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New National Asset Forfeiture Law

On August 9, the National Asset Forfeiture Law (“NAFL”) was published in the Federal Official Gazette. Previously approved by the House of Senators and subsequently by the Chamber of Deputies, the NAFL entered into force the day after its publication, therefore repealing the Federal Asset Forfeiture Law and local asset forfeiture laws, as well as all legal and administrative provisions that oppose to it.

The most important aspects of the NAFL are as follows:

I. Asset forfeiture

Article 3 of the NAFL defines asset forfeiture as the loss of rights over any asset by a court ruling, without any compensation for the owner or anyone who stands as such.

II. Assets subject to forfeiture

Action for asset forfeiture applies over assets whose legitimate origin cannot be established, particularly those that qualify as a product, object or instrument of illegal activities. Thus, property subject to forfeiture may have an unlawful origin or be lawful but destined to illicit purposes.

The definition of property is notably broad and includes all types of tangible and intangible assets pertaining the private property of individuals and companies.

III. Criminal activities that may lead to asset forfeiture

According to the NAFL, the following activities may give rise to asset forfeiture:

- Terrorism
- Human trafficking
- Organ trafficking
- Arms trafficking
- Corruption of minors
- Smuggling
- Kidnapping
- Hydrocarbons, oil and petrochemical offences
- Crimes against health
- Crimes involving corruption
- Cover-up activities
- Theft of vehicles
- Transactions involving illegally-sourced funds
- Unlawful exercise of public service
- Offences against justice administration
- Extortion

IV. Civil nature of asset forfeiture proceedings

Both article 22 of the Constitution and the NAFL provide that the legal action of asset forfeiture will be exercised through a civil procedure, completely independent from any parallel criminal proceeding.

The Public Prosecutor's Office ("PP") will be in charge of all legal actions regarding asset forfeiture and may exercise it even where no criminal responsibility has been established. The NAFL also provides that no criminal acquittal will prove the legitimacy of assets and, therefore, will not affect the course of the forfeiture.

V. Characteristics of asset forfeiture procedures

Asset forfeiture proceedings shall be carried out by a judge specialized in the matter, will be eminently oral and consist of two stages:

- a) **Preparatory:** the PP investigates and accredits sufficient elements to promote legal action.
- b) **Judicial:** admission, notification, reply, initial hearing, main hearing, ruling and enforcement.

Precautionary measures

The PP may request the judge to secure property as a precautionary measure in order to ensure its preservation. In such cases, the provisional and immediate attachment of funds, assets, accounts and other financial securities may be ordered, as well as the securing of commercial establishments or real estate.

Precautionary measures may be enforced during the trial or even before the commencement of proceedings. In the latter case, the PP will have 4 months to pursue legal action, extendable for up to 2 months.

Preparatory information

Moreover, the PP may request the judge to require client information of financial institutions, as well as their tax information, during the preparatory stage. In such cases, bank and tax secrecy shall not be effective, and access to databases may not be denied. Once the PP considers that it has sufficient elements to prosecute, it will summon the owner of the assets to justify their lawful origin within 10 working days.

Burden of proof

Due to the nature of the forfeiture procedure, and despite the fact that the NFAL provides for a presumption of good faith in favor of the party concerned, such party must demonstrate the legitimacy of assets, both in terms of origin and purpose.

RITCH

M U E L L E R

No statute of limitations

Legal action for asset forfeiture will have no statute of limitations regarding assets with an illicit origin. For lawful property, albeit intended for illicit purposes, action shall be subject to a statute of limitations of 20 years from the date the assets were used to such purposes.

In the event that the PP in charge of a criminal procedure informs the PP responsible of exercising forfeiture actions of any property that may be forfeited, and the latter fails to do so, his legal powers will expire within 10 years of being informed.

Continuation of proceedings in the event of death

The death of the defendant does not put an end to the forfeiture of assets. All consequences and effects will subsist for heirs, legatees and anyone with rights over the property.

VI. Advanced sale or disposition of assets

Property subject to forfeiture will be transferred to the Assets Administration Institute ("Institute"), a decentralized public agency of new creation that replaces the Property Management Service (SAE).

The Institute may sell or dispose the assets prior the issuance of any forfeiture ruling where:

- a) Their disposition is necessary because of their nature.
- b) Present risks to the environment or public health.
- c) May suffer damages or losses that can affect their operation.
- d) Their administration or custody are unaffordable.
- e) Assets consist of livestock or expendable or perishable property.
- f) Assets depreciate significantly over time.

Similarly, property may be destined for the provision of public services through federal, local and municipal offices, or otherwise be transferred to third parties where this yields a higher profit than its anticipated sale.

Proceeds from sales will first be deposited in a reserve fund, which shall be constituted as follows:

- a) 10% of the proceeds resulting from the sale of assets over which a final ruling of forfeiture was issued.
- b) 30% of the proceeds resulting from anticipated sales.

Once resources are deposited in the reserve fund, remaining balance will be transferred to the so-called Special Account, along with all benefits, yields and returns that may have generated.

VII. Destination of assets

Where a final ruling declares the forfeiture, assets will be destined to the federal, local and municipal public administrations, as determined by the Social Cabinet of the Presidency, a collegiate body responsible for the allocation and transfer of such property.

Assets may not be disposed of where, as a result of an ongoing criminal procedure, their preservation has been ordered for evidentiary purposes.

VIII. Return of assets

In the event that the action of asset forfeiture is declared inadmissible, the judge will order the immediate return of the property. If this is not possible, he shall order the payment of its updated value plus interest, returns and accessories produced while administered, where appropriate.

Where assets were sold in advance, all sale proceeds, plus interests, returns and accessories, minus management expenses, shall be paid. Finally, if the property was donated or destroyed, or its return is not feasible, the owner will receive the appraisal value of the assets at the time they were secured. Resources of the reserve fund will be used for such payments.

Transitory provisions of the decree issuing the NFAL provide as follows:

- a) Local legislations shall harmonize with the NFAL within 180 days of its entry into force.
- b) The Council of the Federal Judiciary will have a maximum of 6 months from the publication of the NFAL, to create the courts that shall be competent in asset forfeiture. In the meantime, district civil judges with no special jurisdiction will be responsible of such legal actions.
- c) Any procedure initiated under the Federal Asset Forfeiture Law or the corresponding local legislations must be completed and executed in accordance with such and their ruling will have all legal effects.
- d) Investigations under way will continue as provided for in the NFAL.
- e) Resources administered by the SAE regarding asset forfeiture in accordance with the Federal Asset Forfeiture Law, will continue under its administration and shall be destined to the Special Account provided for in the NFAL, once the reserve fund is established.

RITCH

M U E L L E R

f) Within the year following the entry into force of the NFAL, the Attorney General shall issue a public summon for the review of the regulatory framework regarding asset forfeiture. Results will be informed to the Congress for any necessary legislative adjustments.

**For information regarding this subject, please do not hesitate to contact us at 9178 7000 or through the following e-mail:
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