

Confiscation of Unjustifiably Acquired Assets in Kosovo: Five key issues to consider during the law drafting process

October 2021





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Policy Note 06/2021

CONFISCATION OF UNJUSTIFIABLY ACQUIRED ASSETS IN KOSOVO: FIVE KEY ISSUES TO CONSIDER DURING THE LAW DRAFTING PROCESS

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October 2021

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Introduction

The legal framework for confiscation of illicit wealth in the Republic of Kosovo is defined, including the criminal code, the code of criminal procedure and the law on extended powers for confiscation of property. The above-mentioned legislation regulates the situations when the property confiscation is a consequence and related to a conviction or as it is otherwise called criminal confiscation.

The confiscation of illicit wealth according to the concept of civil confiscation was updated during 2020 after the establishment of the new government known as the Kurti Government 1. A draft concept for this purpose was drafted which passed the consultation process in June 2020 however, the approval procedures were interrupted by the arrival of the Hoti 2 Government until this concept document was finally approved in April 2021¹ and paved the way for the drafting and approval of the draft law on confiscation of illicit wealth. The concept document provides several options on how to establish the legal framework for the confiscation of illicit assets, while the drafting of the draft law for this purpose is proposed as a recommended option.

The concept paper, although quite detailed in some points, it still leaves many points vague which consequently are causing issues in the process of drafting the law on verification and confiscation of illicit wealth. For this purpose, in this letter with policy note we have presented 5 issues that should be taken into account while drafting the law on verification and confiscation of illicit wealth.

I. LAW SCOPE

The first issue that should be defined from the beginning is the scope of the draft law on which the regulation of the following draft law depends. As for the horizontal scope, for which the law is effective, the concept document does not provide any concrete option, except that it mentions the experiences of other states that have gone through this process, which in fact is limited to two main models.

The first, according to which the confiscation of illicit wealth targets the property of illegal origin, a model known in legal terminology as *confiscation in rem*. According to this model, in cases when the prosecutor or other authorized bodies have suspicions that the property of certain persons has been acquired through illegal activity, they can request the confiscation of that property even in cases where there is no judgment against such persons. Thus, according to this model, the confiscation of property of illegal origin is allowed, even though it has not been previously proven that a criminal offense has been committed through which the property in question was obtained. The scope of this model, in principle, extends to all citizens, without restrictions on certain categories of people.²

Whereas, the second model of civil confiscation compares the actual property of certain persons with the declared income in order to identify the discrepancy between them. Even for this model of confiscation, proving that illicit wealth was acquired through the commission of a criminal offense is not necessary to pave the way for civil confiscation.³

¹Government of the Republic of Kosovo, decision no. 01/06 I dates 13.04.2021. Via: <https://bit.ly/3pa3oeY>

²Government of the Republic of Kosovo, Concept Paper on the Issue of Unjustifiably Acquired Property, page 38. Via: <https://bit.ly/3BUvw9k>

³Ibid, page. 39

The first model according to the concept paper is based on the legal regulations of states such as: Ireland, the United Kingdom, Slovenia, Germany, Italy, while the second one is a Bulgarian model. The Ministry of Justice has far so has embraced the second model of confiscation, the scope of which is narrow and extends to the illicit wealth of all officials, politically exposed persons, their family members and persons suspected of that the official person transferred the property on their behalf.

Most civil society in Kosovo supports the first model, similar to Albania⁴ which takes into account the concept of illicit wealth without being limited to a certain circle of persons, but to all people. We support this idea mainly for these reasons: first, the concept of civil confiscation is related to illicit property, therefore it is a "determination" of the status of a property, i.e the determination of the legal status of an item or *in rem*. In the concept document this is correctly repeated and explained very clearly according to which the object of assessment is the property and not necessarily the criminal liability of its owner, possessor or user therefore what would be the meaning or argument that the circle of persons be limited to persons holding a public authority, their relatives and third parties to whom they have passed the property. Second, how other categories of offenses would be handled such as: drug trafficking, prostitution and similar types of offenses aimed at amassing wealth. This implies the fact that the criminal legal framework is in place, nevertheless in practice the same is not being implemented and that has been the centre in the concept paper on illicit wealth - to establish a new mechanism such as civil confiscation. In

⁴Parliament of Albania. Law no. 10192, dated 3.12.2009 (amended in 2014 and 2017) on the prevention and suppression of organized crime, trafficking, corruption and other crimes through preventive measures against property. Article 3.

conclusion, the horizontal scope should focus on illicit wealth which has been illegally obtained as a result of committing a criminal offense without restriction on certain group of people.

The material scope of the law (what the law regulates) is still unclear and it depends mostly on the horizontal scope abovementioned however, for most of the points which are part of this scope we will talk below as separate issues.

Another aspect of the scope is the temporal validity of the draft law, respectively from which moment the law will be in force. The options under discussion are more current propositions than argued in evidence. Even at this point one must be very careful knowing the absolute concept of illicit wealth, therefore the time limit can be an obstacle to effective implementation in practice and make unclear the verification and decision-making process itself. Another aspect that can be raised as an issue in the temporal scope of the law is its "retroactive" action, under the assumption that the law will investigate and address the illicit wealth, which was acquired before the entry of this law into force.

Again, the misunderstanding arises by comparing the criminal confiscation with the civil one. In criminal confiscation it is very correct to conclude that retroactivity is not valid due to the nature of criminal law based on the principle of legality which is the main principle in a criminal trial. According to this principle no one can be imposed a criminal sanction or measure of compulsory treatment for an offense if before its commission it was not defined by law as a criminal offense and no criminal sanction or measure of compulsory treatment for that offense was provided at that time.⁵ Civil confiscation on the other hand has another meaning and is not

⁵The parliament of Kosovo. Code no. 06 / L-074 Criminal Code of the Republic of Kosovo. Via: <https://bit.ly/3vkWpkg>

related to the person but to the property which has been illegally acquired and whose acquisition does not necessarily have to be related to a certain moment. "In the case of *Gogitidze and Others v. Georgia*⁶, the European Court of Human Rights (ECHR) held that of the amendment of 13 February 2004, the Court notes from the outset that the amendment in question was not the first legislation in the country requiring public officials to be held accountable for the unexplained origin of their assets. Thus, as early as 1997 the Act on Conflict of Interest and Corruption in the Public Service had already addressed issues such as corruption offenses and the obligation of public officials to declare and justify the origin of their property and that of their close encirclement, subject to possible criminal, administrative or disciplinary liability, the exact nature of which would be regulated by specific laws governing violations of those anti-corruption requirements (see paragraphs 44-48 above). As such, it is clear that the February 13, 2004 amendment simply re-regulated the financial aspects of existing anti-corruption legal standards."

II. THE PROCEDURE OF VERIFICATION AND CONFISCATION OF UNJUSTIFIABLY ACQUIRED ASSETS

This procedure is in fact is the regulation for confiscation of illicit wealth, but which in the concept document is not treated in a structured way. The regulation of the procedure for confiscation of illicit wealth must contain a balance between freedoms and human rights as well as the protection of the general interest. As discussed extensively in the concept paper, civil confiscation should be distinguished from other types of confiscation especially from criminal confiscation. In this regard, the legal regulation regarding the procedure

during the verification and confiscation of property should be based on objective and subjective criteria set out in law and should provide at least the following rights: notification of measures against property; active participation of the party in the procedure; the right to be heard and to present arguments and the right to legal remedies against a confiscation order.⁷ Regarding the course of the procedure for confiscation of illicit wealth, the whole procedure can take place in these stages:

The investigation phase, where crime proceeds are identified and the evidence on their owner (and information on their property) collected – also called a financial investigation. As a result of the financial investigation, an interim measure (confiscation) may be imposed to ensure subsequent confiscation ordered by the court.

Judicial phase, where an individual is convicted (or acquitted), or another final decision is issued by the court implying the confiscation of property and,

Disposal phase, where property is confiscated and disposed of by the state in accordance with the law, taking into account the international division of assets.⁸

According to the concept document for **the investigation phase**, an establishment of an agency is proposed, which has the competence to conduct investigation and verification of assets. The agency and its status will be introduced in more detail in the following point. In the investigation phase, it should be seen that some segments of the procedure are developed as original in the draft law on verification and confiscation of illicit wealth, while the current legislation on administrative procedure and other relevant legislation on the investigation of financial

⁶European Court of Human Rights (36862/05) - (Fourth Section) - Judgment in *Gogitidze and Others v. Georgia*. Point 99. 15 May 2015.

⁷OECD (2018), *Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia*. Via: <https://bit.ly/2Z7jsDF>

⁸Ibid

crimes may be applied. Another important point during the investigation phase is to raise the presumption “*that the property may be of illegal and illicit origin*”, therefore it is the duty of the authority conducting the investigation and verification of the property to be able to prove that the investigated property could potentially be illicit and illegally obtained.

The judicial stage is within the jurisdiction of the court. Which of the courts will be competent will be discussed below. Knowing the fact that civil confiscation as a concept is based on the "possibility of probabilities" rather than "beyond reasonable doubt" made even more typical the procedure that takes place before the court by placing the burden of proof on the holder of the property. The custodian of the property (owner, possessor and any person who uses a property) before the court proceedings must prove that the wealth that is his property or possession, and administration is legit, as well as it does not derive from a criminal offense or as a consequence of it.

In the concept of civil confiscation procedure, the main and distinguishing feature of criminal confiscation proceedings is the transfer of the burden of proof to the possessor of the property. In this regard, the United Nations Convention against Corruption in paragraph 8 of Article 31 stipulates that “*Each states Parties may consider requiring a perpetrator of a criminal offense to show the origin of such proceeds of crime or of any other property which is subject to confiscation, to the extent that such a request is in accordance with the basic principles of its domestic law and the nature of court and other proceedings*”⁹. This provision has some requirements which can be regulated in the domestic legislation in the fight against

corruption. The first is that a perpetrator of a criminal offense may be required to indicate the origin of the proceeds of crime or any other property subject to confiscation which is understood to be the duty of the holder of the property to prove whether the property is legal, whereas the second concerns the "accommodation" of this regulation within the internal legal order and the nature of court proceedings. In the case of *Gogitidze and others v. Georgia*, the ECtHR states that in general, the main trial, in which the burden of proof was placed on the respondent by law, was fair, and the court decisions were sufficiently reasoned.¹⁰ Here comes the discussion point because the draft law should explicitly place the “burden of proof” on the holder of the property as well as regulate the procedure that will take place in court. When it comes to the burden of proof, many discussions have been held in the drafting phase of the concept paper as well as now in the draft law regarding the quality of evidence, given that Kosovo is a post-war state and many documents and evidence have been destroyed as a result. Another point of discussion related here has to do with the unfinished inheritance process which is a real and long-standing problem in the Kosovo society.

The procedure to be followed should be regulated by a draft law, although many elements can be borrowed from the civil legislation, which in our case are regulated by the relevant law with the contentious procedure.

The phase of destruction (execution) should include the norms which enable the seizure and confiscation of property because of the criminal confiscation, perhaps with the necessary adjustments to authorize and give competence to the relevant public body in the case of civil confiscation as in the phase of

⁹United Nations Convention against Corruption. Paragraph 8 Article 31. Via: <https://www.unodc.org/unodc/en/treaties/CAC/>

¹⁰European Court of Human Rights (36862/05) - (Fourth Section) - Judgment in *Gogitidze and Others v. Georgia*. Point 118. 15 May 2015.

sequestration - as a protective measure during the proceedings also as a final measure after a final judgment by the court. Both in the case of the execution of precautionary measures and in the execution of the final court decision ordering confiscation by law, the procedure must be regulated.

III. RESPONSIBLE AUTHORITIES FOR CIVIL CONFISCATION

For the phase of investigation and verification of assets according to the concept paper, the establishment of a new mechanism is proposed, which can be a new agency based on Article 142 of the Constitution or by a unit specialized in the current structures. Regarding the establishment of a new agency we are reserved for the following reasons: It is a fact that the Assembly has full authority to establish independent agencies under Article 142, however this should be interpreted together with the principle of separation of powers set out in Article 4 of the Constitution restricting the Assembly from establishing Independent Agencies solely in the exercise of its oversight function.¹¹ This constitutional regulation is well explained in the Law on Organization and Functioning of State Administration and Independent Agencies according to which independent agencies according to Article 42 of the Constitution can be established by the Assembly provided that they are not part of the executive powers of the Government, however according to the Constitution they serve the Assembly to exercise specialized parliamentary oversight / control of legality and integrity in certain areas of administrative activity.¹² In this regard, the

interpretation should first be made of the constitutional and legal basis mentioned above for the establishment of an independent agency for the investigation and verification of assets if its functions are supervisory functions and if the supervision relates to a specialized field of administrative activity. Second, according to the concept paper it is proposed that this agency has 30 employees, yet it is not provided why this number would be enough and what their specialization would be, given this it is very difficult to achieve the abovementioned standards especially for this type of agency, which has very complex functions such as investigating and verifying illicit wealth. Third, even with the option of establishing an independent agency by law, the mechanisms of independence and accountability between it and the Assembly as a political body must be well defined. The option that we consider that could be more efficient is to create specialized units that deal only with this purpose in the current public bodies that are currently investigating and verifying unjustifiable assets. If this option is followed, each body would have the opportunity to initiate a civil confiscation procedure in the competent court, yet a filter should first be placed in the court (similar to the pre-trial procedure) to assess whether the facts and evidence are sufficient to initiate a civil confiscation procedure.

Regarding the body responsible for the judicial procedure of civil confiscation, according to the concept document, it is proposed that this authority be held by the Department for Serious Crimes within the respective basic court, assuming that it has the expertise for confiscation of property. This assumption is rebuttable for the following reasons: so far the confiscation of property has been based only on criminal confiscation both in the case when it was

¹¹Government of the Republic of Kosovo, Concept Paper on the Issue of Unjustifiably Acquired Property, page 44. Via: <https://bit.ly/3n31V7E>

¹²The parliament of Kosovo. Law no. 06 / I-113 on the organization and functioning of the state administration

and independent agencies, article 38, paragraph 2, <https://gzk.rks-gov.net/ActDetail.aspx?ActID=18684>

done according to the criminal code and when it was done under the law on extended powers for confiscation of property implemented criminal legislation and not civil law, while the other reason is that in practice, however, this department has not been so effective in execution of criminal confiscation to have an expertise which would be transferred to civil confiscation. Given the distinctive features of civil and criminal confiscation as well as the necessity of a conviction to initiate civil confiscation proceedings as a possible option is to establish a specialized division within the General Department of the Court of Appeals by combining in its composition civil and criminal judges.

For the phase of sequestration and confiscation of property based on civil confiscation, the draft law must authorize the public body that carries out the seizure and confiscation, which in our case can be authorized by the relevant Agency for Administration of Sequestration and Property Confiscation. The draft law should provide the authorization for this agency to have the competence to execute the seizure of property both in the investigation and verification phase and in the trial phase. The same agency should be authorized to execute the confiscation of property on the basis of a final court judgment. The execution procedure should be clear and defined by law.

IV. LEGAL REMEDIES

Legal remedies are another aspect that in the draft law should be treated very carefully for all stages of the development of the civil confiscation procedure. First of all, it should be considered whether or not any legal remedy should be allowed in the first phase, i.e. during the phase of investigation and verification of assets. Some dilemmas may arise here, such as when should the right to appeal before the start of the judicial phase is exercised and what will be the superior

body that decides on the appeal! Taking into account these characteristics, even at this stage, the possibility should be considered regarding the decision-making in the investigation and verification phase, as well as any precautionary measure taken at this stage to allow the appeal, which is reviewed by the court. The appeal at this stage as a rule should not have a suspensive effect; i.e. the exercise of the right to appeal does not stop the development of court proceedings.

There are some legal situations that need to be considered in court proceedings. First, when a security measure is taken for the property which is the object of the trial, therefore, even in this case, the right to appeal should be considered, while in the final decision of the court ordering full or partial confiscation, the appeal should be allowed. In both cases the appeal must be examined from a higher level and in our case this competence lies on the Court of Appeals. Similar to that in the Basic Court, a specialized division for civil confiscation can be created.

Another discussion that may arise regarding the right to appeal is the issue of the concept of the party and especially when the party is not satisfied with the court decision of the public body (competent body that has initiated the civil confiscation proceedings) similar to that of the prosecutor in a criminal proceeding. In this case, the law should specify and express this situation, especially whether or not the right of a public body party to file an appeal against a first instance court decision is allowed.

V. EXECUTION

The execution in practice is the main purpose of this piece of legislation. Given that civil confiscation involves new regulations that have never existed before on one hand, and given its complexity on the other, it should first be considered to allow a

slightly longer time to take effect (vocation legis), i.e at least 1 year from the approval. In the part of preparation for execution, another moment that must be considered is the rest of the legislation related to vetting, which is a bit behind and still unapproved, which makes it almost impossible to effectively execute the confiscation of property without having a proper vetting process for the responsible persons in all links of public bodies and the court that will implement the civil confiscation. After going through the vetting procedure, the next important stage is sufficient human and financial capacity to execute the civil confiscation. When it comes to capacity building, special training modules should be prepared, while also long-term on-the-job training in similar institutions in other countries should be considered, from which our civil confiscation system has been most influenced in order to better understand the practical experience and challenges that have passed during the process of executing civil confiscation in practice.

Another aspect that should be considered and be well defined by law is the transition of open procedures based on criminal confiscation which from the entry into force of the law governing civil confiscation the same can be applied for them.

Concluding remarks and recommendations

On the basis of the analysis provided in this report, the following remarks and recommendations are provided that should be considered during the law drafting process:

- The horizontal scope of the law should be inclusive and based in the concept of unjustifiably acquired assets and not in the individuals, as certain individuals can be 'granted amnesty' and exclude them of being

subject to confiscation of illicit wealth;

- The timeframe, including retroactive effect that the law will have should be carefully analyzed and considered, and requires an all-inclusive consultation approach with a wider public;
- The entire verification and confiscation procedure should pass the following phases: investigation phase, judicial phase and liquidation phase;
- The verification and confiscation procedure should be regulated by the law to the necessary extent, while investigation phase should be administered on the basis and in compliance with the respective legislation in place for administrative procedures, as well as respective legislation in place for financial aspects;
- Prior to court proceedings, a procedural filter should be installed (similar to the preliminary procedures).
- During the procedure, the following rights should be secured: notification measures against wealth, active participation of parties involved, the right to be heard and to present arguments, and the right to legal remedies against a confiscation verdict;
- During the procedure to guarantee the following rights: notification of measures against property, active participation of the party in the procedure, the right to be heard and present arguments and the right to legal remedies against a decision for confiscation;
- Responsible authorities for the verification and confiscation of unjustifiably acquired assets should be well defined by law and on the

basis of the procedural phases elaborated above;

- The establishment of an agency with competences to conduct investigation carries a risk that may initiate constitutional debate on whether the right to wealth investigation is one of the typical oversight rights of the Assembly of Kosovo as per Article 142 of the Constitution of the Republic of Kosovo. Even if this agency is mandated by the parliament, the question still remains on how will parliamentary oversight be ensured upon this agency;
- To consider the possibility for a new specialized unit to be established from the current structures, exclusively responsible for the investigation of unjustifiable assets. A unit that will also undergo regular specialized trainings on this issue;
- The court procedure should take place at a specialized division composed of judges specializing on criminal and civil law;
- Legal remedies to be determined at all phases of the confiscation procedure;
- From the adoption of the law and until its implementation in practice, a preparatory period should be foreseen in order to allow for sufficient time for the establishment of new mechanisms (if appropriate), staff training, and ensuring material and financial capacities.
- To consider the option for this law to enter in force in parallel with the law on vetting, as those responsible to implement this law should be characterized by a high level of integrity and be able to pass the vetting test. This due to the high sensitivity and the risk that the civil

confiscation procedure carries in itself.

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