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Confiscation of Illicit Wealth in Kosovo: Time to think for a new policy?



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Confiscation of Illicit Wealth in Kosovo: Time to think for a new policy?

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CONFISCATION OF ILLICIT WEALTH IN KOSOVO: TIME TO THINK FOR A NEW POLCY?

I. Background

Corruption and organized crime stifles economic development, erodes confidence in the government and rule of law, thereby perpetuating poverty in developing countries, Kosovo being no exception. Before we analyze further the actual state of the issue, it is important to discuss the concept of corruption and organized crime used for the purposes of this paper as opposed to its various academic and policy uses. First, there is no major consensus, but there is an on-going debate among academics with regard to conceptualizations of corruption and organized crime. It is also challenging to set a clear boundary between the two, since as one is caused by the other; it is also fed by it. The traditional meaning of organized crime involves crime conducted in networks including drugs, trafficking of human beings, and the like; however, a more updated definition of organized crime involves also white-collar crime including tax evasion, real estate frauds, and the like. On the other hand, corruption can be systematic (the entire rule of law system which also includes tax evasion), individual (exploit public position for personal gain), and institutional (when institution affected is tolerant to corruptive practices).¹ For the purposes of this paper corruption refers to all three systematic, institutional, individual, while organized crime refers to white-collar crime excluding drugs and trafficking of human beings. Both are interrelated, and as corruption is combated, hence is organized crime. Furthermore, one very important tool in fighting corruption and organized crime as such is the identification and confiscation of illicit wealth- particularly of senior officials.² Illicit enrichment refers to a significant increase in the assets of an individual which she or he cannot explain in relation to his/her lawful income.³ Illicit wealth is also referred to and interchangeably used in the paper as illicit enrichment, unexplained wealth, or inexplicable wealth. Confiscation of such wealth also serves for the purpose of preventing further money laundering and organized cross border criminal activities. The proper application of such mechanisms indicates a firm political will and a well-defined governmental policy to combat serious corruptive activities that are of a nature to generate illicit wealth for perpetrators or related persons. However, policies against illicit wealth are rather weak in Kosovo. Corruption -particularly the systematic one- remains widespread, and Kosovo ranks 110th in Transparency International's 2014 Corruption Perception Index.⁴ According to the Transparency International Global Corruption Barometer the institution perceived as the most corrupt is the judiciary, followed by medical and healthcare services, political parties, and the parliament.⁵ According to the same source, 57% of households believe that the government's fight against corruption is ineffective. The European Union (EU) report for Kosovo also acknowledges "limited progress" in the fight against corruption and organized crime and it

¹ For more on the two concepts, please review: Center for the Study of Democracy (2010). Examining the Links between Organized Crime and Corruption.

² Senior officials refer to directly elected officials which hold executive and higher management positions in the government, thus have a higher likelihood to get engaged in corruptive activities.

³ United Nations Office on Drugs and Crime (2004). Article 20. Available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

⁴ Transparency International (2014) Corruption Perception Index. Available at <https://www.transparency.org/cpi2014/results>

⁵ Transparency International (2013). Global Corruption Barometer 2013. Available at file:///C:/Users/lenovo/Downloads/2013_GlobalCorruptionBarometer_EN.pdf

highlights a “limited implementation” of the legal framework largely put in place.⁶ Another important indicator in evidencing the ongoing corruptive activities is the perception of corruption as the main obstacle in doing business by more than half of business representatives in Kosovo.⁷ In general, in Kosovo this policy segment is underdeveloped due to various reasons starting with the lack of political will to draft and implement governmental policies including confiscation of illicit wealth which would directly combat corruption and organized crime by punishing the perpetrators. The number of confiscations and sequestrations remains low; thereby, it poses a serious challenge in delivering results in the fight against corruption and organized crime.⁸

Regardless the fact that Kosovo is lagging behind in the fight against corruption, there are several institutions and strategies established for the purpose of combating this phenomena including the Anti-Corruption Agency, National Coordinator for Fighting Economic Crimes, National Anti-Corruption Council, and National Anti-Corruption Strategy. In 2012, the President of the Republic of Kosovo has established the National Anti-Corruption Council. The Council serves as a mechanism of coordination among institutions established for the purpose of fighting corruption.⁹ Although, to date there is no concrete evidenced result through this Council. In addition, in 2013 the government has also adopted a new anti-corruption strategy.¹⁰ This strategy aims to strengthen integrity and build citizens trust in institutions and good governance, and contribute to progressive and consistent reduction of corruption. Drafting such a strategy might not be that difficult, however the problem lies in its implementation. One of the major reasons for lack of implementation is absence of clear division of responsibilities among different actors, combined with lack of sanctions if the responsible institution fails to fulfill its duties under the strategic plan. Another often cited barrier to implementation is lack of political will. The problem grows bigger due to the public general perception that although legal framework is often put in place, most of the time is not respected. After all, the current situation of corruption as shown above through global measurement indicators and the establishment of these institutions seems only an obligation or a governmental bureaucratic task, with no real outcome in fighting corruption and organized crime. The current capacities of confiscation are entrenched in the Law on extended powers for confiscation of assets acquired by criminal offence¹¹, while the Criminal

⁶Kosovo 2014 Progress Report (2014). Available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-kosovo-progress-report_en.pdf

⁷United Nations Office on Drugs and Crime (2013). Business, Corruption and Crime in Kosovo: The impact of bribery and other crime on private enterprise. Available at http://www.unodc.org/documents/data-and-analysis/statistics/corruption/Kosovo_Business_corruption_report_EN.pdf

⁸Kosovo 2014 Progress Report (2014). Available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-kosovo-progress-report_en.pdf

⁹ European Commission (2012). Commission Staff Working Document accompanying the document Commission Communication on Feasibility Study for a Stabilization and Association Agreement between the European Union and Kosovo. Available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/ks_analytical_2012_en.pdf
For more see the President Jahjaga's Speech in the latest meeting of the National Anti Corruption Council <http://www.president-ks.gov.net/?page=2.6.3385>

¹⁰ Republic of Kosovo, Anti-Corruption Agency (2011). Anti-Corruption Strategy 2012-2016. Available at http://akk-ks.org/repository/docs/Draft_Anti-Corruption_Strategy_2012%20-%202016.pdf

¹¹ See Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offence (2013). Available at http://www.md-ks.org/repository/docs/Ligji_per_Kompetencat_e_zgjeruara_anglisht.pdf

Code 12 and Procedure Code¹³ strengthen the confiscation of crime proceedings. However, proper implementation is difficult due to various legislative and institutional problems, apart from the lack of political will. Among others, the lack of reversed burden of proof is considered as the main legal obstacle towards confiscation of illicit wealth.

Therefore, this policy report analyzes the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offence, and the Law on Administration of Sequestered and Confiscated Wealth providing an independent look at the current institutional capacities of confiscation. The first section discusses international practices including the EU regulations on confiscation. The second section compares the current legislation with the Anti-mafia law of Albania and Italy, and draws on differences and legislative loopholes. The third section discusses practical constraints while trying to provide an answer to why has Kosovo failed to fight illicit enrichment. The last section introduces a set of policy recommendations in line with international practices and EU regulations that will help Kosovo overcome the existing problems of confiscation while effectively fighting corruption and organized crime.

2. Internationally Recognized Instruments for Confiscation of Illegally Acquired

As previously mentioned confiscation of illegal wealth is listed in the top of the EU agenda and is globally recognized as an important tool for ensuring effectiveness of anti-corruption efforts. United Nations Convention against Corruption (UNCAC) indicates that “each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment...”¹⁴ According to the same source, illicit enrichment refers to an increase in the assets of public officials that he/she cannot reasonably explain in relation to his/her lawful income. The Inter American Convention against Corruption (IACC) provides a similar definition of illicit enrichment, and prescribes such act as an offense.¹⁵

There are two types of legal frameworks that serve for the confiscation of proceeds of crime. Non-conviction based confiscation regime and conviction-based confiscation regime or criminal conviction. The key difference between the two systems is the confiscation procedure.¹⁶ Conviction-based confiscation requires a criminal conviction as a pre-requisite for the confiscation of the proceeds of crime, thereby treating confiscation as part of the criminal process. On the other hand, non-conviction based confiscation does not require a criminal conviction, and can be imposed at a lower standard of proof and it may be possible to confiscate even when there is insufficient evidence to support a criminal conviction. The other crucial

¹² See Code No. 04/L-082 .Criminal Code of the Republic of Kosovo. Available at <http://www.assembly-kosova.org/common/docs/ligjet/Criminal%20Code.pdf>

¹³ See Criminal No. 04/L-123. Procedure Code. Available at file:///C:/Users/Albana/Downloads/Kosovo_CPC_2012_en.pdf

¹⁴ United Nations Convention against Corruption, article 20 (2004). Available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

¹⁵ Inter-American Convention Against Corruption. March 1996.

¹⁶ United Nations Interregional Crime and Justice Research Institute (2013).Confiscation of the Proceeds of IP Crime: A modern tool for deterring counterfeiting and piracy. Available at [file:///C:/Users/lenovo/Downloads/Proceeds_of_Crime%20\(1\).pdf](file:///C:/Users/lenovo/Downloads/Proceeds_of_Crime%20(1).pdf)

difference between the two systems is the burden of proof. Under the conviction-based confiscation system, the prosecution bears the burden of proof. In simpler words, prosecution is responsible to provide documentation about wealth origin. While, the non-conviction based confiscation has a reversed burden of proof. In this context, the accused is required to present documentary evidence of the legitimate sources of income. Nowadays, courts have commonly moved toward placing the burden of proof on the accused rather than on the jurisdiction.¹⁷ In other words they have shifted their focus from individuals to their assets, in which the reversed burden of proof is crucial. Although some continuously claim that this is in contrast with the fundamental principle of many justice systems which indicate innocence until proven guilty, the European Court of Human Rights has treated confiscation as part of the sentencing.¹⁸ Thus, as far as public interest is concerned the reversed burden of proof can be considered a valid and a legitimate mechanism for combating crime.

EU instruments: The Council of Europe convention on money laundering, search, seizure, and confiscation of the proceeds from crime approved in September 1990¹⁹ has achieved recognition as one of the main international instruments in this realm. This convention was the first international treaty to facilitate international co-operation and mutual assistance in investigating crime, seizure and confiscation of assets, the prevention and the control of money laundering and the financing of terrorism.²⁰ Apart from that a New Directive has been adopted by the European Parliament and the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. This directive provides minimum rules with this regard, and allows countries to provide more extensive powers in their national law.²¹ Given that, countries can benefit by establishing additional (more or less rigid) regulation depending on their own jurisdiction.

3. Kosovo Legislation compared to Albanian and Italian Framework

This section compares and contrasts the Kosovo legislation on confiscation of illicit wealth with Albanian and Italian Legislation. First, due to the similar geopolitical history and language we will compare the Anti-Mafia Legislation in Albania with the Kosovo legislation on confiscated wealth. The Law on Prevention and Striking at Organized Crime and Trafficking through Preventive measures against Assets, otherwise referred to as Anti-Mafia Law entered into force in 2009,

¹⁷Muzila, L., Morales, M., Mathias, M., Berger, Tammar., (2012). On the Take: Criminalizing Illicit Enrichment to Fight Corruption. World Bank Publishing.

¹⁸ FRA. (4 December 2012). "Opinion of the European Union Agency for Fundamental Rights on the Confiscation of Proceeds of Crime." Accessed at https://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf

¹⁹ Council of Europe (1999). Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime CETS No.:141. Available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CM=1&DF=11/13/2007&CL=ENG>

²⁰Governance, Basel Institute on Governance (2007). Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990. Available at <http://www.assetrecovery.org/kc/node/b2f844cc-a348-11dc-bf1b-335d0754ba85.0;jsessionid=93CAE4EF5D82AAB23027FA87B3514913>

²¹ Directive 2014/40/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. Article 22. Available at https://mail-attachment.googleusercontent.com/attachment/u/0/?ui=2&ik=654476ffa0&view=att&th=14966d3b025a4da8&attid=0.7&disp=inline&realattid=f_i1xp5gp26&safe=1&zw&sadnir=1&saduie=AG9B_P-14DPDUPZJUoo4p-zJ-ERi&sadet=1415135377263&sads=OOKlyx21BoWEetYC9MBCDZLgAbw

regulates the field of sequestrated and confiscated assets in the territory of Albania.²² Since then the Anti-Mafia Law has undergone continuous improvement until the latest amendments of 2014 which aim to succeed in fighting organized crime, particularly illicit asset confiscation. The implementation of the Anti-mafia law has shown progress while the number of confiscated assets has increased.²³

Second, according to Europol, Italy is the location of one of five European crime centers.²⁴ Therefore, Italian authorities have drafted a number of administrative and legislative measures to combat, prevent, and disrupt criminal activities with positive results. That is also the reason why the Italian experience is valuable for other countries including Kosovo. Therefore, this paper provides a comparison of Kosovo with Italy in various legislative aspects of confiscation.²⁵ The table below shows few crucial differences among the three legislations.

Tab.1 A comparison of key points among Kosovo, Albanian, and Italian Legislation on Asset Confiscation

	Characteristics	Kosovo	Albania	Italy
1	Conviction based system	√	√	√
2	Non-conviction based system	—	√	√
3	Reversed Burden of Proof	—	√	√
4	Sequestration has a time limit	—	√	NA
5	Confiscation of Property Transferred to Third Parties	√	√	√
6	Maintenance and Management of Sequestrated and Confiscated Wealth	√*	√	√

*Maintenance and Management of Sequestrated and Confiscated Wealth is regulated by a separate Law in Kosovo, and is not part of the main Law on Extended Powers of Confiscation. Source: Author's compilation based on readings of other countries legislation.

In Kosovo the sequestration and confiscation of illicit assets is regulated with the Law 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offence, which was amended in March 2013. From the title of the Law it is evident that confiscation is bounded with criminal offence. The second Law which regulates this field is the Law 03/L-141 for Administration of Sequestrated or Confiscated Wealth, issued in 2010. The characteristics shown in the table.1 will be further analyzed in the following sections.

²² See Law nr. 10 192 on Prevention and Striking at Organized Crime and Trafficking through Preventive measures against Assets.(2009) Official Gazette of Albania. Available at <http://www.legjislacioni.gov.al/?q=node/2089> and its amendment in 2014, available at http://www.parlament.al/web/pub/ligj_nr_24_dt_20_3_2014_16489_1.pdf

²³ Albania 2014 Progress Report (2014). Available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf

²⁴Italian legislation on organized crime, corruption and money laundering (2012). Library Briefing, Library of the European Parliament. Available at <http://www.europarl.europa.eu/document/activities/cont/201210/20121015ATT53636/20121015ATT53636EN.pdf>

²⁵ Illicit Assets Recovery in Italy, Transparency International (Dec. 2013).

Conviction based system (vs. Non-conviction based system): The Kosovo Law on confiscation is a conviction based system which treats confiscation as part of a criminal process. Under the Albanian model, the “Anti-Mafia Law” includes measures that allow asset forfeiture through civil proceedings, while the Albanian Criminal Code allows for seizure of property as part of a criminal conviction.²⁶ The first is considered a much more powerful legal tool to deprive criminals of the proceeds of their crime²⁷, since the focus is shifted from the criminals to their assets. Apart from Albania, there is an increasing number of states such as United States, United Kingdom, Ireland, Colombia, Switzerland, Slovenia, Thailand, Australia, South Africa that have introduced non-conviction based confiscation regimes.²⁸ While, the current system in Kosovo, allows Kosovo courts to confiscate any asset acquired by committing criminal offence following a conviction. Having in consideration the overwhelming number of cases in Kosovo courts, it takes a long process until the final court verdict is made. Given that, the process towards confiscation is much longer in time, might have adverse impact on involved parties, and it is quite difficult to apply it in practice. In general, the system itself presents a challenge and prolongs the confiscation process of illicit wealth. While the non-conviction based confiscation, may have an enormous impact on fighting corruption and organized crime; for example, in Italy the application of such a system allowed authorities to freeze around €700 million, in one case.²⁹

Reversed Burden of Proof: The Albanian Anti-Mafia Law foresees the reversed burden of proof, where the suspected person is responsible for providing evidence about the wealth origin, as opposed to the Kosovo legislation where the burden of proof lies with the prosecution. Given that, the prosecutor in Kosovo is responsible to prove the source of the property. However, the Kosovo legislation on confiscated assets fails to take into consideration the very problematic nature of prosecution and law enforcement bodies in collecting evidence for proving the sources of property; therefore, lacks the powerful tool of reversed burden of proof. Given the challenges the prosecution can easily fail to provide sufficient evidence about property origin. There are various factors that have a high potential to hinder the investigation process including witness intimidation, lost or destroyed evidence, and political influence, amongst others. It is very hard to control for all these factors in the fragile justice system of Kosovo, compared to the other option of entrenching the reversed burden of proof in legislation. In addition, the justice principle of being ‘innocent until proven guilty’ does not apply, since the European Court of Human Rights has treated confiscation as part of the sentencing.³⁰ This indicates that measures to shift the burden of proof can be considered as valid and legitimate tools for combating crime when

²⁶Qosaj- Mustafa, A., Gashi, A. (2011). “Confiscation of Illegally Obtained Property.” KIPRED Publication. Available at http://www.kipred.org/advCms/documents/98577_Confiscation_of_illegally_obtained_property.pdf

²⁷ United Nations Interregional Crime and Justice Research Institute (2013). Confiscation of the Proceeds of IP Crime: A modern tool for deterring counterfeiting and piracy.

²⁸The Italian experience in the management, use and disposal of frozen, seized and confiscated assets (2014). Open-ended Intergovernmental Working Group on Asset Recovery. Vienna. Available at http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2014-September-11-12/Combined_CacCosp-Wg2-2014-CRP3.pdf

²⁹ European Commission, Press Release Database (2012). Confiscation and asset recovery: Better told to fight crime. Available at http://europa.eu/rapid/press-release_MEMO-12-179_en.htm?locale=en

³⁰ FRA. (4 December 2012). “Opinion of the European Union Agency for Fundamental Rights on the Confiscation of Proceeds of Crime.” Accessed at https://fra.europa.eu/sites/default/files/fra-opinion-3-2012_confiscation-of-proceeds-of-crime.pdf.

justified by the public interest, as it is the case. Moreover, apart from Albania similar provisions with regard to reversed burden of proof are applied also in Italy and Switzerland.³¹

Sequestration's time limit: Sequestration means “temporary suspension of the assets ordered by a competent authority in accordance with the law in force.”³² In Kosovo, the Agency for the Administration of Sequestered or Confiscated Assets; henceforth, the Agency in accordance with the Law³³ and in cooperation with other competent institutions including the courts maintains and manages the sequestered or confiscated assets. However, the Kosovo legislation does not foresee any duration on sequestration of these assets. On the other hand, in Albania, the sequestration measure is valid for six months, with a possible extension of three months. Thus, there is no legally defined time limit for how long a case involving sequestered assets can last. Sequestered assets can continue to be under the supervision of the Agency for years until the final court decision is reached. There is a huge downside to the lack of sequestration time limit. The Agency incurs large financial costs to maintain the sequestered costs. There are cases when the Agency needs to pay large amounts of money for the security of a building or factory which is sequestered and which does not generate any income for the state. For instance, there is a sequestered immovable asset (the building of a hotel) for the administration of which the Agency pays 1000 euro per month, and has not generated any income for the last three year.³⁴ On the other hand, legislation allows the Agency to sell assets which value decreases during the sequestration process, but this policy is almost irrelevant in practice. The Agency has send more than 100 request³⁵ to the Judiciary for the selling of several movable assets which value decreases; however, they have received only few positive answers in regard to few mobile phones and meat. It is evident that judges are reluctant to issue such decisions, and on the other hand the Agency is obliged to manage these assets by keeping or increasing their value.

Maintenance and Management of Sequestered and Confiscated Wealth: The Albanian Anti-Mafia Law contains a chapter about the issue of sequestered wealth administration. This chapter details the rights and responsibilities of the administrator.³⁶ One of the underlined duties foreseen in that Law is the duty to act in such a way of increasing the values of sequestered assets. Article 19 of this Chapter also allows the administrator to sell the sequestered assets, due to their potential decreasing financial value, with the court decision. On the other hand, the Kosovo legislation has a separate Law on Administration of Sequestered or Confiscated

³¹ United Nations Interregional Crime and Justice Research Institute (2013). Confiscation of the Proceeds of IP Crime: A modern tool for deterring counterfeiting and piracy.

³² See Law. No. 03/L-141 on the Administration of the Sequestered and Confiscated Wealth. Article 2. Republic of Kosovo. Available at http://www.gazetazyrtare.com/e-gov/index.php?option=com_content&task=view&id=389&Itemid=28&lang=en

³³ See Law. No. 03/L-141 on the Administration of the Sequestered and Confiscated Wealth. Republic of Kosovo.

³⁴ Interview with Fadil Bunjaku, Director of Normative, Judicial, and Administration. Agency for the Administration of Sequestered or Confiscated Assets. 7 October, 2015.

³⁵ Interview with Fadil Bunjaku, Director of Normative, Judicial, and Administration. Agency for the Administration of Sequestered or Confiscated Assets. 7 October, 2015.

³⁶ See Law. No.10 192 for the Prevention and Fight against Organized Crime and Trafficking Through Preventive Measures against Property. Republic of Albania.

Wealth³⁷ which foresees the rights, duties, and responsibilities of the administrator. However, the Law does not clearly define the mandate of the Agency. The Law does not govern certain issues including definition of crucial concepts such as other authorities (what other authorities), or free legal circulation which could be misinterpreted from other actors. These ambiguities have led other actors to try to get under the administration of the agency sequestered assets such as drugs which are not under the mandate of the Agency.³⁸ This Law, also allows the Agency to sell sequestered assets which financial value can easily decrease, but that rarely takes place in practice (as explained in the above section). The legislation does not allow the Agency to transfer confiscated assets to other third actors such as civil society, or institutions such as hospitals, orphanages and the like. Property can only be used by the Government, and up to now only two confiscated vehicles are in use by the Kosovo Police³⁹ which shows that the benefits from confiscation are also minimal.

Confiscation of Property Transferred to Third Parties: One of the most common ways to hide illegal gains or to escape from corruption is to transfer assets to a third party. This is an increasing global phenomenon used to conceal and thus avoid asset confiscation.⁴⁰ Therefore, in order to keep up with the ever-advancing criminal techniques of hiding illicit gains, the Kosovo Legislation foresees confiscation from third parties, if the purchaser cannot prove that h/she is a bona fide purchaser. Thus, assets cannot be confiscated from a person that shows s/he is a bone fide purchaser of that asset. According to the Law, the bone fide purchaser is a person who purchased an asset from a defendant or convicted person after having paid a reasonable market price for that asset.⁴¹ If a person does not provide all the information needed to prove wealth origin, the state can confiscate its assets. This is also in accordance with the Criminal Code, article 97.2.⁴² Similarly, Albanian legislation also foresees the confiscation of assets transferred to third parties, if they cannot prove that they are bone fide purchaser.⁴³ A legal time period is granted to third parties to prove the wealth origin and if not the confiscation process automatically takes place in accordance with the legislation. There is no data in regard to confiscations from third parties⁴⁴ which implies a large possibility of zero cases in regard to

³⁷ See Law. No. 03/L-141 on the Administration of the Sequestered and Confiscated Wealth. Article 2. Republic of Kosovo. Available at http://www.md-ks.org/repository/docs/Ligji_03-L-141_Per_Administrimin_e_Pasurise_se_Sekuestruar_ose_te_Konfiskuar.pdf

³⁸ Interview with Fadil Bunjaku, Director of Normative, Judicial, and Administration. Agency for the Administration of Sequestered or Confiscated Assets. 7 October, 2015.

³⁹ Interview (by email) with Shqipdon Fazliu, National Coordinator for Economic Crime. 2 October, 2015.

⁴⁰ European Commission (2012). Confiscation and asset recovery: Better tools to fight crime. Available at http://europa.eu/rapid/press-release_MEMO-12-179_en.htm?locale=en

⁴¹ See Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offence (2013). Available at [http://www.md-ks.org/repository/docs/Ligji_per_Kompetencat_e_zgjeruara_\(anglisht\).pdf](http://www.md-ks.org/repository/docs/Ligji_per_Kompetencat_e_zgjeruara_(anglisht).pdf)

⁴² See Code No. 04/L-082 .Criminal Code of the Republic of Kosovo. Available at <http://www.assembly-kosova.org/common/docs/ligjet/Criminal%20Code.pdf>

⁴³ See Law. No.10 192 for the Prevention and Fight against Organized Crime and Trafficking Through Preventive Measures against Property. Article 22. Republic of Albania.

⁴⁴ Interview (by email) with Shqipdon Fazliu, National Coordinator for Economic Crime. 2 October, 2015.

confiscations of property transferred to third parties, while there are only two cases where property was sequestrated from third parties.⁴⁵

4. Institutional Constrains in Fighting Illicit Enrichment

Kosovo's lacks capacity and has a weak legal framework to deal with complex cases of corruption, particularly those of high public officials. On the other hand, a strong legal framework is the precondition for succeeding the fight against illicit enrichment. Second, the current "political willingness" is an important factor that does not push forward confiscation of illegally acquired wealth as an important mechanism to combat corruption. International reports including the European Commission Progress Report have continuously highlighted the very low number of confiscations and sequestrations as a serious concern in the fight against corruption and organized crime.⁴⁶ The same report notes that most of the confiscated assets do not result in permanent confiscation, most of the time. Up to now, there are no cases known of any confiscation of wealth from public officials.⁴⁷ In other words no public official has been impoverished, so far. This situation does not discourage or threat them but it may only encourage them to conduct such corruptive practices. The following section will show in numbers the value of sequestrated and confiscated wealth according to the Agency for Administration of Sequestrated or Confiscated Assets.

Data (Progress/Regress in terms of number)s: The Agency for the Administration of Sequestrated or Confiscated Assets (henceforth, the Agency) does not have a shared database for the administration of these data with the judiciary, and the National Coordinator for fight against economic crimes. The Agency keeps its own data in some simple excel tables for its own uses.⁴⁸ The lack of such a shared database results in inconsistent data among institutions, delays related to information regarding specific cases, and it makes it very challenging to measure the real progress/regress in this realm and it hampers the identification of practical problems. The lack of such a database also impedes the cooperation among institutions and at the same time reflects the lack of sound cooperation and collaboration of the Agency with the prosecution and the judiciary.

Furthermore, we have got the necessary data from the Agency to find out the trend of sequestrated, confiscated, frozen, and returned assets in order to analyze the real progress/regress in the field. It is important to note that immediately after the Agency receives sequestrated and confiscated assets, they are evaluated in monetary figures by the two evaluator experts that the Agency have. Although there are specific assets such as diamonds that the Agency does not have the capacity to evaluate. These values might also change when they are in auction depending from offers.

⁴⁵ Interview with Fadil Bunjaku, Director of Normative, Judicial, and Administration. Agency for the Administration of Sequestrated and Confiscated Assets. 7 October, 2015.

⁴⁶ Kosovo 2014 Progress Report (2014). Available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-kosovo-progress-report_en.pdf

⁴⁷ Panel Discussion on Cooperation and coordination of the EULEX with local stakeholders, within the new mandate and new priorities: Discussion on Challenges in Fighting Corruption. 25 Sep. 2014 Hasan Preteni. The Pannel Discussion was organized by the Group for Legal and Political Studies.

⁴⁸ Interview with Fadil Bunjaku, Director of Normative, Judicial, and Administration. Agency for the Administration of Sequestrated or Confiscated Assets. 7 October, 2015.

Tab.2 Values of Sequestered, Confiscated, Frozen, and Returned Assets (2011-2015)

Total	2011	2012	2013	2014	(September)2015
Sequestered € 24,409,940.18	€ 41,582.31	€ 1,527,669.76 ↑	€ 550,558.43 ↓	€ 21,196,492.71 ↑	€ 1,093,636.97 ↓
Confiscated € 898,556.22	€ 27,675.35	€ 778,017.45 ↑	€ 6,302.80 ↓	€ 26,928.81 ↑	€ 59,631.81 ↑
Frozen € 4,407,000.00	€ -	€ -	€ 1,000,000.00	€ 2,310,000.00 ↑	€ 1,097,000.00 ↓
Returned € 447,538.35	€ -	€ 141,500.00	€ 142,488.35 ↑	€ 59,650.00 ↓	€ 103,900.00 ↑
€ 30,173,099.75	€ 71,268.66	€ 2,449,199.21 ↑	€ 1,701,362.58 ↓	€ 23,595,085.52 ↑	€ 2,356,183.78 ↓

The data shows that there is a huge lowering trend (2015) in sequestered assets as compared to last year (2014). Whereas the value of confiscated assets has increased in the last year (2015), however, when compared to the value of returned assets, the confiscated assets value is only half of that. Another important finding shows that in the last three years (2013-2015) the value of sequestered assets have ended up more in returned state rather than in confiscated state. The data shows that the values of confiscated assets within the last five years are less than one million (€ 898,556.22) representing an enormously low value when compared to the high levels of corruption in the country, and to the perceived huge wealth of people engaged in politics. The numbers itself do not show any progress in regard to confiscation of illicit wealth as a mechanism for fighting corruption and organized crime in the country.

Lack of Prioritization of Complex *Corrupt* Cases: Since the armed-conflict ended in Kosovo, many court cases were left unresolved due to lack of expertise and human capacity resulting in a huge backlog of cases. This high number of unresolved cases causes also other cases to delay; therefore, it continuously causes adverse consequences on parties involved. The backlog has also a negative impact in terms of delaying and 'escaping' from more serious and complex criminal cases. On the other hand, there is no internal or administrative regulation that addresses the prioritization of complicated and complex corruption cases.⁴⁹ Neither there is any regulation that prioritizes confiscation cases as opposed to punishment cases. Thus, prioritization of more complex corruption cases is left to the judges and prosecutors themselves. This combined with political interference diminishes their motivation and frightens them to take on complex corruption cases, thereby particularly increasing the number of unresolved complex cases.

⁴⁹ Interview with Hamdi Ibrahim, President of the Basic Court in Prishtine, 05 November, 2014.

The lack of sound cooperation between the Prosecution and the Judiciary: It is evident from many TV debates on corruption, and panel discussions organized by civil society that the prosecution and the judiciary do not carry out a sound cooperation.⁵⁰ The main problem in many cases is that they spent more time on blaming each other for the low-meaningless results in this realm, rather than on concentrating on how to form a cooperation strategy for the facilitation of complex corruption and organized crime cases. This in essence does not represent a sound spirit of cooperation which would bring positive results in combating illicit enrichment. According to one of the judges, the prosecutors, in many cases, do not know how to write well an indictment, or how to legally argue an asset sequestration request.⁵¹ On the other hand, their input is crucial and interconnected since confiscation is directly or indirectly a result of co-coordinative actions. The Director within the Agency for Administration of Sequestered or Confiscated Assets also highlights the need for more coordination among key actors prosecution, judiciary, and the Agency itself.⁵² The latter, particularly notes that the Agency is not informed on time from the judiciary about the final verdicts related to sequestration or confiscation. Due to that, there are final verdicts related to confiscation or sequestration for which the Agency is informed much later and thus cannot always reflect on the most updated values on confiscated or sequestered wealth.

International Institutional Cooperation: Organized crime operates without borders; therefore, there is an increasing need for effective international cooperation in order to effectively tackle this problem. Along with tracing and investigation, and provisional measures (freezing and seizure), international co-ordination is also highly valued as an integrated part of a successful framework on confiscation.⁵³ Kosovo has made its first step in the realm of international institutional cooperation by being part of the informal international cooperation network CARIN, although only as observer.⁵⁴ It will continue to be an observer, only, due to its statehood recognition problems with five EU member states, amongst others. This network is a group of states including neighboring countries and western democracies such as Germany, Switzerland, and France that exchange information with regard to different aspect of corruption including confiscation. In general, research shows that international cooperation is still at its infancy.

Lack of Independence: First, political interference which leads to lack of independence (and vice-versa) undermines the prosecution and the judiciary system thereby continuing to be a serious concern of the rule of law system. Political interference is spread in the entire rule of law system including customs, taxes and the like presenting a kind of a systematic corruption seriously harming the legitimacy of the system itself. One of the judges has underlined that lack

⁵⁰ TV Debate: "Betimi per Drejtesi" (2014). Amnistia e Korrupsionit ne Kosove. Available at <http://www.youtube.com/watch?v=aNYEcf6y7WQ>

⁵¹ Interview with Ali Kutillovci, Acting Chairperson of the Basic Court in Mitrovica, 22 November, 2015.

⁵² Interview with Fadil Bunjaku, Director of Normative, Judicial, and Administration. Agency for the Administration of Sequestered or Confiscated Assets. 7 October, 2015.

⁵³ Financial Action Task Force (2012). Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery. Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf>

⁵⁴ Interview with Shqipdon Fazliu, National Coordinator for Economic Crimes. 30 October, 2014

of motivation in terms of payments or/and physical security are one of the main challenges for both judges and prosecutors.⁵⁵ There is only a €20 difference in monthly payments for judges that work with complex corruptive cases and those that work with other general cases is extremely low. Following that fact, the motivation to work with complex corruption cases remains low. On the other hand, unemployment is high and incomes are low, thereby making everyone prone to corruptive activities. Politics and politicians dominate every aspect of life in the country; therefore, political affiliation remains the only hope to find a job and to have a carrier. Furthermore, important positions in the public sector are occupied by people who have connections with key political figures, or who are affiliated with political parties, no matter their qualifications. As a consequence, low qualified people are easily influenced and guided by other politicians behind the scenes, while leading to decisions which benefit only those in power. This and other similar situations of political interference are harming the legitimacy of the prosecutorial and judicial system throughout Kosovo.

5. Recommendations

As mentioned above, there are several problems with the legislative framework, institutional capacities, and cooperation mechanisms of confiscation which make the entire system a chain of problems. If we measure effective fight against corruption and organized crime in terms of the value of confiscated assets, the results and benefits from confiscation are very low (less than one million), thereby indicating lack of effective fight by our institutions. As such, this policy report puts forward a set of policy recommendations that should be addressed promptly by the respective institutions in order to effectively use confiscation of illicit wealth as a mechanism for combating, and preventing corruption and organized crime, thereby ensuring that the proceeds of crime will not be used in further criminal activities and will be returned to the state's budget.

Legislative Recommendations:

Legislative recommendations highly suggest and support changes in two laws, (1) the Law on Extended Powers for Confiscation of Assets Acquired by Criminal Offense, and (2) the Law for the Administration of Sequestered or Confiscated Assets. These two laws present the legislative framework of the policy on asset confiscation as a crucial mechanism in fighting corruption and organized crime. The first three recommendations are related to the first Law, and the last to the second Law.

I. Change to the Non-Conviction Based System

The current conviction based system treats confiscation as part of a criminal process; thus, without the final court verdict confiscation cannot take place. Taking into consideration the huge number of unresolved cases in the Kosovo courts- most of the new cases take a long time to come to a final court decision. Therefore, the confiscation process is prolonged, resulting in the current low/meaningless number of confiscations. Based on other successful country practices such as Italy, Switzerland, Albania, it is recommended that Kosovo introduces the non-conviction based system which would directly benefit the fight against corruption by accelerating the entire confiscation process, since confiscation would not be bounded to criminal convictions anymore.

⁵⁵ Interview with Ali Kutllovci, Acting Chairperson, Basic Court in Mitrovice. 22 November, 2015

The non-conviction based system could at least be introduced for a specific group like public officials, since they should bear certain responsibilities upon taking a post. Within this new system put in place, there will be a focus shift from the corrupted individual to their assets. While, the main purpose of the confiscation mechanism is to directly fight corruption by impoverishing criminals, since this has proven to have the potential to discourage them more than other kinds of punishments. These changes should be followed by a change in the title of the Law itself, including the removal of the “acquired by criminal offense”.

II. Reversed Burden of Proof

The lack of the reversed burden of proof is one of the key factors contributing to the meaningless values of confiscation; since, prosecutors in Kosovo lack investigating capacities which would produce in positive results. Therefore, in order to ease this process of data collection, it is recommended to introduce the provision of the reversal of burden of proof in the legislation. This provision would shift the burden of proof to the suspected from the prosecution, thereby reducing the workload of prosecution. In that case, the suspected will be obliged to prove and document the wealth origin. In general, considering the very low investigating capacities of the prosecution in Kosovo, and allowing to put the burden of proof on the suspected individual would facilitate the entire confiscation process. Furthermore, it is important to note that a person with lawful income has no trouble proving the legal origin of his or her assets.

III. Introduce a Time Limit for Sequestration

As shown, according to the Kosovo legislation, sequestration as a provisional measure does not have a legal time limit. Thus, due to lack of asset sequestration time limit which would oblige prosecutors and judges to at least accelerate cases to final verdicts, amongst others, sequestered assets continue to be under the supervision of the Agency. This supervision or maintenance can be costly for the Agency. Therefore, it is recommended that Kosovo adds a provision with regard to a legally defined time limit for sequestration in the legislation. The legal time duration could be for six months with a possible extension of three months. This recommendation becomes even more important considering the fact that currently judges are reluctant to issue decisions which would authorize the Agency to sell sequestered assets for keeping or increasing their value.

IV. Clarification in the Mandate of the Agency for Administration of Sequestered or Confiscated Assets

First, the current Law does not define very important concepts such as ‘free legal circulation’, or ‘other competent organs’ which make the mandate of the Agency ambiguous. Second, the Agency is not regularly updated by the judiciary in regard to final verdicts about sequestration and confiscation. Third, the Law does not foresee the transfer of confiscated assets to third parties such as civil society, or institutions like hospitals. Therefore, it is suggested that the Law defines key concepts which would clarify the mandate of the Agency including ‘free legal circulation’ or ‘other competent organs’. In addition, the Law should include a provision which would oblige the courts to inform on time the Agency about any final verdict in relation to sequestered or confiscated assets. The Law should also foresee the transfer of assets to third parties including civil society or institutions such as hospital or orphanages. This new policy would also potentially motivate the parties to denounce corruption cases.

Institutional Recommendations:

V. Prioritization of Complex Corruption Cases

There is no legal, administrative, or internal regulation that would prioritize complex corruption or organized crime cases. The prioritization of such cases is left to the will of the prosecution and the judiciary. Therefore, considering prosecutors and judges' lack of motivation combined with political interference such cases are left behind or prolonged. It is recommended to at least introduce an internal regulation in the prosecution and judiciary system which would give strategic priority to complex/big corruption cases. Such a regulation would facilitate and push forward the sequestration or confiscation process, as a key mechanism in fighting corruption and organized crime.

VI. Provide Reliable Data and Shared Database

There is no shared database among relevant institutions including the National Coordinator for fight against Economic Crimes, the Agency, Prosecution, and Judiciary. The lack of shared data undermines the integrity of the work and reliability of the Agency and of other law enforcement institutions. Second, as this data is also read by and presented to other countries, particularly to EU, as an indicator of measuring the fight against corruption and organized crime, it is important to show the real results (by our institutions) in this battle. Therefore, in order to increase the data reliability, the Agency should establish a common database with the prosecution and with the judiciary. In the meantime, they should intensify their collaboration for the purpose of updating their data.

VII. Address the Courts Backlog

The backlog in Kosovo courts is not a problem that could be evidenced as a cause and/or a consequence of one particular problem but it has been there for a long time, and there has been institutional reluctance in tackling the problem. The backlog is causing a number of problems including increasing the number of unresolved corruption cases or prolonging such cases. In general, the backlog undermines the credibility of the legal justice system, and has adverse impact for legal parties. Therefore, it is highly recommended that the courts system together with the Ministry of Justice invests as much resources (both, human and financial) as needed in addressing the backlog. As the backlog is a problem that is not only part of Kosovo courts, but it is a problem of global proportions, our institutions should request the advice of other countries in establishing programs to decrease the number of unresolved cases. Given that, there will be more human capacity available to tackle other new corruption cases.

International and National Cooperation and Coordination:

VIII. Enhanced Cooperation between Prosecution-Judiciary

It is evident that there is lack of sound cooperation and collaboration between the prosecution and the judiciary. Both institutions continue blaming each other for the meaningless results of sequestrated and confiscated wealth. On the other hand, confiscation is a process that requires sound and intensified cooperation and collaboration between the two. Therefore, it is recommended that they establish communication strategies which would result in more

intensified meetings and discussions on how to better use and improve the confiscation legislation in combating corruption and organized crime. Intensified meetings in regard to specific cases or to the interpretation of certain pieces of legislation would also potentially enhance their cooperation.

IX. Enhanced Cooperation between the Agency and the Judiciary

The Agency for the Administration of Sequestered or Confiscated Assets is not regularly updated with the newest final verdicts on sequestration or confiscation by the Judiciary. There are cases when sequestration or confiscation decisions have been taken, and the Agency is informed months later. Therefore, it is very important to establish direct links Agency-Basic Courts in all municipalities, to regularly update the Agency for every decision in regard to sequestration and confiscation.

X. Build Sound International Co-operations

History has proven that organized crime has no borders, therefore in fighting it there is a need for cross border joint efforts, be it formal or informal. The formal ones usually tend to be lengthy and more bureaucratic in nature as opposed to the informal ones. However, they are both beneficial in exchanging information for the confiscation of criminal proceedings. Although, Kosovo is still at its infancy of establishing international co-operation, it is recommended that responsible institutions invest a lot in enhancing and strengthening such cooperation. Given this, confiscation should be treated as a joint-investigation with designated benefits.

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POLICY REPORTS

Policy Reports are lengthy papers which provide a tool/forum for the thorough and systematic analysis of important policy issues, designed to offer well informed scientific and policy-based solutions for significant public policy problems. In general, Policy Reports aim to present value-oriented arguments, propose specific solutions in public policy – whereby influencing the policy debate on a particular issue – through the use of evidence as a means to push forward the comprehensive and consistent arguments of our organization. In particular, they identify key policy issues through reliable methodology which helps explore the implications on the design/structure of a policy. Policy Reports are very analytical in nature; hence, they not only offer facts or provide a description of events but also evaluate policies to develop questions for analysis, to provide arguments in response to certain policy implications and to offer policy choices/solutions in a more comprehensive perspective. Policy Reports serve as a tool for influencing decision-making and calling to action the concerned groups/stakeholders.