Strasbourg, 2 December 2022

CDL(2022)051*

Opinion 1108 / 2022

Or. Engl.
(TP/GiD/ba)

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

ARMENIA

DRAFT *AMICUS CURIAE* BRIEF FOR THE CONSTITUTIONAL COURT OF ARMENIA

ON CERTAIN QUESTIONS RELATING TO THE LAW ON THE FORFEITURE OF ASSETS OF ILLICIT ORIGIN

On the basis of comments by

Ms Angelika NUSSBERGER (Member, Germany)
Ms Janine OTÁLORA MALASSIS (Substitute Member, Mexico)
Mr Cesare PINELLI (Substitute Member, Italy)

Draft restricted

Opinion co-funded by the European Union

*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.

This document will not be distributed at the meeting. Please bring this copy.
www.venice.coe.int

Contents

I. Introduction 3
II. Request 3
III. Background 3
IV. International standards on the civil forfeiture of illicit assets 5
A. The civil forfeiture as a tool to combat corruption 5
B. The civil forfeiture from the international human rights perspective 6
1. The case-law of the European Court of Human Rights 6
2. Previous opinions of the Venice Commission 7
V. Replies to the questions put by the Constitutional Court 8
A. Presumption of illicit origin of property, the distribution of the burden of proof and the standard of proof in the forfeiture proceedings (Questions 1 and 2) 8
1. Operation of the presumption under the Law 8
2. Proportionality 9
B. Retroactivity of the Law and its temporal scope (Questions 3 and 4) 10
1. Permissibility of the retroactivity 10
2. Other rules on the temporal scope of the Law 12
VI. Conclusion 13

Draft-restricted

I. Introduction

1. By letter of 12 September 2022, the President of the Constitutional Court of the Republic of Armenia, Mr Arman Dilanyan, requested an *amicus curiae* brief of the Venice Commission on certain questions related to the Law on Confiscation of Property of Illegal Origin adopted on 16 April 2020 ("the Law") (CDL-REF(2022)058).

2. Ms Angelika Nussberger, Ms Janine Otálora Malassis and Mr Cesare Pinelli acted as rapporteurs for this *amicus curiae* brief.

3. This brief was prepared in reliance on the English translation of the Law. The translation may not accurately reflect the original version on all points.

4. *This brief was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its … Plenary Session (Venice, …2022).*

II. Request

5. The request for the *amicus curiae* brief has been submitted by the Constitutional Court in the context of a pending case originated from a complaint filed by a group of MPs regarding the constitutionality of the Law.

6. In the request the Constitutional Court formulated the four following questions:

> *"1) Is the presumption of illicit origin of property, as prescribed under Article 22 of [the Law] compatible with the applicable European standards for protection of the right to unimpeded use of property with respect to the institution of non-conviction based confiscation of property?*
>
> *2) What is the best practice in the Council of Europe member states and parties to the European Commission for Democracy through Law with regard to the issue of protection of the right to a fair trial and the right to unimpeded use of property from the perspective of comparative constitutional law on the fair distribution of the burden of proof between the parties and the standards of proof in the proceedings for non-conviction-based forfeiture of property?*
>
> *3) Is the procedural obligation to prove the legitimacy of the origin of property acquired before the entry into force of [the Law] compatible with the possible European standards on the prohibition of retrospective application of the law, considering that the respective Law entered into force on 23 May 2020?*
>
> *4) Is the non-determination of the maximum period prescribed by [the Law] for the initiation and implementation of confiscation proceedings of illicitly obtained property compatible with the European standard on the protection of the right to use the property after the entry into legal force of the criminal conviction?"*

III. Background

7. The recovery of the assets illegally acquired by corrupt public officials was one of the key objectives of the new Armenian Government after the "Velvet Revolution" of 2018. As a part of that political agenda, the Parliament adopted the Law at issue on 16 April 2020 which took effect on 23 May 2020.

8. Pursuant to Article 1 of the Law, it *"shall regulate the relations pertaining to proceedings for confiscation of property of illicit origin, define the grounds for initiating an investigation, the scope*

Draft-restricted

of authorities competent to initiate proceedings and implement an investigation for confiscation of property of illicit origin, and the rules of international cooperation regarding the confiscation of property of illicit origin, as well as regulate other relations pertaining to the confiscation of property of illicit origin".

9. The Law provides for the forfeiture of assets of which the legal origin cannot be established (hereinafter – the illicit assets). In the international documents such measures are called the "non-conviction based confiscation" or "civil forfeiture" of assets of illicit origin. In this brief, the Venice Commission will mostly use the term "civil forfeiture".

10. Under the Law the forfeiture action regarding such assets can be filed by the prosecution: (a) against a person *convicted* of one of the crimes mentioned in the Law; (b) against a person *charged* with one of the crimes mentioned in the Law; (c) against a person *suspected* of one of the crimes mentioned in the Law, but where there are legal grounds preventing opening a case or proceeding with it (for example, the death of the suspect, his/her lack of capacity to stand trial, the suspect fleeing from justice, expiration of time-limit for prosecution, application of amnesty law); (d) against a public official if there is information that s/he may possess illicit assets. The forfeiture action can also be initiated against a legal or natural person affiliated to the person concerned (see Article 5, para. 1), however the forfeiture shall not be ordered against a *bona fide* owner (Article 23).[1]

11. The Law provides a value threshold for the forfeiture order: the illicit assets valued over 50 million Armenian drams (approximately 110,000 Euros) may be subject to forfeiture (Article 23). If the amount is lesser, the forfeiture cannot be ordered, and the claim should be dismissed. The forfeiture of illicit assets in favour of the State is implemented within the framework of civil proceedings (Article 2) implying a civil standard of proof. The civil action can be initiated based on the results of an investigation conducted by the relevant department of the General Prosecutor's Office. The presumption of illicit origin of the assets applies in the court proceedings, affecting the distribution of burden of proof: it is for the prosecutor to substantiate that the assets cannot be explained by the legitimate income of the person concerned. The respondent may refute the presumption that the property is of illicit origin, by providing evidence justifying the acquisition of the property on legitimate grounds (Article 22).

12. According to the Law, the maximum period of retrospective examination of assets is ten years (Article 7, para. 2). It means that the origins of the property which the person owns for more than ten years would not be questioned. However, in some cases the period under examination may go back to 21 September 1991 (Article 7, para. 3).

Draft restricted

[1] Article 5, para. 1 of the Law describes several scenarios when the confiscation measure may be applied. These scenarios relate to different models of non-conviction-based confiscation that have been discussed on the international and European level and introduced, in various modifications, in domestic jurisdictions:
- the model under Article 5, para. 1 (1) seems to have the features of "extended confiscation" in the sense that there is certain connection with a criminal conviction, but there is no formal acknowledgement that some particular property has been acquired as a result of a particular crime;
- the model under Article 5, para. 1 (2) seems offer a broad interpretation of the non-conviction based confiscation: the criminal case is pending and there are no objective obstacles for seeking confiscation in criminal proceedings, however the law-enforcement authorities may resort to the confiscation by way of civil action, without waiting for the outcome of the criminal proceedings;
- the regime based on Article 5, para. 1 (3) and (4) is a version of a classic model of non-conviction based confiscation: the prosecution has to use this tool because there are objective obstacles for seeking confiscation in criminal proceedings (death, mental state, absence of the suspect, amnesty, prescription period etc.);
- the confiscation based on Article 5, para.1 (5) and (6) targets only public officials and reflects an unexplained wealth model underpinned by the acute need to fight public corruption in the country: it allows the authorities to seek civil forfeiture even if there was no conviction or any pending criminal case.

IV. International standards on the civil forfeiture of illicit assets

A. The civil forfeiture as a tool to combat corruption

13. Most commonly, the overall objective of illicit enrichment/civil forfeiture laws is to address corruption.[2] The Venice Commission reiterates that corruption undermines the rule of law, weakens public trust in political institutions and has adverse effects on the exercise of human rights and fundamental freedoms. As it has been reported, *"[r]ecovering assets stolen by way of corruption remains one of the biggest challenges faced by law enforcement officials, as they seek to deprive criminals of the proceeds from illicit activities and to return those assets to their original owners or to compensate the victims."*[3]

14. Several international instruments are relevant in this field. Some of them encourage the States to put in place legal mechanisms allowing or facilitating the forfeiture of illegal assets. Thus, Article 54, para. 1 (c) of the 2003 United Nations Convention against Corruption (UNCAC)[4] provides that "*[e]ach State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: … (c) [c]onsider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.*"

15. At the European Level, the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[5] provides for more specific measures, namely that *"[e]ach Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law"* (Article 3, para. 4), and that *"[e]ach Party shall adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass: (a) the property into which the proceeds have been transformed or converted; (b) property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds; (c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds."* (Article 5).

16. In the same vein, the Financial Action Task Force on Money Laundering (FATF)[6] stated the following: *"Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged*

[2] Venice Commission, CDL-AD(2022)029, Republic of Moldova - Joint amicus curiae Brief of the Venice Commission and the OSCE/ODIHR relating to the offence of illicit enrichment, adopted by the Venice Commission at its 132nd Plenary session (Venice, 21-22 October 2022), para. 9.

[3] Transparency International Anti-Corruption Helpdesk Answer, *Non-conviction-based confiscation as an alternative tool to asset recovery*, January 2022, p. 2.

[4] Armenia signed the UNCAC on 19 May 2005. The Convention was ratified on 8 March 2007 and entered into force on 7 April 2007.

[5] That Convention entered into force in respect of Armenia on 1 October 2008.

[6] An intergovernmental group which is globally recognized as an authoritative body that sets standards and develops policies, *inter alia*, to combat money laundering.

Draft restricted

to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law."[7]

17. The relevant standards and recommendations in this area have been further developed in G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets (2004), the G8 Best Practices for the Administration of Seized Assets (2005), as well as in the EU regulations, especially the EU Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, and 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.

18. The Law at issue therefore contributes to implementing the international standards and recommendations of the relevant international bodies in the field of combat against corruption, organised crime, and money laundering.

B. The civil forfeiture from the international human rights perspective

19. That being said, the States do not have a *carte blanche* in achieving this aim. The principal challenge to the Law, and this is the context of the present request for *amicus curiae* brief, is whether the Law is compatible with international and constitutional human rights standards, notably those relating to the protection of the right to a property and the right to a fair trial. In that respect it will be essential to have regard to the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (the ECtHR) as well as to the rule-of-law standards and the recommendations developed by the Venice Commission.

1. The case-law of the European Court of Human Rights

20. The forfeiture of assets is a measure which constitutes interference with the right to peaceful enjoyment of possessions protected by Article 1 of Protocol no. 1 to the ECHR. The ECtHR has repeatedly stated that in order to be compatible with the ECHR, such a measure must be lawful, it must serve a legitimate public interest; moreover, it should be proportionate to the aim sought to be realised. In other words, a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[8] In cases where the forfeiture regime and its enforcement had complied with the above test, the ECtHR found no issue regarding the respect for property rights of the applicants.[9]

21. The ECtHR has recognised that the aim of combating public corruption corresponds to legitimate general interests that can limit the "peaceful enjoyment of possessions". The forfeiture of money or assets obtained through illegal activities or paid for with the proceeds of crime is a necessary and effective means of combating criminal activities.[10]

22. Furthermore, the ECtHR has accepted that such aim can be achieved not only through criminal proceedings (which are cumbersome and require a particularly high standard of proof) but also by employing other legal tools, like, for example, the civil forfeiture. The civil forfeiture mechanisms are often based on a presumption of illicit origin of certain types of assets. Every legal system recognises presumptions of fact or of law, and the ECHR does not prohibit such presumptions in principle, in so far as they are applied in reasonable limits and their operation is

---

[7] FATF (2012-2022), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, France, p. 12; www.fatf-gafi.org/recommendations.html
[8] See ECtHR, *G.I.E.M. S.R.L. and Others v. Italy [GC],* nos. 1828/06 and 2 others, 28 June 2018, paras. 292-293, with further references.
[9] See, for example, ECtHR, *M. v. Italy* (dec.), no. 12386/86, 15 April 1991, *Arcuri and Others v. Italy* (dec.), no. 52024/99, ECHR 2001-VII; *Butler v. the United Kingdom (dec.),* no. 41661/98, ECHR 2002-VI.
[10] see ECtHR, *Raimondo v. Italy*, 22 February 1994, para. 30, Series A no. 281-A.

Draft restricted

accompanied by effective procedural guarantees.[11] As it has been ruled by the ECtHR in the context of the confiscation proceedings, there is a wide margin of appreciation for States concerning a fair balance between respect for rights under Article 1 of Protocol No. 1 and the general interest of the community.[12] The ECtHR has concluded that the onus of proving the lawful origin of the asset presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation.[13]

23. As regards the standard of proof, the ECtHR has found it legitimate for the relevant domestic authorities to issue confiscation orders based on a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order resulted from civil proceedings related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the ability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1.[14]

24. The mechanism of the civil forfeiture may also be analysed through a purely procedural prism, either from the standpoint of the procedural guarantees implicitly enshrined in Article 1 of Protocol no. 1, or under Article 6 of the Convention, guaranteeing fair trial. Article 1 of Protocol no. 1 implies that any confiscation proceedings must afford the individual concerned a reasonable opportunity of putting his or her case to the competent authorities for the purpose of effectively challenging the measures interfering with the property rights.[15] Moreover, such proceedings will fall within the ambit of Article 6. The ECtHR maintains its approach that confiscation proceedings must comply with the procedural requirements under the "civil" limb and that more demanding guarantees relating to "criminal" trials do not necessarily apply.[16] Nevertheless, it cannot be excluded that, depending on specific features of the forfeiture regime and particular circumstances, the procedural safeguards in civil confiscation procedure should be as essential as those in a criminal procedure.[17]

2. Previous opinions of the Venice Commission

25. The Venice Commission has earlier dealt with the issues of the civil forfeiture.[18] It considered that the use of such mechanism was an acceptable tool not only in respect of criminal assets but also the assets that had been obtained in an otherwise illegal way.[19] In another recent opinion, a similar tool was considered important for securing the basis for the economic development of the country.[20]

Draft-restricted

---

[11] See, *mutatis mutandis*, ECtHR, *Arcuri and Others v. Italy*, cited above.
[12] ECtHR, *Butler v. United Kingdom,* no. 41661/98, ECHR 2002-VI.
[13] See ECtHR, *Gogitidze and Others v. Georgia*, cited above, para. 105.
[14] See ECtHR, *Gogitidze and Others v. Georgia,* cited above, para. 107.
[15] See ECtHR, *Todorov and Others v. Bulgaria*, nos. 50705/11 and 6 others, para. 188, 13 July 2021.
[16] See ECtHR, *Gogitidze and Others v. Georgia*, no. 36862/05, 12 May 2015, paras. 121, 124-127; *Todorov and Others v. Bulgaria*, cited above, paras. 287-295, 302-308.
[17] See Venice Commission, CDL-AD(2022)014, Opinion on the draft Law N°08/L-121 "On the State Bureau for verification and confiscation of unjustified assets" of Kosovo, 20 June 2022, para. 19.
[18] See Venice Commission, CDL-AD(2010)010, Interim Opinion on the draft Act on forfeiture in favour of the State of illegally acquired assets of Bulgaria, 16 March 2010; CDL-AD(2010)019, Second Interim Opinion on the draft Act on forfeiture in favour of the State of criminal assets of Bulgaria, 10 June 2010; CDL-AD(2010)030, Final opinion on the third revised draft Act on forfeiture in favour of the State of assets acquired through illegal activity of Bulgaria, 18 October 2010; CDL-AD(2011)023, Opinion on the sixth revised draft Act on forfeiture of assets acquired through criminal activity or administrative violations of Bulgaria, 20 June 2011; CDL-AD(2022)014, Opinion on the draft Law N°08/L-121 "On the State Bureau for verification and confiscation of unjustified assets" of Kosovo, 20 June 2022.
[19] See Venice Commission, CDL-AD(2010)030, Final opinion on the third revised draft Act on forfeiture in favour of the State of assets acquired through illegal activity of Bulgaria, 18 October 2010, paras. 7 and 9.
[20] Venice Commission, CDL-AD(2022)014, Opinion on the draft Law N°08/L-121 "On the State Bureau for verification and confiscation of unjustified assets" of Kosovo, 20 June 2022, para. 18.

26. The Venice Commission has considered that the civil forfeiture systems are designed to ensure that the central issue, i.e. whether the assets are obtained as a result of a criminal or other unlawful activity, is to be proved to the civil standard of proof of "the balance of probabilities" rather than the criminal standard of "beyond the reasonable doubt". A lower standard of proof should allow the state to more easily obtain the forfeiture of the concerned assets and thus restrict the funding of illegal activities.[21] At the same time, if the burden on the person concerned to provide a justification of the origin of his or her assets is too high, the confiscation might also be seen as a disproportionate interference into the property rights.[22] The standard of proof should be clearly specified in law.[23]

27. Thus, the underlying idea of the Law *as such* does not appear objectionable from the standpoint of the international standards and best practices. It is necessary, however, to see whether the Law provides sufficient safeguards, both substantive and procedural, to achieve a fair balance between the public interests involved and the legitimate interests of the persons targeted by the forfeiture measures.

V. Replies to the questions put by the Constitutional Court

A. Presumption of illicit origin of property, the distribution of the burden of proof and the standard of proof in the forfeiture proceedings (Questions 1 and 2)

1. Operation of the presumption under the Law

28. The mechanism of the civil forfeiture under the Law is based on a presumption of the illicit origin of the assets.[24] Article 22 para. 1 of the Law provides that in relations of confiscation of the property of illicit origin *"there is the presumption that the property is of illicit origin so long as the lawfulness of acquisition of the property has not been proved."* The presumption of illicit origin of property under the Law has therefore an important procedural effect in the sense that it distributes the burden of proof between the parties on the questions of legal origin of assets. Accordingly, the questions of the Constitutional Court on the presumption of the illicit origin of the property and on the burden of proof are inextricably linked together.

29. The operation of the presumption and the shift of the burden of proof have to be assessed in the light of the provisions determining the progress of the case.

30. First, under the Law it is necessary to start an investigation into the origin of the assets. The grounds for initiating the investigation are laid down in the abovementioned Article 5 of the Law. In the first four scenarios, the suspicion is linked to the criminal proceedings that are either already terminated by a conviction (Article 5 para. 1 (1)), are on-going (Article 5 para. 1 (2)), or are impossible for specific reasons, while the suspicion is upheld (Article 5 para. 1 (3) and (4)). Only in the case of *public officials* a link to the prosecution of a crime is not necessary (Article 5 para. 1 (5) and (5)). Yet, in the latter case the competent authority still has to have some information, revealed in the context of other domestic procedures, which raises doubts as to the lawful origin of the property.

---

[21] See Venice Commission, CDL-AD(2011)023, Opinion on the sixth revised draft Act on forfeiture of assets acquired through criminal activity or administrative violations of Bulgaria, 20 June 2011, para 50.
[22] See Venice Commission, CDL-AD(2022)014, Opinion on the draft Law N°08/L-121 "On the State Bureau for verification and confiscation of unjustified assets" of Kosovo, 20 June 2022, para. 57.
[23] See Venice Commission, CDL-AD(2022)014, Opinion on the draft Law N°08/L-121 "On the State Bureau for verification and confiscation of unjustified assets" of Kosovo, 20 June 2022, para. 29.
[24] Article 22 para. 1 of the Law provides that in relations of confiscation of property of illicit origin "*there is the presumption that the property is of illicit origin so long as the lawfulness of acquisition of the property has not been proved.*"

Draft restricted

31. In none of the cases it must be proven that the relevant property has been acquired as a result of a particular crime. For the continuation of the procedure at the stage of investigation under the Law it is necessary to establish that there are *"sufficient grounds to assume that the person owns illicit property"* and that the value threshold has been crossed (Article 13 par. 2, Article 18 para. 2).

32. Second, once the case has been submitted to the court, the Law specifies in Article 22 the rules for applying this presumption, describing the way in which the burden of proof is distributed between the parties: *"2. The court may render a judgment based on the presumption that the property may be of illicit origin where, as a result of the investigation of the case, the claimant proves that the property owned by the respondent, including one unit of property, several units of property or a share of one unit of property are not substantiated by the data on the sources of legitimate income. 3. The respondent may refute the presumption that the property is of illicit origin, by delivering evidence justifying the acquisition of the property by legitimate income."*

33. It is therefore for the competent authority to prove that the data on the sources of legitimate income do not correspond to the property owned. Only if these conditions are fulfilled the burden of prove shifts to the owner. S/he may refute the presumption that the property is of illicit origin by producing evidence justifying the acquisition of the property by legitimate income.

34. The Venice Commission acknowledges that this presumption provides a significant scope of interference with human rights. However, this interference does not seem disproportionate, and that is for the following reasons.

2. Proportionality

35. First of all, the difficulties in fighting against corruption must be considered. Very often, it is nearly impossible to prove the illicit origin of property. This explains why under the Law, there is no need to demonstrate *beyond reasonable doubt* that the asset has been acquired illegally, but a lower standard of proof is required. The Law does not describe in clear terms the standard of proof in the court proceedings. By virtue of Article 2 of the Law, general provisions of the Civil Procedure Code would apply in such cases. In the Armenian legal system, the standard of proof in civil proceedings is described as based on the "inner conviction of judge" which should result from "the comprehensive full and objective examination of the evidence".[25] Probably, a more precise description of the standard of proof referring to "the balance of probabilities" could be added to the Law (see paragraphs 23 and 26 above). This can be done either by the legislator, or by the Constitutional Court through giving a constitutional interpretation of the relevant provisions of the Law.

36. Second, the moment when the burden of proof shifts to the respondent is particularly important. In this regard, it is necessary to differentiate between the confiscations having a certain connection with criminal proceedings and confiscations against officials where this condition is not applicable.

37. In the first scenario, when the confiscation of assets is applied under Article 5 para. 1 (1) - (4) of the Law, it is relevant that the confiscation, even if it must be "somehow linked" to a criminal procedure, is not based on a conviction establishing the guilt of the person concerned. The investigation has only to lead to the conclusion that "there are sufficient grounds" confirming the suspicion that the asset may be of illicit origin.

[25] Article 66, para. 1, of the Civil Procedure Code of Armenia provides: *"The court, having assessed all the evidence in the case file, shall determine the issue of proof by inner conviction based on a comprehensive, full and objective examination of the evidence."*

Draft restricted

38. In the second scenario, when the confiscation of assets against public officials is applied under Article 5 para. 1 (5) and (6) of the Law, a link between the measure (forfeiture) and prior criminal proceedings is missing. Yet, it appears that there should be other elements *(*for example, obtained through surveillance measures or in other proceedings) supporting the suspicion which leads to the confiscation of illicit property. It is essential that the operational intelligence measures be fully in line with all applicable legal provisions, notably in the "Law on Operational Intelligence Activity".

39. In all cases the defendant will have the possibility of refuting this presumption, in the adversarial proceedings. S/he may refute the presumption by producing evidence justifying the acquisition of the property from a legitimate source. It is important that the Law contains a specific safeguard prohibiting making findings based on the presumption at issue, when the evidence is inaccessible to the respondent for objective reasons (Article 22, para. 4). So, even if the direct evidence proving the lawful origin of an asset is missing, the court may still rule in favor of the defendant, when there is a convincing explanation of why the evidence is missing.

40. Third, only the property of a certain value may be subjected to the civil forfeiture, which means that this mechanism would be applicable only to the most serious cases, which reduces its overall human rights impact.

41. Fourth, according to Article 2 of the Law, the Civil Procedure Code of the Republic of Armenia shall apply to the proceedings on the civil forfeiture. It follows that in addition to the procedural safeguards provided by the Law (see, for example, Article 16 and Article 17 of the Law as regards the notification procedures), the general guarantees under the Civil Procedure Code will also apply. Accordingly, in this procedural framework the respondent should be able to enjoy the full extent of the defence rights, including effective participation in the hearings and appealing against the acts of the court.

42. The Venice Commission notes that the Law provides that the confiscation measure is not necessarily directed against the criminal suspect/the accused or the public official who directly owns the property, but can also be directed against an affiliated person, which significantly broadens the impact of the Law. However, the ECtHR has observed that the domestic authorities should be given leeway under the ECHR to apply confiscation measures not only to persons directly accused of offences but also to their family members and other close relatives who were presumed to possess and manage the ill-gotten property informally on behalf of the suspected offenders, or who otherwise lacked the necessary *bona fide* status.[26] Thus, the legislator should be given a discretion in defining the concept of an affiliated person; at the same time, it is important that the Law offers guarantees for *bona fide* acquirers (Article 23) imposing therefore reasonable limits on the scope of persons falling under the Law.

43. In the light of these safeguards and in view of the overarching aim of fighting corruption, these arrangements appear to be proportionate, as long as the presumption is based on a thorough investigation under the Law and the person concerned has a real chance to refute the presumption of illegal origin of the property.

B. Retroactivity of the Law and its temporal scope (Questions 3 and 4)

1. Permissibility of the retroactivity

44. The present Law is applicable not only to the assets that have been acquired after its entry into force, but also to the assets acquired in the past.

[26] See ECtHR, *Gogitidze and Others v. Georgia*, cited above, para. 107, with further references.

Draft - restricted

45. The Constitution of Armenia contains in Article 73 a prohibition of retroactive laws deteriorating the legal situation of a person: *"Laws and other legal acts deteriorating the legal situation of a person shall not have retroactive effect."* This rule follows from a more general principle of legal certainty. Yet, it is stricter than comparable rules in other legal systems. While – with the exception of the criminal law – the prohibition of retroactive laws with negative effects for the person concerned is understood as a general rule, it is not without exceptions. It may be recommendable to distinguish between different types of retroactivity: laws that interfere with past events and laws that interfere with continuous situations that started in the past but are still ongoing. While in the first scenario the prohibition of retroactivity is more rigorous, in the second scenario a more flexible approach should be possible as long as the interference is not excessive.

46. Article 73 of the Constitution can be interpreted in line with these general principles. Such an interpretation would also be compatible international Rule of Law standards. Thus, in its Rule of Law Checklist the Venice Commission noted as follows: *"In civil and administrative law, retroactivity may negatively affect rights and legal interests. However, outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally)."*[27]

47. The issue of retroactive laws has been repeatedly discussed by the Venice Commission in respect of Armenia.[28] In the context of the new duty of a judge to explain "changes" in his or her assets, the Venice Commission *"[did not] exclude that a judge may be legitimately required to explain "changes" in his or her assets – a new duty introduced by the Package – in relation to the acquisition of property or other transactions which occurred before the adoption of the new law. However, the duty to demonstrate the lawful origin of such property or transactions should not impose a disproportionate burden on the judge, should concern only particularly significant transactions and should not concern, for example, property which the judge or his or her family have owned for decades. The duty to give explanations should remain reasonable."*[29]

48. Concerning the confiscations, it is generally accepted that the fight against corruption makes it necessary to act not only *pro futuro*, but also with a view to illicit acquisition of property in the past. The Law at issue does not interfere exclusively with the past events, but with the on-going facts: the ownership of the illicit property has started in the past, but it still continues. The expectation to be able to keep illegally acquired assets does not weigh heavily in comparison to the interest of the public to "correct" unjust enrichment. Against this background retroactive application of the Law to property acquired in the past can be considered proportionate and compatible with the Armenian Constitution which affords protection of property only when it has been acquired lawfully (Article 60, para. 1 of the Constitution). It is arguable that there cannot be a genuine legitimate expectation that an unlawful possession would obtain constitutional protection. The Law at issue clarifies the procedure for implementing this constitutional principle.

49. This approach would generally follow the ECtHR case-law which found that the application of civil forfeiture to facts that had occurred before the law has taken effect is not in principle contrary to the ECHR.[30] However, such retroactivity should be accompanied with sufficient procedural safeguards, and it should not impose an excessive individual burden.

[27] Venice Commission, CDL-AD(2016)007rev, Rule of Law Checklist, para. 62

[28] Venice Commission, CDL-AD(2019)024, Armenia - Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI, on the amendments to the Judicial Code and some other Laws, 14 October 2019, para. 41; CDL-AD(2022)002, Armenia - Joint opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft laws on making amendments to the Constitutional Law in the Judicial Code and to the Constitutional Law on Constitutional Court, 21 March 2022, paras. 69-80.

[29] Venice Commission, CDL-AD(2019)024, Armenia - Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI, on the amendments to the Judicial Code and some other Laws, 14 October 2019, footnote to para. 41.

[30] See ECtHR, *Gogitidze and Others v. Georgia*, para. 99, with further references.

Draft restricted

50. The Venice Commission therefore considers that retroactive effects of the Law are not incompatible with the international standards, provided that the defendants' duty to give explanations about the origins of the property remains reasonable, and the defence's arguments in this regard are thoroughly addressed by the courts.

2. Other rules on the temporal scope of the Law

51. Article 7, para. 2, of the Law provides that the maximum period of retrospective assessment is ten years. From this ten-year rule the Law allows an exception: it may be possible to seek the forfeiture of the assets acquired after September 1991 (Article 7, para. 3, i.e. more than 30 years ago), if *"evidence regarding acquisition of such property is preserved"*.

52. In principle, the existence of a timeframe may be necessary in this context, even not so much to protect the expectation of the particular owner (legitimate or not), but to preserve stability of the economic order in general, which transcends this expectation. Nevertheless, several critical remarks are called for in respect of the timeframe established by the Law.

53. First, it does not appear that the possibility for applying the extended timeframe (which permits going back to 1991) is sufficiently defined and justified, as it seems to allow the exception whenever some evidence has been identified by the competent authority. Moreover, with such an extension of time, the period under examination appears excessively long. It has also to be observed that the period will further increase with the lapse of time.[31]

54. Second, the Law leaves it essentially at the discretion of the competent authorities to determine their temporal jurisdiction on the case-by-case basis. Thus, according to Article 7, para. 2, of the Law "*the competent authority shall define … the period of time preceding rendering of a decision on the initiation of an investigation which may not be longer than ten years";* under Article 7, para. 3 of the Law *"… the competent authority shall render a decision, establishing a new period for investigation…"*. It is problematic that the important question of the temporal scope of the Law is not firmly fixed in the Law itself but is left to the seemingly unfettered discretion of the administrative authority.

55. Apart from that, the Law does not define any time-limit within which the civil forfeiture may be initiated as prescribed under Article 5 para. 1 (1) of the Law (in cases where there was a criminal conviction of the person concerned). The absence of such a time-limit may adversely affect the legal certainty exposing to judicial scrutiny events that took place long time ago.

56. As shown by the ECtHR in the case of *Todorov and Others v. Bulgaria*, the fact that the "scope of application was very large, as concerns the periods of time examined" was understood as specifically burdensome for the person concerned.[32] It may be disproportionate to request to prove facts in the distant past. However, the approach taken by the ECtHR suggests that such factor as the large scope of application of law in time may be one of the disturbing factors which, however, is not decisive in itself to render the whole model disproportionate to the legitimate aim pursued.[33]

57. Accordingly, while such a legislative solution is problematic and requires correction, it might be difficult to make a definite finding as to the disproportionality of the Law based only on its abstract revision.

Draft-restricted

[31] Compare with time-limit of fifteen years which the Venice Commission recommended to reduce in practice (CDL-AD(2011)023, Opinion on the sixth revised draft Act on forfeiture of assets acquired through criminal activity or administrative violations of Bulgaria, 20 June 2011, para. 47).
[32] ECtHR, *Todorov and Others v. Bulgaria*, cited above, para. 210.
[33] ECtHR, *Todorov and Others v. Bulgaria*, cited above, para. 211.

58. From this perspective, the guarantees and procedural safeguards applicable in this type of proceedings and discussed in the previous section acquire even higher importance to neutralise the risk of arbitrariness and disproportionate interference with the individual rights. Thus, it is important to determine the exact scope and contents of a possible defence of inaccessible evidence (Article 22, para. 4) and the protection of the *bona fide* owners (Article 23).

VI. Conclusion

59. The request for an *amicus curiae* brief has been submitted by the Constitutional Court of Armenia in the context of pending proceedings on the constitutional review of the Law on Confiscation of Property of Illegal Origin adopted on 16 April 2020 (the Law). This brief provides an outline of the relevant international and European standards and best practices, so as to facilitate the Court's consideration of the issues at hand. It is, however, for the Constitutional Court to determine whether the Law is compatible with the national Constitution.

60. International and European standards suggest that civil forfeiture may be an effective tool to fight public corruption and prevent illicit acquisition of assets. This constitutes a public interest, which may justify 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.

61. However, this tool should be applied within reasonable limits and be accompanied by effective procedural guarantees. 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, the solution appears proportionate. In the context of the Law, it could be useful to explain better the standard of proof applied in such cases.

62. As regards the retroactive effect of the Law, it is generally accepted that the fight against corruption makes it necessary to act not only *pro futuro*, but also with a view to illicit acquisition of property in the past. Retroactive application of the Law can generally be considered proportionate and compatible with the Armenian Constitution which affords protection of property only when it has been acquired lawfully. That being said, the duty to give explanations about the origins of the property should remain reasonable. Furthermore, the timeframe for the forfeiture of property should be reasonable and it should be applied equally to all cases, and not left to the discretion of the authorities.

63. The Venice Commission remains at the disposal of the Constitutional Court and Armenian authorities for further assistance in this matter.

Draft-restricted