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Financial Investigation and Adequacy of State Response to Property Crime (Norm and Practice in The Republic of Serbia)

Abstract: *The subject matter of the paper includes criminal legal (theoretical, normative and practical) issues of financial investigation as an increasingly important instrument of adequacy of the state response to property crime. A lot of issues have been analysed and particular attention has been paid to the following issues: the notion and assumptions of the adequacy of the state response to property crime; criminal and political reasons for the necessity of conducting a financial investigation, as well as the most important features of its standardization and practical realization (conditions, subject matter and objectives, as well as the basic principles of its implementation – urgency and timeliness of the procedure, exclusion of the possibility of invoking confidentiality of data, transfer of burden of proof to the suspect, confidentiality of the collected data, etc.)*

At the end of the paper, the authors' position regarding the adequacy of the analysed legal norms in terms of the desired degree of success in detecting, proving and confiscating property acquired through the commission of criminal offenses is presented.

Keywords: *state response, adequacy, financial investigation, temporary confiscation of proceeds, public prosecutor.*

Adequacy of the state response to property crime (general notes)

When it comes to financial investigation as an instrument of adequacy of the state response to property crime, as well as crime in general, one must start from the notion of the adequacy of the state response to crime, its importance in confronting this negative social phenomenon and the assumptions of its desired degree. The justification of such an approach to the problem in question lies primarily in the indisputable fact that adequate state response to crime in general, and thus to its various forms, is not only one of the key indicators of the functioning of the state's legal system both in the field of crime and generally, but also one of the most important prerequisites for the general preventive function of criminal law in the field of combating this form of crime as well as crime in general (Ignjatović, 2004). It goes without saying that an adequate state response to crime is not only the key prerequisite for the adequacy of the necessary degree of combating crime in a particular state, but also an indicator of the functioning of that state's legal system in general (Bejatović, 2016a). Otherwise, not only is this lacking, but it must also be a signal for taking the necessary measures in order to create the assumptions of the adequacy of the state's response to crime – the adequacy of the criminal policy (legal and judicial) of a particular state (Bejatović, 2017).

When it comes to the notion of adequacy of the state response to crime, it should be observed in connection with the legal and judicial penal policy.¹

According to this, adequate state response to crime in general, and thus to this form of crime, should imply both a policy of prescribing criminal measures and other instruments for the necessary degree of state's fight against criminal activities of every kind, as well as a policy of imposing criminal sanctions and applying other criminal measures against offenders (Djordjevic, 2018). This approach to understanding this concept is based on the fact that, while the courts should not pursue any kind of policy but only correctly apply the law when applying criminal legal norms, yet they have a fairly wide margin of discretion, both with regard to the choice of the type of criminal sanction and with

¹ See: Bejatović, S., et al. (2018). *Criminal Policy in Serbia (Law and Practice)*. Serbian Association for Criminal Law Theory and Practice, Belgrade

regard to sentencing. Such freedom is afforded to them by a significant number of institutes of the general part of the Criminal Code, but also by the widely prescribed penal frameworks in a separate part (Kolarić, 2019). In view of all this, we are talking about both the policy of the legislator and the policy of the entities responsible for the implementation of legal norms. Understood in this sense, an adequate state response to crime has, first and foremost, a preventive (general and special) effect. In view of this, and given the importance of the adequacy of the state response to crime, one of the unavoidable questions about it is the question of the factors on which it depends. The question is justified by the fact that only an adequate penal policy is in function of the desired degree of effectiveness of the fight against crime and the fact that it is also an indicator of the functioning of the rule of law (Mijalkovic, Cvorovic, Turanjanin, 2019a). Only in cases where a state has adequate instruments for combating crime – an adequate standard and its adequate implementation, can it count on success in the fight against it (Simovic, Sikman, 2018). Otherwise, not only is this absent, but it can also be one of the signals for the increasing activity of the main actors of this type of criminal activity not only for the continuation of such behaviour but also for the spread of their criminal activity (Boskovic, 2011).

The factors of adequacy of criminal policy are numerous, with criminal legal factors taking a special place among them (Banovic, 2015). It is crystal clear that criminal instruments are not only extremely important but also an indispensable factor in the adequacy of the fight against crime, regardless of its form. Both in theory and in practice, their functional connection and the fact that the degree of adequacy of criminal instruments depends on the degree of adequacy of the state in the field of combating crime in general are undeniable. Such a causal link between criminal legal instruments and the adequacy of the fight against crime in general is particularly evident in organized crime and other forms of crime the basis of which is the illicit acquisition of property (Mijalkovic, Cvorovic, Turanjanin, 2019b). This is because it is precisely in these forms of crime that the necessity and justification of the most appropriate application of measures of criminal coercion is indisputable, and among them as a necessary measure is the measure of confiscation of the proceeds of crime.

There are numerous criminal and political reasons for the necessity to confiscate the proceeds of crime. Among them are the following:

first, preventing the infiltration of illegally acquired income into legal financial flows – preventing money laundering (Bejatović, 2016b). One of the key goals of the perpetrators of crime committed for the purpose of obtaining material gain is the infiltration of illegally acquired income into legal financial flows, and thus their subsequent undisturbed use. In view of this, if a society wants to successfully combat criminality, it must provide instruments to prevent the infiltration of illicitly obtained proceeds into legal financial flows, and one of the most important instruments for this purpose is to confiscate proceeds acquired through criminal activities before its infiltration into legal financial flows. Secondly, there is the goal of reducing the possibility of subsequent investing in further criminal activities. One of the peculiarities of the functioning of criminal groups in general, and especially of those whose aim is to gain material gain, is the constant expansion of their criminal zone and thus the enhancement of their financial power. The basic way to achieve this goal is to invest already acquired assets gained by criminal activities in further criminal activities. By preventing such pathways, their functioning is not only diminished, but also the possibility of investing in further criminal activities is interrupted, which in turn has the consequence of termination of their work. Because of this, the standardization and practical application of instruments that prevent subsequent investment in new criminal activities is an extremely important factor in the fight against crime, the basis of which is the illicit acquisition of material gain. The way of its realization is precisely timely and complete confiscation of property acquired through criminal activities. Third, there is the goal of weakening of power of criminal organizations and then their complete destruction. The functioning of one criminal organisation, as in any other organization, requires financial resources. Without the resources in question, not only is there no ‘successful’ functioning, but no functioning at all. One of the key instruments for achieving this goal is precisely the seizure of the proceeds of crime, especially in cases where it is timely and complete. Fourth, in this way, the preventive function of criminal law in general significantly gains in its intensity and thus makes a significant contribution to the reduction of criminal activity in general.

Considering the stated need for the most complete seizure of the proceeds of crime, the state’s effort to create all the necessary preconditions for the practical realization of its objective is quite justified. One of them is the creation of a normative basis for conducting a fi-

nancial investigation in all cases where there are grounds for suspecting that the property was obtained in a specific case through the commission of criminal offenses. This is primarily because the practice has shown the impossibility of successfully detecting and proving that property was acquired through criminal offense using only classical methods and means of detecting and proving criminal offenses and their perpetrators, which is especially evident in organized and other forms of crime, the basis of which is illegal acquisition of property (Lukić, 2009).

Criminal and political reasons for the special legal regulation of the issue of financial investigation

As already stated, one of the most important instruments for detecting and proving illegally acquired property gain is financial investigation. The basis for the validity of such an attitude is the indisputable fact that by using only standard methods of detecting and proving criminal offenses and their perpetrators, it is not possible to successfully detect, prove and confiscate property acquired by a criminal offense, which is especially evident in organized and other forms of crime, which underlies illegal acquisition of proceeds (Golobinek, 2006). Starting from this generally accepted attitude, the Republic of Serbia has taken concrete steps to create the possibility of conducting financial investigations with the aim of timely detection, proving and seizing the proceeds of crime (Skulic, 2015). The result of the steps taken is the adoption of the Law on Seizure and Confiscation of the Proceeds from Crime² which provides a normative basis for the practical implementation of financial investigations aimed at discovering, proving and seizing (first temporary and then permanent) the proceeds of crime (Cetenovic, 2016).

There are a number of criminal and political reasons that guided the legislator in passing the law that specifically standardizes the issue of financial investigation (Law on Seizure and Confiscation of the Proceeds from Crime). Among them are the following:

1. Specificity of the procedure of confiscation of the proceeds from crime;

² The Law was adopted in 2008, (Official Gazette of the Republic of Serbia, No. 97/2008) and it was valid until the adoption of the new *Law on Seizure and Confiscation of the Proceeds from Crime* in 2016 which is still in force (Official Gazette of the Republic of Serbia, No. 94/2016).

2. Impossibility of using standard methods and means for successfully discovering and proving the proceeds from crime;
3. International legal standard contained in a vast number of international legal acts of this character, which, quite rightly, were ratified by the Republic of Serbia;³
4. Excellent results achieved through conducting financial investigations in countries where such a possibility exists for a long time;⁴
5. Greater preventive effect in general of the legal norm due to a greater degree of certainty of detecting and proving illegally acquired material gain;
6. Creating a normative basis for the prompt and efficient detection and proving of illicitly acquired property gain;
7. Creating a basis for specializing the bodies for detecting and proving illegally acquired material gain;
8. Creating the basis for the possibility of applying special investigative techniques and detection actions and proving illegally acquired material gain (Banović, 2012).

Basic features of financial investigation (norm and practice)

Viewed from the aspect of the term itself, financial investigation is a phase of the process of detecting and proving proceeds from crime, which investigates cash flows and gathers information and evidence about property allegedly acquired through a criminal act and property at one's disposal in general with a view to detecting proceeds from crime, identifying disproportion to lawful income and temporary seizure of the proceeds from crime to secure subsequent final confiscation. According to this term, the basic normative features of financial investigation are:

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- 3 The case is primarily with: *the UN Convention against Transnational Organized Crime* – with its protocols (Palermo Convention of 2000); *Council of Europe Convention on Laundering, Search, Confiscation and Seizure of the Proceeds of Crime and the Financing of Terrorism* (Warsaw Convention of 2005); *The EU Strategy for the Prevention and Control of Organized Crime at the Beginning of the New Millennium* of 3 May 2000; *Recommendation No.11 of the Committee of Ministers of the Council of Europe on the Guiding Principles for the Fight against Organized Crime* of 2001; *the UN Convention against Corruption* (New York Convention of 2003) and *the Council of Europe Convention on Corruption* (Strasbourg, 1990).
 - 4 The case of Germany for example (See: *Financial Investigation as a Tool in the Fight against Organized Crime, Corruption and Money Laundering – Comparative Analysis of Bosnia and Herzegovina, Serbia and Montenegro, Monitoring and Research Center, Podgorica, 2018*).

First, financial investigation is not only a special stage of the process of detecting and proving proceeds from crime, but also a mandatory stage of the process of seizing proceeds from crime.⁵ Without a previously conducted financial investigation, there is no possibility of confiscation of property that is presumed to have been acquired through the commission of criminal offenses, provided that these are criminal offenses for which the law provides for the possibility of conducting a financial investigation.

Second, the range of offenses that can possibly be subject to conducting financial investigation with a view to detecting, proving and confiscating proceeds from crime is quite wide. In addition to organized crime (Skulic, 2015)⁶ there are other crimes as well. For example, these are the crimes of first degree murder, kidnapping and property crime if the material gain gained by the crime, i.e. the value of the item gained by committing crime exceeds one million and five hundred thousand dinars.

Third, there is the issue of specialization of bodies responsible for conducting financial investigations. Considering the fact that one of the indispensable preconditions for the successful conduct of a financial investigation is the special expertise of a body in the Ministry of Internal Affairs of the Republic of Serbia, a special Organizational unit in charge of financial investigation has been established as a specialized organizational unit of the Ministry of Internal Affairs. It is tasked with discovering criminal property assets and it executes its task ex officio or at the discretion of the public prosecutor or court, whereas state and other bodies, organizations and public services are obliged to submit the requested information to the Unit without delay. In addition, in order to accomplish the tasks entrusted to it in the conduct of a financial investigation, the Unit may engage an expert, employed in a state body or institution, to provide expert assistance, which is another confirmation of the legislator's position on the need to provide experienced and highly qualified persons to conduct a financial investigation.

5 Proceeds from crime are the property of the owner which is manifestly disproportionate to his lawful income, and the owner is the defendant, the accused associate, the decedent, the legal successor or a third party.

6 Organized crime represents the commission of criminal offenses by an organized criminal group or its members bearing in mind that an organized criminal group is a group of three or more persons, which exists for a while and acts by agreement with the purpose of committing one or more criminal offenses for which a punishment of imprisonment for a term of four years or a more severe sentence is prescribed, for the direct or indirect gain of a financial or other benefit.

Fourth, the only material prerequisite for initiating and conducting a financial investigation is the existence of a reasonable doubt that a particular person possesses substantial property arising from the crime.

Fifth, the subject of the financial investigation is: assets and legally acquired income (their proportion); evidence of property inherited by the legal successor and evidence of property and compensation for which the property was transferred to third parties. In view of this, the financial investigation encompasses collection of evidence of the property, legal income, manner and cost of living of the defendant, the accused associate or the decedent, evidence of the property inherited by the legal successor, i.e. evidence of the property and compensation for which the property was transferred to a third party.

Sixth, the abundance of entities conducting financial investigation is one of its characteristics, which in itself speaks to both its complexity and the multitude of issues that need to be addressed regarding it. In addition to active entities (public prosecutor and specialized organizational unit in charge of financial investigation), there are almost no natural or legal persons who are excluded in advance from the possible acquisition of a passive entity of financial investigation (Vazić, 2016).

Seventh, the only authorized entity to initiate a financial investigation is the public prosecutor who initiates it by issuing an order after the material condition for its implementation has been met – there is reasonable doubt that a specific person possesses substantial property arising from the criminal offense. In addition, the public prosecutor is the head of its implementation. In that capacity, and at his request, natural and legal persons having documents and evidence of sources of income and property gained on any basis are obliged to hand them over without delay, if it is probable that property derived from criminal offence could be identified on the basis of them. Also, the public prosecutor is authorised to order any banking or other financial organization to provide information on the balance of the business and personal accounts and safes of the owner and then to automatically process the data on the balance of the business and personal accounts and safes of the owner, etc.

Eighth, there are several principles that must be respected in conducting a financial investigation in order to achieve its objective. These are: timeliness of commencement; urgency of acting in conducting the investigation; confidentiality and secrecy of data obtained in the course of investigation; exclusion of the possibility of invoking confidentiality of data, which makes it obligatory for state and other bodies, organizations

and public services to enable the authorized entity to inspect, access and retrieve data from their electronic databases, as well as to view and submit records, documents, data and other requested objects; exclusion of the possibility of invoking banking secrecy and the mutual coordination and cooperation of active entities in conducting financial investigations.

Ninth, by its very nature, a financial investigation is not a criminal investigation. On the contrary, these are not only separate and independent investigations, but also investigations different according to their various characteristics (starting with the goal, case, subjects and other peculiarities) (Kostić, 2018). As a rule, a financial investigation precedes a criminal investigation, but evidence collected in one of these investigations can be used in another investigation, whereas evidence obtained in a financial investigation can be used in a subsequent criminal proceeding, provided that it is obtained in the manner prescribed by law.

Tenth, in the event that the confiscation of proceeds found to have been acquired by the commission of a criminal offense is not possible, other property corresponding to the value of the property arising from the criminal offense shall be confiscated.

Eleventh, the results achieved so far in conducting financial investigations are more than satisfactory. This is evidenced not only by confiscated property from financial investigations conducted worth millions, but also by the percentage of increased prosecuted and adjudicated criminal matters after the conducted financial investigations.

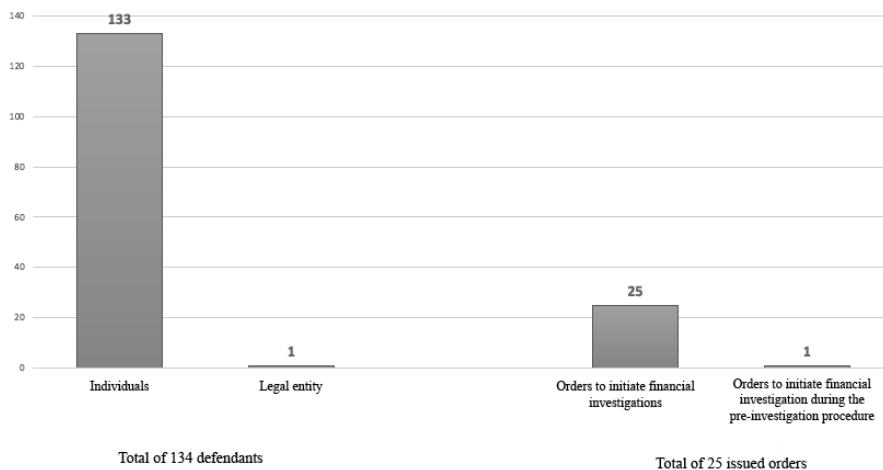
Finally, with regard to the subject matter, one of the most important issues when it comes to the normative basis for regulating financial investigation issues is the following question: do the previously analysed norms on financial investigation provide a good basis for appropriate action by the competent state authorities in the field of detection, evidence and confiscation of proceeds from crime? The justification of the question posed is that, in theory and in practice, it is crystal clear that the legal norm is one of the key preconditions for the appropriateness of seizing illegally acquired material gain, but not unconditionally. In order for specific legal norms to be an adequate instrument for combating crime, they must also meet certain conditions from this point of view. Two of them are crucial. Namely, they need to be in line with the requirements of modern criminal legal science, relevant international legal acts and competent comparative legislation in the field. Secondly, they need to comply with the requirements of the time in which they are applied and the specific circumstances of the place in which they are applied. Only those legal norms

that, by their content, meet these requirements (both in preventive and repressive terms) are an instrument of successful seizure of illegally acquired material gain. Otherwise, they represent only decor with no usable value. Only in cases where specific legal norms provide for the effective detection, proving and seizure of the proceeds of crime are they effective in combating crime not only of this character but in general. Otherwise, they may also be one of the factors in deciding whether or not to commit or continue criminal activity. The analysis of the subject matter as well as the experience in applying the analysed norms for ten years so far show that the norms of the Law on Seizure and Confiscation of the Proceeds from Crime constitute a solid basis for the effective detection, proving and seizure of proceeds from crime by conducting a financial investigation. However, this should not lead to a conclusion that the norm alone is sufficient to achieve the goal of its adoption. What will be the practical results of any criminal norm, including this one, depends not only on them. Other assumptions must be fulfilled. These are first and foremost:

1. The exclusion of abuse of a legal norm or its minimisation. For the legal norm to be an adequate instrument for detecting, proving and confiscating proceeds from crime, it should not be misused (Ciric, 2018). It must be applied in its spirit – in terms of its standardization.
2. Adequate application of the legal norm. In order for the legal norm to be an adequate instrument of this aspect of the fight against crime, it must be properly implemented. Only in situations where a standard that meets the requirements set out above has been properly applied does it have a strong preventive and repressive effect. The application of the norm must not be selective. All those who violated it must undergo the measure.
3. Effective application of a legal norm of this character understood in its qualitative and quantitative sense of meaning (Vuković, 2016).
4. A high degree of certainty of detecting, proving and confiscating proceeds from crime. Considering from the point of view of the general preventive aspect of criminal legal norms in general including these ones, the fact of “certainty of their application” is extremely important (Bejatović, 2019). It is extremely important to feel the degree of likelihood that the offender will not be able to retain the proceeds of the crime. It is more than indisputable that the criminal legal norm is intended to discourage the commission of criminal offenses as well as the purpose of strengthening gen-

eral morality in society only if there is a certain degree of certainty of its application. In view of this, the legislator of Serbia has taken this into account prescribing the purpose of punishment. Namely, Article 42 (2) of the Criminal Code of the Republic of Serbia⁷ explicitly stipulates that, within the general purpose of criminal sanctions⁸, the purpose of punishment is preventing the perpetrator from committing crimes and influencing him not to commit criminal acts in the future; influencing others not to commit crimes; expressing social condemnation for the crime, enhancing morale and reinforcing the obligation to obey the law.

In support of the justification of the previously stated facts and the efficiency of the application of the legal norm, we will list the statistical indicators of the Prosecutor's Office for Organized Crime relating to the number of orders issued to initiate financial investigations, orders related to the prohibition on disposition of assets as well as temporary seizure of movable property, the number of filed requests for the temporary confiscation of proceeds from crime, statistics on finally temporary and permanently confiscated property and the number of approved requests for permanent confiscation of property.



Graphic 1 – Total number of orders of the Prosecutor's office for organized crime to initiate financial investigations in relation to 134 defendants⁹

7 *Criminal Code*, Official Gazette of the Republic of Serbia, No. 85/2005,88/2005, 107/2005,72/2009, 111/2009, 121/2012, 104 /2013,108 /2014, 94/2016 and 35 /2019

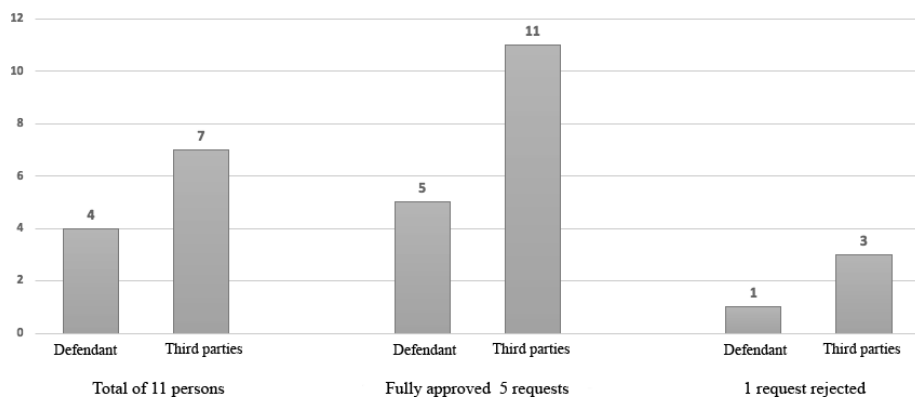
8 The general purpose of prescribing and imposing criminal sanctions is to suppress acts that violate or threaten the values protected by criminal law.

9 Source: The Report of the Republic Public Prosecutor's Office for the Organized Crime

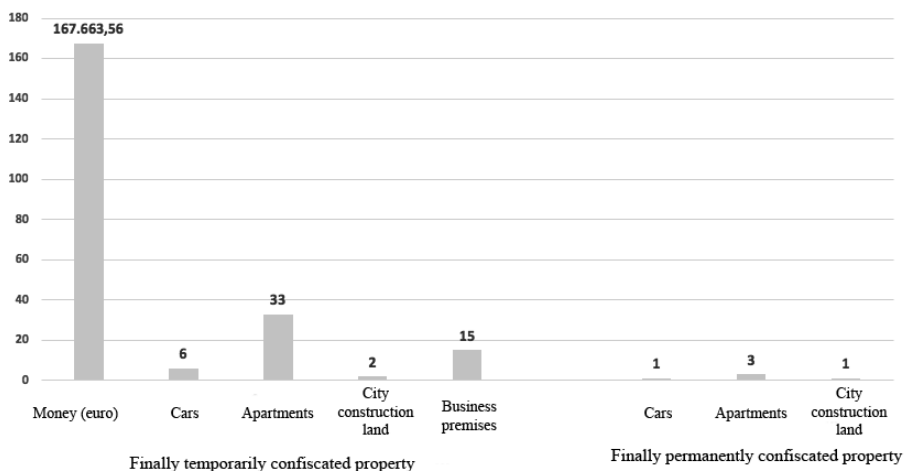
Финансијске истраге и адекватност одговора државе на имовински криминал
(норма и пракса у Републици Србији)



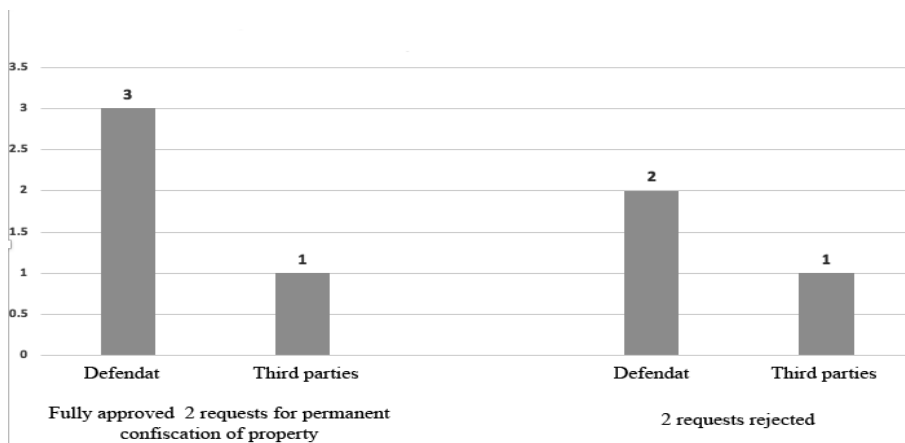
Graphic 2 – Orders issued in accordance with Article 24 of the Law on Confiscation of the Proceeds from Crime



Graphic 3 – Requests for temporary confiscation of proceeds from crime



Graphic 4 – Finally confiscated property



Graphic 5 – *Approved and rejected requests for permanent confiscation of property*

In accordance with previously presented statistical indicators, The Prosecutor's Office for Organized Crime is in the period from January 1, 2019 to December 31, 2019 issued a total of 26 orders to initiate a financial investigation in relation to 134 defendants - 133 individuals and 1 legal entity. During the investigation procedures, 25 orders were issued to initiate a financial investigation and 1 order to initiate a financial investigation during the pre-investigation procedure.

107 orders were issued within the meaning of Article 24 of the Law on Confiscation of the Proceeds from Crime, which refer to the prohibition on disposition of assets, as well as temporary confiscation of movable property in relation to a total of 61 persons, 31 defendants, 28 third parties and 2 legal entities.

The Prosecutor's Office also submitted requests for temporary confiscation of proceeds from crime against a total of 11 persons, namely: 4 defendants and 7 third parties. 5 requests for temporary confiscation of property were fully approved - against 5 defendants and 11 third parties, and 1 request for temporary confiscation of property against 1 defendant and 3 third parties was rejected.

The following property was finally temporarily confiscated: 167,663.52 euros, 6 cars, 33 apartments, 2 city construction lands and 15 business premises.

2 requests for permanent confiscation of property were fully accepted in relation to 3 defendants and 1 third party. 2 requests for permanent

confiscation of property against 2 defendants and 1 third party were rejected. The following property was permanently confiscated: 1 car, 3 apartments, 1 city construction land.

Conclusion

One of not only extremely important, but also indispensable institutes of the adequacy of the state reaction to property crime, both in the preventive and repressive sense, is the institute of confiscation of proceeds from crime. There are numerous and indisputable reasons for such a high degree of importance of this institute for the adequacy of the state reaction to property crime. Given this, every state that wants to succeed in the field of combating this type of crime must first of all ask and answer the question: What are the preconditions for the adequacy of confiscation of proceeds from crime and is it fulfilling them? The analysis of this question shows that in the Republic of Serbia, the adoption of the Law on Confiscation of the Proceeds from Crime created an adequate normative basis for confiscation of illegally acquired proceeds, and one of its important solutions serving the function is financial investigations. The results of the ten-year application of this legal text so far show that the norms of the Law on Confiscation of the Proceeds from Crime represent a solid basis for efficient detection, proof and confiscation of proceeds of crime through financial investigation. However, it must not be concluded from this that only a norm is sufficient to achieve the goal of its adoption. On the contrary, what will be the practical results of every criminal legal norm, including these norms, does not depend only on them. It is necessary that other assumptions be met. These are, first of all: Exclusion of abuse of the legal norm or its reduction to the minimum possible measure; Adequate application of legal norms; The application of norms must not be selective; All those who have violated it must be subject to it; Effective application of the legal norm understood in its qualitative and quantitative sense also means a high degree of certainty of detection, proof and confiscation of proceeds from crime. Given all this, special attention must be paid to these preconditions for the adequacy of the state response to property crime.

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Финансијске истраге и адекватност одговора државе на имовински криминал (норма и пракса у Републици Србији)

***Апстракт:** Предмет анализе у раду су кривичноправна (теоретска, нормативна и практична) питања финансијске истраге као све значајнијег инструмента адекватности државне реакције на криминалитет с имовинским обележјем. Међу немалим бројем анализираних питања посебна пажња је посвећена питањима која се тичу: појма и претпоставки адекватности државне реакције на криминалитет с имовинским обележјем; криминално-политичких разлога неопходности спровођења финансијске истраге као и најважнијих особености њеног нормирања и практичне реализације (услова, предмета и циља, као и основних начела њеног спровођења - хитност и благовременост поступања, искључење могућности позивања на тајност података, пребацивање терета доказивања на осумњиченог, поверљивост прикупљених података и др).*

На крају рада изнет је став аутора по питању адекватности анализираних законских норми за жељени степен успешности откривања, доказивања и одузимања имовине стечене вршењем кривичних дела.

***Кључне речи:** државне реакције, адекватност, финансијске истраге, привремено одузимање имовине, јавни тужилац.*