presumption shifts the burden of proof to the owner of assets: the competent authority has a duty to demonstrate that the assets may be of illegal origin, while the respondent may refute these allegations by presenting evidence to the contrary.[21] Such solution appears proportionate "as long as the owner of the property has a real chance to refute the presumption, and may forward the "inaccessible evidence" or bona fide ownership defence".[22] This is also in line with the jurisprudence of the ECtHR.[23] Thus, the Venice Commission has welcomed the safeguard contained in domestic legislation according to which, in the absence of direct evidence proving that the lawful origin of an asset is missing, the court could still rule in favour of the defendant, provided that convincing explanation of why the evidence is missing was given.[24] Such a safeguard does not seem to exist in the Law under examination. The Venice Commission recommends the drafters introducing a similar safeguard therein.

26.The law, either in Article 41 or elsewhere, contains no provision on the standard of proof that shall inform the courts in their final decision on the confiscation of assets.[25] As this issue is strictly correlated with the requirement of establishing a substantive link between the assets in respect of which confiscation is sought and the criminal offence, the Venice Commission will formulate its views and recommendations in the section below.

C. Link between the crime and the confiscation measure

27. In balancing the general interest of preventing the illicit acquisition of property through criminal activity and the use of such property and the protection of property rights under Article 1 of Protocol No. 1 to the ECHR, two, among other, factors are particularly important: 1) the existence of a substantive link between the crime and the assets for which confiscation is requested; and 2) the temporal limits in the retroactive review of the legality of enrichment.

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[19] Article 3 reads: "*Proceeds of crime shall be proceeds of crime for which the owner cannot prove that it was legally acquired, regardless of where it is located.*
Proceeds of crime shall represent any increase or prevention of decrease in assets resulting from criminal activity, as well as income or other benefit realized directly or indirectly from criminal activity, as well as assets into which it was converted or with which it was combined".

[20] As an example, the drafters could consider the following formulation: "*Proceeds of crime shall represent any increase or prevention of decrease in assets resulting from criminal activity, as well as income or other benefit realized directly or indirectly from criminal activity, as well as assets into which it was converted or with which it was combined that the owner cannot prove to be legally acquired, regardless of where it is located*."

[21] CDL-AD(2022)048, cited above, § 60. See also ECtHR, *Gogitidze and Others v. Georgia*, cited above, § 105.

[22] CDL-AD(2022)048, cited above, § 61.

[23] ECtHR, *Todorov and Others v. Bulgaria,* cited above, §§ 205 and 210.

[24] CDL-AD(2022)048, cited above, § 39.

[25] By contrast, in Article 25 the Law provides that in deciding on provisional measure, the court shall indicate circumstances affording *well-founded* suspicion that the material benefit has been derived from criminal activities.

1. Substantive link between the crime and the confiscation of assets

28. Article 5 § 1 of the 2014 EU Directive, clarified by Recital 21 of the same Directive, requires, in the case of "extended confiscation", that a national court is satisfied that the property to be forfeited "is derived from criminal conduct". Recital 21 provides further explanations in that regard, pointing out, in particular, that an asset can be the subject of "extended confiscation" where a court can "reasonably presume" that it is "substantially more probable" that it was obtained from criminal conduct than from licit activities. The 2024 EU Directive does not refer to a specific standard of proof but reiterates that a court shall be satisfied that the property in question is derived from criminal conduct and that the fact that the property of the person is disproportionate to that person's lawful income could be among the facts giving rise to a conclusion by the court that the property derives from criminal conduct.

29. In the case of *Yordanov and others v. Bulgaria*, the ECtHR confirmed the approach it had followed in the case of *Todorov and Others* v. Bulgaria. In particular, it found that "*the national courts ordering the forfeiture had to provide some particulars* (emphasis added) *as to the criminal conduct in which the assets to be forfeited were alleged to have originated, and show in a reasoned manner* (emphasis added) *that those assets could have been the proceeds of that conduct; such a requirement was seen as a counterbalance against the State's advantage in the forfeiture proceedings, stemming from the restrictions on the ability of defendants to effectively challenge the measures against them […], and as a basic guarantee of the applicants' rights.*"[26] In particular, the Court found that the fair balance requirement had been upset on the grounds that the assets had been confiscated only because the applicant had failed to prove any lawful income to justify their acquisition, without examining any relevant criminal activity or administrative offence, nor establishing any link between those assets and any such activity. The Court thus found a violation of Article 1 of Protocol No. 1 to the Convention.[27]

30. As to the required standard of proof, the Venice Commission has previously stated that whether the assets are obtained as a result of a criminal or other unlawful activity, is to be proved according to the civil standard of proof of "the balance of probabilities" rather than the criminal standard of "beyond reasonable doubt".[28]

31. Article 8 § 2 of the Law provides that "well-founded suspicion that material benefit was derived from criminal activities exists if the property of the perpetrator referred to in Article 2 paragraph 1 of this Law is manifestly disproportionate to his lawful income". While this provision seems reasonable in itself, it is not clear whether the mere disproportion between assets and income could *per se* lead to confiscation of those assets. In this regard, Article 36 § 1(5) of the Law, in setting out the content of the motion filed by the prosecution to confiscate material benefit derived from criminal activities, provides that the prosecutor shall submit, *inter alia*, evidence that the material benefit has been derived from criminal activities **or** (emphasis added) reasons which indicate a manifest disproportion between the value of the property (reduced by taxes and other duties paid) and the holder's lawful income. Accordingly, the said provision seems to treat the two issues of the link between the confiscation and the offence and the disproportionate value of property as two separate issues. Lastly, and as mentioned above, Articles 40 and 41, which regulate respectively the presentation of evidence at trial and the final ruling by the court on the confiscation of assets, are silent as to the standard of proof that shall inform the courts adjudicating on the confiscation of assets. In the view of the Venice Commission and bearing in mind the above-mentioned jurisprudence of the ECtHR, the current text of these Articles does not provide sufficient guarantees against a loose or arbitrary interpretation of the required standard of proof and of the requirement, for the prosecution and in turn for the courts, of establishing a substantive link between the assets in respect of which confiscation is sought and the criminal offence.

[26] ECtHR, *Yordanov and Others v. Bulgaria*, cited above, § 122.
[27] ECtHR, *Yordanov and Others v. Bulgaria*, cited above, §§ 130-133.
[28] CDL-AD(2022)048, cited above, § 26.

32. In light of the above, the Venice Commission recommends that Article 36 § 1(5), as well as Articles 40 and 41 of the Law be amended so that the Law clearly identifies the standard of proof, possibly in a separate provision in light of its importance,[29] and makes it clear that a substantive link should be established between the assets in respect of which confiscation is sought and the criminal offence.[30]

2. Temporal limits in the retroactive review of the legality of enrichment

33. The Law further allows for the seizure and confiscation of assets derived from criminal activity that have been obtained before the commission of such a crime, if the court finds that there is a temporal correlation between the time of acquisition of the material benefit and other circumstances of the case justifying the seizure of confiscation.[31] The Venice Commission recalls that it is generally accepted that the fight against corruption makes it necessary to act not only *pro futuro*, but also with regard to illicit acquisition of property in the past.[32] The ECtHR has in turn found that, while it is in principle possible to link civil forfeiture to facts that had occurred even before the entry into force of a given law,[33] the fixation of a too lengthy period renders "*the proof of lawful income or lawful provenance of their assets difficult for the applicants*".[34]

34. Article 8 of the Law does not determine a time limit, but tasks domestic courts with proving "a temporal correlation". It might be an acceptable option to allow for a margin of appreciation to the courts in this respect, provided that courts take into account both the actual possibilities of the person concerned to prove the origin of assets after a long lapse of time and the stability of the economic order. However, legal certainty and security would require more specific time limits to alleviate the burden on the person concerned to prove the legality of the acquisition,[35] and to prevent disproportionate interference with one's property rights. The Venice Commission notes that some EU Member States have set up time limits within which the acquired assets may be considered as originating from criminal conduct (e.g. 5 years before indictment in Belgium, Hungary, Portugal and Romania; 6 years before indictment in Cyprus and Ireland; 10 years before indictment in Bulgaria; 5 years before committing the offence in Czechia, Lithuania and Poland and 6 years before the commission of the criminal offence in Netherlands).[36] The Venice Commission therefore recommends specifying a definite temporal scope prior to the commission of the criminal offence within which it is possible to seize and confiscate assets.

D. Non-conviction-based confiscation

35. Art. 10 provides for a non-conviction-based confiscation,[37] notably codifying the situations in which proceeds of crime can be confiscated despite the impossibility for the criminal proceedings to continue (death, illness, flight, immunity, amnesty, pardon, statute of limitations or existence of other circumstances that permanently exclude prosecution).

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[29] *See, similarly*, CDL-AD(2022)014, cited above, § 19.
[30] ECtHR, *Gogitidze and Others v. Georgia*, cited above, § 107.
[31] Article 8 of the Law provides that *"Material benefit derived from criminal activities can be seized and confiscated from the perpetrator referred to in Article 2 § 1 of this Law if it was obtained in the period before and/or after the commission of the crime referred to in Article 2 § 1 of this Law until the finality of the judgment, when the court finds that there is a temporal correlation between the time of acquisition of material benefit and other circumstances of the case justifying property seizure or confiscation*".
[32] CDL-AD(2022)048, cited above, § 48.
[33] ECtHR, *Gogitidze and Others v. Georgia*, cited above, § 99.
[34] ECtHR, *Todorov and Others v. Bulgaria*, cited above, § 202.
[35] ECtHR, *Yordanov and Others v. Bulgaria*, cited above, § 117.
[36] European Commission, *Report from the Commission to the European Parliament and the Council – Asset recovery and confiscation: ensuring that crime does not pay*, 2 June 2020, § 2.2.4.1.
[37] See Council of Europe, *The use of non-conviction based seizure and confiscation*, October 2020.

36. The Law provides a value threshold in order to proceed with the confiscation of proceeds of crime in the absence of a conviction: the illicit assets should be over EUR 5,000. During the online meetings interlocutors explained that such a threshold was necessary in order not to overburden the prosecution with financial investigations and procedures that would ultimately result in confiscations of a limited value. The Venice Commission understands the reason underlying the introduction of such a threshold. Indeed it previously noted, in the framework of a legislation that limited forfeiture to illicit assets valued over EUR 110,000, that this meant that forfeiture would be applicable only to the most serious cases, reducing its overall human rights impact.[38] However, also in view of the need to target primarily high-value, serious cases of financial crime, and considering the well-documented difficulties in concluding financial investigations and getting final decisions from courts, the drafters might consider raising the threshold of EUR 5,000.[39]

37. The provision contained in Article 10 § 3 according to which confiscation without prior conviction shall be limited to cases where, in the absence of the circumstances detailed above, it would have been "probable" for the relevant criminal proceedings to lead to a criminal conviction, is a sufficient guarantee against arbitrariness.[40] However, the remarks and recommendations made above regarding the need to prove the existence of a substantive and temporal link between the assets and the criminal offence apply *a fortiori* here, in the absence of a criminal conviction.[41]

E. Financial investigation

38. A proper financial investigation can start, under the order of the state prosecutor, as soon as there are grounds of suspicion that material benefit was derived from criminal activities and there is grounded suspicion that the criminal offence referred to in Article 2 § 1 of the Law has been committed.[42] The amendments introduce, in Article 18, a deadline of six months to complete the investigation after the final judgment convicting a person for the crimes referred to in Article 2 § 1 or after the decision prohibiting criminal prosecution in accordance with Article 10 of the Law. Some representatives of the civil society organisations argue that introducing such a deadline would lead to negative outcomes, such as superficial investigations, and would potentially undermine justice and efficiency in combating corruption. The Venice Commission considers that establishing such a deadline does not *per se* run counter to international standards. On the contrary, it is a guarantee against excessively lengthy proceedings and disproportionate interference with human rights. However, in order to ensure effective financial investigations and given the aforementioned serious shortcomings, the Venice Commission encourages, as mentioned above, the Montenegrin authorities to provide the prosecution with the necessary financial, technical and human resources, as also recommended in Article 26 of the 2024 EU Directive.

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[38] CDL-AD(2022)048, cited above, §§ 11, 40.

[39] The Venice Commission notes that several EU Member States have set thresholds for the value of property below which **extended confiscation** (emphasis added) is not possible, *see Report from the Commission to the European Parliament and the Council – Asset recovery and confiscation: ensuring that crime does not pay*, cited above, § 2.2.4.1.

[40] Article 15 § 2 of the 2024 EU Directive provides: "*Confiscation without a prior conviction under this Article shall be limited to cases where, in the absence of the circumstances set out in paragraph 1, it would have been **possible** for the relevant criminal proceedings to lead to a criminal conviction for, at least, offences liable to give rise, directly or indirectly, to substantial economic benefit, and where the national court is satisfied that the instrumentalities, proceeds or property to be confiscated are derived from, or directly or indirectly linked to, the criminal offence in question.*"

[41] As the standard proceedings for permanent confiscation would apply also to non-conviction-based confiscation (Article 10 § 1, *in fine*), the remarks made above with regard to the drafting of Articles 36 § 1(5), 40 and 41 are pertinent here too.

[42] Article 11 of the Law. The amendments have modified the required standard of proof. The previous version of the law foreseen a "well-founded suspicion" that material benefit was derived from criminal activities and "a reasonable suspicion" that the criminal offence referred to in Article 2 § 1 had been committed.

F. Provisional measures

39. Provisional measures (or "freezing orders") can be issued against a person provided that well-founded suspicion exists that the material benefit has been obtained through a criminal activity (Article 20 of the Law). Provisional measures are imposed upon motion of the prosecution and upon decision by the investigative judge, and can be appealed against before a three-judge panel of the court of first instance (Article 21 of the Law). In urgent cases (Article 21 § 3 of the Law), the prosecution may issue an order to freeze assets that shall be swiftly confirmed by the investigating judge.

40. Freezing orders are measures which do not deprive the holder permanently of his/her possessions, but provisionally prevent him/her from using and disposing of them. The ECtHR treats freezing orders as "control of the use of property", thus falling within the ambit of the second paragraph of Article 1 of Protocol No. 1 to the ECHR.[43] Such orders are, by their own nature, a harsh and restrictive measure, which is capable of affecting the rights of an owner to such an extent that his or her main business activity or even living conditions may be put at stake.[44] While the length of time during which the restrictions remain in place is a crucial part of the Court's assessment,[45] the scope and nature of restrictions as well as the presence or absence of procedural guarantees are no less relevant.[46] In particular, it is recalled that in judicial proceedings concerning the right to property an individual must have a reasonable opportunity to submit his or her case to the competent authorities and to challenge effectively any measures interfering with his/her property rights.[47]

41. The amendments aim at rendering the freezing of assets easier, while at the same time fixing strict deadlines for its execution and validity. As to the amendments facilitating the application of provisional measures, Article 20 § 1 of the Law (Conditions for imposing provisional measures to secure assets), while providing that "*Provisional measures to secure assets shall be imposed if well-founded suspicion exists that the material benefit has been obtained through a criminal activity*" no longer contains the safeguard "*if threat exists that the confiscation of such material benefit would be prevented or protracted*". As clearly stated in the rationale of the amendments, the purpose is to facilitate the application of provisional measures.

42. However, the Venice Commission notes that the Law delimits the application of provisional measures by providing in Article 20 § 2 that provisional measures shall be imposed if, in addition to the well-founded suspicion that the material benefit has been obtained through a criminal activity one of the following risks also exists: "*1) that the value of material benefit referred to in paragraph 1 of this Article would depreciate; 2) that the holder would use the material benefit referred to in paragraph 1 of this Article himself or via other persons to commit a crime; 3) that the holder would use the material benefit referred to in paragraph 1 of this Article himself or via other persons to prevent or significantly protract its confiscation*."

43. For the sake of legal clarity and certainty, the Venice Commission recommends substituting the word "shall" with the word "may" in Article 20 § 1, so that it is clear that provisional measures become possible, rather than mandatory, *vis-à-vis* a "well-founded suspicion that the material benefit has been obtained through a criminal activity" and become mandatory only if the latter is coupled with one of the risks listed in Article 20 § 2.

44. The elimination of the safeguard clause contained in Article 20 § 1 is coupled with the elimination of the *ex-parte* hearing that had to take place within three days from the date of delivery of the motion by the prosecution, formerly provided for in Article 23 of the Law. However, Article 22

[43] ECtHR, *Karahasanoğlu v. Turkey*, nos. 21392/08, 53870/09/32844/17, §§ 144-145, 16 March 2021.
[44] ECtHR, *JGK Statyba Ltd and Guselnikovas v. Lithuania*, no. 3330/12, § 129, 5 November 2013.
[45] ECtHR, *Forminster Enterprises Limited v. the Czech Republic*, no. 38238/04, § 75, 9 October 2008.
[46] ECtHR, *Karahasanoğlu v. Turkey*, cited above, § 151.
[47] ECtHR, *Yordanov and Others v. Bulgaria*, cited above, § 112.

has been amended providing for the possibility for the person subject to a provisional measure to comment in writing within eight days of the receipt of the motion of the prosecution.

45. The Venice Commission recalls that except in very exceptional circumstances, there should be at least the opportunity to request that hearings be held in public.[48] Accordingly, and provided that : (i) the owner is fully put in the condition of knowing and commenting on the proposal by the prosecution, and (ii) the owner is free to request (and obtain) an oral hearing in the appeal procedure (see Article 28 § 1) the Venice Commission does not consider that the elimination of such a hearing puts an excessive burden on the person whose assets are subject provisional measures.

46. On the other hand, as mentioned above, the amendments provide for stricter deadlines for the prosecutor and for the courts to decide on provisional measures. First of all, by providing at Article 21 that the prosecution shall submit a reasoned proposal to impose provisional measures to the investigating judge within eight days of the urgent order (in the previous version of the law there was no time limit) to freeze assets provided in Article 21 § 3. Additionally, by providing at Article 32 § 3 that should the indictment not be confirmed within two years as of the date of issuing the ruling imposing a provisional measure to secure assets, the prosecution cannot submit again a proposal for a provisional measure against the same person and in relation to the same assets. The Venice Commission welcomes the introduction of such amendments, which are an important guarantee against arbitrariness and abuse of the use of provisional measures.[49] It recalls that the ECtHR has repeatedly found that the state of uncertainty in which an owner finds him/herself as to the fate of his/her property can lead to a violation of Article 1 of Protocol No. 1 to the ECHR.[50]

47. The Venice Commission delegation received critical remarks from the representatives of civil society organisations that these amendments could undermine the fundamental purpose of provisional measures, i.e. to prevent suspects from disposing of assets that could later be subject to confiscation. In particular, with regard to the eight-day deadline provided for in Article 21, it was argued that short deadlines coupled with the limited resources of the prosecution will make it challenging to react quickly within such a short timeframe. With regard to the two-year deadline to confirm an indictment, it was pointed out that long-standing issues of excessive length of pre-trial proceedings in Montenegro can lead to significant delays in judicial proceedings.

48. The Venice Commission is well aware of the structural lack of resources of the Montenegrin judiciary and prosecution, as documented above (see paragraphs 10-11 above). However, it considers that structural deficiencies and lack of resources cannot justify the undermining of human rights. The person whose assets are subject to provisional measures should not bear the consequences of such dysfunctionalities. The Venice Commission takes note of the willingness of the Ministry of Justice to provide sufficient resources to the judiciary and prosecution, *inter alia,* within the planning and implementation of the Judicial Reform Strategy for 2024-2027 and it encourages it to reinforce its work in this domain.

49. In conclusion, the Venice Commission finds that the deadlines and limitations set in the Law with regard to the temporal application of provisional measures sufficiently counterbalance the State's advantage in the aforementioned proceedings.

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[48] In the context of confiscation proceedings *see* ECtHR, *Bocellari et Rizza v. Italy*, no. 399/02, §§ 34-41, 13 November 2007.

[49] *See also*, with regard to the 8-day deadline for the prosecution to submit a proposal to the investigation judge, Recital 22 of the 2024 EU Directive : "*[…]In order to prevent the disappearance of property, the competent authorities of the Member States, which might include asset recovery offices, should be empowered to take immediate action, which could take the form of an order, to secure such property until a freezing order has been issued. Given the exceptional nature of such action, Member States should limit its temporary validity.*"

[50] *See, mutatis mutandis,* ECtHR, *Beinarovič and Others v. Lithuania*, nos. 70520/10 and 2 others, § 142, 12 June 2018.

G. *Bona fide* third parties

50. The amendments extend the guarantees of *bona fide* third parties, who are now notified of the ruling upholding or rejecting the prosecutorial motion for confiscation (Article 41 § 3). However, it is not clear when and how the third parties are notified of the ongoing confiscation proceedings. This is particularly relevant in light of Article 49 § 4, which stipulates that "*if the bona fide third party does not join the procedure conducted in accordance with this Law before the decision to confiscate material benefit derived from criminal activities becomes final, their right to seek the settlement of claims from the confiscated material benefit shall be forfeited*". The Venice Commission recommends that the Law expressly provide that third parties, as identified by the prosecution in its motion to confiscate assets, should be notified of the initiated and ongoing confiscation proceedings.

IV. Conclusion

51. The Minister of Justice of Montenegro has requested the Venice Commission to provide an Urgent Opinion on the draft amendments to the Law on seizure and confiscation of material benefit derived from criminal activity. While it understands the willingness to swiftly improve legislation in order to pursue Montenegro's EU accession process, the Venice Commission regrets the limited time afforded to the finalisation and adoption procedure, which prevented a full-fledged public debate and discussion on the scope of the amendments, on which there seems to be no clear consensus among political forces.

52. The Venice Commission assessed the Law in light of the relevant European standards, notably the guarantees contained in the European Convention on Human Rights and the European Court of Human Rights' case-law.

53. In particular, the Venice Commission assessed whether the law strikes a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individuals' fundamental rights. It found, *inter alia*, that the Law provides for an improved model of non-conviction-based confiscation and that provisions in the Law setting strict deadlines for the prosecution and the courts in finalising investigations or applying provisional measures sufficiently counterbalance the State's advantage in seizure and confiscation proceedings.

54. However, some provisions need clarification and amendments in order to be fully in line with European standards. In particular, the Venice Commission recommends:

- Clarifying the scope of seizure and confiscation measures in Article 2 of the Law (as explained in paragraphs 16-19 above) as well as of some terms in the Law (as explained in paragraphs 21-24 above), in order to improve legal clarity and certainty;
- Adding a provision which prevents the courts from making findings based on the presumption of illicit origin when the relevant evidence is inaccessible to the respondent for objective reasons;
- Clearly defining the evidentiary requirements to confiscate assets and clarifying, by amending the relevant provisions, that a substantive link should be established between the assets in respect of which confiscation is sought and the criminal offence;
- Specifying a definite temporal scope prior to the commission of the criminal offence within which it is possible to confiscate assets, in order to alleviate the burden on the persons concerned to prove the legality of the acquisition and to prevent disproportionate interference with their property rights;
- Providing sufficient guarantees for *bona fide* third parties, such as that of being notified of the initiated and ongoing proceedings.

55. Lastly, the effective implementation of the Law requires that the national judiciary and prosecution services be allocated sufficient financial, technical and human resources. The Venice Commission encourages the Ministry of Justice to pursue the path undertaken hitherto and keep strengthening the capacities and resources of the judiciary and the prosecution services, in order for the Law to effectively fulfil its aim of preventing and eradicating corruption while upholding the human rights of the persons affected by the measures contained therein.

56. The Venice Commission remains at the disposal of the Montenegrin authorities for further assistance in this matter.