



Supreme Court Ruling Against Various Provisions of the Mexican Law on Asset Forfeiture

LEGISLATIVE UPDATE

Mexican Law on Asset Forfeiture



On January 6, 2022, the ruling on the Unconstitutionality Action 100/2019, filed on September 9, 2019 by the National Human Rights Commission against various provisions of the National Law on Asset Forfeiture (the "Law") and resolved by the Plenary of the Supreme Court of Justice (the "SCJN") in June 2021, was published in the Official Gazette of the Federation.

The SCJN, in its ruling, although invalidated some of the challenged provisions of the Law, the rest still subsist and remains in force. The declarations of invalidity formally took effect as of June 22, 2021, the date on which the Federal Congress was notified of the resolutions of the ruling by means of Notices 5024/2021 and 5025/2021, without retroactive effects to previous ongoing proceedings. In the current Law published on the internet by the Chamber of Deputies, it is possible to identify already the invalid provisions, for example:

XIV. Legitima Procedencia: El origen o la obtención lícita de los Bienes, [o bien, el uso o destino

lícito de los Bienes vinculados al Hecho Ilícito];

Fracción declarada inválida por sentencia de la SCJN a Acción de Inconstitucionalidad notificada para efectos legales 22-06-2021 (En la porción normativa "o bien, el uso o destino lícito de los Bienes vinculados al Hecho Ilícito")

The constitutional framework for asset forfeiture is found in Article 22, which establishes that in order to initiate an asset forfeiture proceeding, the following 2 elements must be met: (i) an asset of patrimonial nature whose legitimate origin cannot be proven, and (ii) its relation to the investigation of corruption acts, cover-up, crimes committed by public servants, organized crime, vehicle theft, resources of illicit origin, crimes against health, kidnapping, extortion, human trafficking and crimes related to hydrocarbons, petroleum and petrochemicals.

Generally speaking, the resolutions adopted by the SCJN with respect to the Unconstitutionality Action of the Law establish that (i) asset forfeiture only applies to assets whose legitimate origin cannot be proven, element that refers punctually to the origin of the assets and not to their use or destination, as established in the Law; (ii) the action of asset forfeiture proceeds with respect to criminal conducts set forth in federal, general and local laws; (iii) the action of asset forfeiture under no circumstances has unlimited statute of limitations; (iv) the District Attorney may not access databases of other authorities, nor order the securing of assets as a provisional measure, without prior court order; and (v) one of the grounds for the early sale of assets by the authority that established that the disposal was necessary due to the "nature of the asset" is removed, since such circumstance was ambiguous and generated uncertainty as to the assets that fell into such category.

Finally, regarding the requirements to assume that an acquisition was made in good faith, it was necessary to prove, among other things, (a) the incapability of the purchaser to know that the asset subject to forfeiture action was used as instrument, object or product of an illegal act or to hide or mix assets resulting from the illegal act; and (b) in the event of having learned of the unlawful use of the asset, to have prevented or given a timely notice to the competent authority, elements that are invalidated and will no longer be required to prove good faith.

Regarding the controversial provisions of the Law that did not undergo any modifications and are still in force, note the following: (i) the judge may order as a provisional measure, even prior to the filing of a court proceeding, the securing of the property subject to asset forfeiture, with the intention of guaranteeing the conservation of such assets, and the impossibility of the defendant or affected individual to offer any bond in order to lift the measure; (ii) the non-opposability of the banking, exchange, stock exchange, or tax secrecy, within the asset forfeiture proceedings in any of its stages; and (iii) the capability of an early sale of the asset, under certain circumstances (other than its nature), during the process of asset forfeiture, prior to the issuance of the final judgement.

The following is a description of the declarations of invalidity derived from the Unconstitutionality Action ruling:

- The Law defined Legitimate Origin as "the origin or lawful obtaining of the assets, or the lawful use or destination of the assets linked to the illicit act", in this sense, the defined term is modified to refer only to the "origin or lawful obtaining of the assets", invalidating its use or destination. (Article 2, section XIV).

The foregoing clearly states that the action for asset forfeiture is only applicable to those assets whose lawful origin cannot be proven and which are related to the crimes described in the Constitution, without possibility of asset forfeiture on assets of lawful origin under any circumstances, regardless of their use or destination (if the defendant proves lawful origin of the assets, then the action for asset forfeiture should be inadmissible).

- It was specifically determined that crimes of corruption, cover-up, crimes committed by public servants, vehicle theft and resources of illicit origin (also known as money laundering), for which, among other illicit acts, asset forfeiture may proceed, refer to both federal and local jurisdictions, considering that the Law, originally, only referred to federal criminal legislation (Article 1, section V, paragraphs f, g, h, i and j).
- The second paragraph of Article 5 is invalidated, in the provision that established "The information obtained by the District Attorney for the preparation of the asset forfeiture action, will be strictly reserved until it is presented before the judicial authority". The foregoing, as it was considered an overinclusive measure that violated the human right of access to information and the principle of maximum publicity.



- With respect to Article 7, which establishes the type of assets that may be subject to asset forfeiture, it was completely invalidated that the action proceeds over:
 - Assets of lawful origin (section II);
 - Assets of lawful origin, which value is equivalent to any of the assets subject to asset forfeiture, when it is not possible to locate, identify, seize, secure or material seizure the same (section IV); and
 - Assets used for the commission of illegal acts by a third party "*if the owner had knowledge thereof and did not notified the authority by any means or did not performed any action to prevent it*". The foregoing because such provisions were clearly in violation of Article 22 of the Constitution, which expressly establishes that the action of asset forfeiture proceeds only against assets whose legitimate origin cannot be proven, and reaffirming that the owner of the asset will only have the burden of proving the legitimate origin of the same in order to exclude it from the action of asset forfeiture.
- The Law's disposition regarding the "elements of the action of asset forfeiture" foreseen in Article 9 is completely invalidated, since the elements established in Article 22 of the Constitution must always and only be taken into account, and not those established by the Law, exceeding the constitutional framework (*1. The existence of an illicit act; 2. The existence of an asset of illicit origin or destination; 3. The link between the two previous elements; and 4. The owner's knowledge of the destination of the asset to the illicit act, or of the fact that it is the product of an illicit act*). Likewise, Articles 126, fourth paragraph, and 214, first paragraph, in the sections referring to the subjective element of the knowledge of the owner for the admission of the asset forfeiture action were invalidated by extension.

With the aforementioned, it is no longer required to prove subjective elements such as the owner's knowledge of the destination of the asset to the illegal act or that it is the product of such act.

- The Law established the imprescriptibility of the action in the case of assets of unlawful origin, provision that is declared invalid, remaining only a statute of limitations of twenty years, counted from the time the asset has been destined to carry out illicit acts (Article 11).
- Article 15 of the Law provides a presumption of good faith in the acquisition of the assets, provided that the following, that remains in force, is proven:

I. *That it is evidenced in a document of certain date and prior to the occurrence of the Illicit Act, in accordance with the applicable regulations;*

II. *That the relevant taxes and contributions of its acquisition were duly and timely paid; jurídicos en los cuales funde su Buena Fe, o justo título;*

III. *That the asset subject to asset forfeiture action was acquired in a lawful manner and in the case of possession, that this has been exercised in a continuous, public and peaceful way. The publicity will be established through the registration of the title thereof in the corresponding public registry, whenever required by law, and in other cases, in accordance with the rules of evidence;*

IV. *The authenticity of the contract with which is intended to demonstrate its just title, with the suitable, pertinent and sufficient means of proof to arrive to a full conviction of the juridical act and its legality;*

VII. *Any other similar circumstance, in accordance with the applicable regulations.*

The SCJN invalidated and eliminated the following requirements to enjoy such presumption of good faith for the acquisition of an asset:

V. *The actual impediment it had to know that the asset subject to the action of asset forfeiture was used as an instrument, object or product of an Illicit Act or to hide or mix assets product of the Illicit Act;*

VI. *In the event of having learned of the illegal use of the asset of its property, to have prevented or to have given timely notice to the relevant authority.*



Accordingly, it is clear that knowledge and good or bad faith of the owner of the asset, regarding the destination or use of the same by a third party, is irrelevant for the proceeding of the action of asset forfeiture, with the sole requirement of proving that the asset is related to the investigation of certain illicit acts (a burden of proof that corresponds to the District Attorney's Office) and the lack of proof (by the defendant) of the legitimate origin of the asset.

Regarding the procedure, the following provisions of the Law were declared invalid:

- Authority of the District Attorney to, in case of urgency or other duly grounded need, adopt as a provisional measure the securing of assets subject to asset forfeiture without prior court order (Article 173, second paragraph).
- Power of the District Attorney to access, in cases of urgency, information contained in databases without prior court order (Article 190).
- Possibility of the authority to carry out the early sale of the assets subject to forfeiture process, when the disposal was necessary due to the "nature of the asset" (Article 228, paragraph a).

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