

# Confiscation and seizure of illegal assets:

international and local practices



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INSTITUTI GAP  
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## — Table of Contents

Executive Summary	3
1. Introduction	5
2. International conventions and European Directives	8
2.1. Legal basis for confiscation of illegal assets in Kosovo	9
2.2. Draft Law on the Establishment of the State Bureau for Verification and Confiscation of Unjustifiable Assets	11
3. Responses to the new legal initiative on the establishment of the Bureau	13
4. International practices on confiscation of assets	15
4.1. In rem model of confiscation of assets	15
4.2. In personam model of confiscation of assets	15
4.3. Unexplained Wealth Orders (UWO)	16
5. Practices of the countries of the region	16
5.1. Albania	17
5.2. Serbia	17
5.3. Northern Macedonia	18
6. Conclusions and recommendations	18

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## Executive Summary

Confiscation of illegal assets acquired through criminal activities was and remains a major challenge for Kosovo's institutions. In order to increase the efficiency in the fight against this phenomenon, on December 29, 2021, the Government of the Republic of Kosovo approved the Draft Law on the Establishment of the State Bureau for the Verification and Confiscation of Unjustified Assets. Target to this Bureau will be all public officials against whom there is suspicion that their assets have been acquired illegally. Illegal assets means any asset which is acquired through the commission of a criminal offense provided under the Criminal Code of Kosovo. Such assets acquired outside the legal framework negatively affects the economic and political stability of the country, undermines democratic institutions, and impairs the reputation of the state.

The establishment of the Bureau for Confiscation of Assets is expected to lead to an increase of the number of court cases, as it will shift the burden of proof to the accused, rather than the accusers. The Draft-Law on the Establishment of the Bureau, in contrast to previous laws aimed at tackling the issue of illegal assets, also includes cryptocurrencies under the definition of assets, a recently prevalent practice in Kosovo, where the likelihood of laundering illegal revenues is large. However, there were also objections and comments regarding the establishment of the Bureau, including a response of the European Union (EU), which demanded that fundamental freedoms and human rights be respected. In addition, there are a number of contentious points in the draft-law regarding the independence and legality of the Bureau. As a result, putting the draft law for a vote in the Assembly took time until the Venice Commission came out with an official opinion, which was published on June 17, 2022. According to the Venice Commission, the issue with the low number of cases of confiscation of illegally acquired assets is not with the current legislation, but rather with its implementation. Among other, according to the Commission the proposed legislation includes some points which infringe fundamental human rights and freedoms, while it is still doubtful whether the establishment of the Bureau would enhance the effectiveness in the fight against organized crime and corruption or further complicate the judicial system. Despite these concerns raised by the Venice Commission, the Assembly of the Republic of Kosovo has already voted in principle the Draft Law that paves the way for the creation of the State Bureau for the Verification and Confiscation of Unjustified Assets.

Currently, the administration of seized and confiscated assets is under the responsibility of the Agency for the Administration of Seized and Confiscated Assets (AASCA), under the Ministry of Justice (MoJ). The duties and responsibilities of this Agency are defined through two main laws that serve as a starting point for the confiscation and administration of illegal assets in Kosovo: Law No. 05/L-049<sup>1</sup> adopted by the Assembly of Kosovo in 2016, and Law No. 06/L-087<sup>2</sup> which entered into force in January 2019 and provided extended powers for prosecuting authorities in the field of asset confiscation.

To date, illegal asset confiscation figures have not been satisfactory. Of 180 million Euro in value of assets seized during the last six years, only 3.5 million Euro have been ultimately confiscated, respectively, 1.94% of the total amount of seizure. The rest of the seized assets remain pending a court decision which, due to extensive procedures often take years and has also affected their depreciation.

<sup>1</sup> Law No. 05/L-049 on Administration of Sequestered and Confiscated Assets.

<sup>2</sup> Law No. 06/L-087 on Extended Powers for Confiscation of Assets.

Given these findings, this report draws a number of conclusions regarding improved efficiency in the fight against illegal assets and increase the number of confiscated and seized assets. An efficient model of confiscation that Kosovo should follow is the *in rem* model, as it would allow for the avoidance of long court proceedings that can take years, thus preventing the depreciation of assets.

On the other hand, amendments to existing laws, in particular the Law on the Administration of Sequestered and Confiscated Assets, should push forward the establishment of a confiscation fund, clearly defining how confiscated assets are managed, both monetary and non-monetary. For instance, a significant number of them could be used in social awareness programs or payments to legislative institutions, while real estate could be transformed into public property that would be put at the service of the community and increase the level of employment and wellbeing of citizens. It is also important to establish a concentrated fund for legislative institutions in the field of confiscation and seizure of assets so that institutions do not pay separately when carrying out field activities, but are rather funded by this fund.

# 1. Introduction

The post-war period in Kosovo saw a high degree of informal and black economy, which was difficult to monitor mainly due to the fragile political and administrative situation in the country, thus enabling illegal personal benefits to individuals and various groups. This period also saw an administrative transition, initially with international institutions such as UNMIK<sup>3</sup> and then EULEX<sup>4</sup> holding main powers in the fight against organized crime and corruption, then transferring such powers to local institutions in 2014.<sup>5</sup> Corruption has a negative impact in the normal functioning of a country, as it prevents social equality, weakens trust in public institutions, and hampers economic development.<sup>6</sup> Thus, for any democratic country, fighting these negative phenomena must be a priority in the field of rule of law and order.

A major issue for Kosovo, as well as any country in development which has went through stages of transition, is budget oversight and its effective allocation, where lack of transparency allows for budgetary abuse by public officials and third parties. Therefore, in order to have a higher transparency in the work of the government and the distribution of public expenditures, many states have established public agencies that deal with monitoring and preventing the abuse of public funds, as well as the confiscation of illegal gains. Such agencies vary from state to state, depending on the jurisdiction of the country and the efficiency of their management.

In Kosovo, confiscation of assets acquired illegally through criminal activities is administered by the Agency for the Administration of Sequestered and Confiscated Assets (AASCA), which operates under the Ministry of Justice (MoJ).<sup>7</sup> The Agency is independent in performing its functions and no body or institution has the right to influence its work. The cycle for the confiscation of illegally acquired assets starts with the identification of persons involved in criminal activities or the identification of assets acquired illegally. Then, the Agency, in cooperation with other relevant institutions, takes the necessary measures to seize or confiscate such assets following the applicable legislation.

Today, in addition to AASCA, other local institutions with an obligation to address the confiscation and seizure of illegally acquired assets are: Kosovo Police, State Prosecution, courts, and the National Coordinator on Economic Crimes.

Cooperation between these institutions is essential in the fight against organized crime, corruption and confiscation of illegal assets. These competent institutions are already part of the Camden Asset Recovery Inter-Agency Network (CARIN), which provides the country with additional information regarding the identification of persons involved in criminal activities and have been tracked down by international authorities.<sup>8</sup> However, these institutions in Kosovo still face challenges in law enforcement and security activities, from tracking down actors involved in criminal activities, to raising public awareness of the dangers posed by such activities.

<sup>3</sup> The United Nations Interim Administration Mission in Kosovo

<sup>4</sup> European Union Rule of Law Mission in Kosovo

<sup>5</sup> Two objectives of EULEX: Mentoring, Monitoring and Advising (MMA) and Executive Function / EULEX Kosovo. Source: <https://bit.ly/3GFkGFV>

<sup>6</sup> Council of Europe – Corruption undermines human rights and the rule of law. Source: <https://bit.ly/39sOnQ9>

<sup>7</sup> Agency for Administration of Sequestered and Confiscated Assets, Ministry of Justice. Source: <https://bit.ly/3gpKASF>

<sup>8</sup> Camden Asset Recovery Inter-Agency Network (CARIN) The History, Statement of Intent, Membership and Functioning of CARIN. Source: <https://bit.ly/3tGBMzi>

In addition to tracking and confiscating illegal assets, a remaining challenge is the management and use of funds earned from the resale of assets, as in addition to efficient spending, greater transparency is needed to understand where the funds are going and prevent their misuse. Limited funds for law enforcement agencies is an additional problem, as well as the lack of a concentrated fund to finance activities of legislative institutions on the ground and eliminate the current practice where every institution covers the costs separately, e.g. Kosovo Police and AASCA pay separately for the costs of an activity on the ground, despite the objective of the activity being the same – fight against illegal assets and seizure of identified assets.

Applicable laws do not clearly specify how confiscated assets should be used, other than the fact that financial assets are deposited in the state budget while non-financial assets are disposed or made available to the government. Therefore, the establishment of a confiscation fund, for which a draft concept paper already exists<sup>9</sup>, is necessary as it would allow for a part of the revenues from the sale of confiscated assets to be used for social or institutional purposes, increasing the level transparency and citizens' confidence that the assets are being used properly.

There are various practices and possibilities on how confiscated assets and funds from resulting sales should be managed. In this regard, the United Nations Office on Drugs and Crime (UNODC) has published a report on the experiences of 64 countries in the management of confiscated assets.<sup>10</sup> The findings of this paper showcase the best examples of the use of revenues generated from the confiscation of illegal assets by a number of countries (Table 1).

<sup>9</sup> Zyra e Kryeministrit – Drafti i I-re i Koncept Dokumentit per Themelimin e Fondit te Konfiskimit  
Source: <https://bit.ly/3btEDpo>

<sup>10</sup> UNODC. Effective management and disposal of seized and confiscated assets. Fq.33.  
Source: <https://bit.ly/3qwfqcZ> <https://star.worldbank.org/focus-area/management-stolen-assets> fq.47

**Table 1.** Use of revenues from confiscation of illicit assets by country

Country	Form	Clarification
China	Payments for the state	Distribution of recovered revenues to the national revenue fund to meet government priorities.
USA, South Africa, Australia and Brazil	Payment to a special or dedicated fund	Confiscation proceeds are paid into a designated asset recovery fund. The fund is usually defined in law, which must specify the persons responsible for making decisions regarding the fund and the purposes for which the deposited funds can be used.
USA, Canada, and Honduras	Payments to law enforcement agencies	Payments to law enforcement agencies usually come from the overall budget of countries. However, many jurisdictions allow the recovered proceeds to be allocated to improve the efficiency of institutions in combating criminal activity, such as the purchase of special equipment, provision of training, or the financing of joint law enforcement projects.
France and Canada	Coverage of asset recovery program costs	Many countries use confiscated proceeds to cover the cost of capacity building to properly manage seized and confiscated assets, as well as to meet the goals of the asset recovery program. Coverage of asset recovery program costs may include staff pay or infrastructure upgrades.
Belgium, France, Australia, Great Britain, USA, and Honduras	Compensation of victims	Many international legislations encourage states to prioritize the use of crime proceeds to compensate its victims. For example, Directive 2014/42/EU requires that, "as a result of a criminal offense, victims have claims against the person who is subject to a confiscation measure", Member States should ensure that confiscation measures do not deter such victims from seeking compensation for their claims.
Italy, Colombia, Romania, Scotland and Honduras	Social reuse	Social reuse initiatives make confiscated property available to affected communities to carry out economic recovery and restore their trust in state institutions. The purpose of social reuse measures in this context is to demonstrate that the restoration of state control does not necessarily lead to the destruction of economic benefits generated by businesses that were under the control of organized crime.

Source: UNODC, 2017

Regarding the issue of the use of seized assets, the Government of the Republic of Kosovo, in its meeting of June 24, 2022, approved the concept paper for the Confiscation Fund, which provides that the funds from confiscation should be used for marginalized groups.<sup>11</sup> In addition, the draft decision on the use of confiscated assets by central and local institutions was also adopted in this meeting, which aims to ease the burden of financial maintenance for AASCA, and support institutions in meeting their needs.<sup>12</sup>

<sup>11</sup> Koha.net – Funds from confiscation will be used for the marginalized groups of the society. Source: <https://bit.ly/3nkCi2s>

<sup>12</sup> Ibid.

The purpose of this GAP Institute report is to analyze the role of responsible institutions in Kosovo dealing with the confiscation and seizure of illegal assets<sup>13</sup>, legislative aspects of the law on public financial management, the best form of allocation of funds generated by the sale of illegal assets, as well as to analyze new legal initiatives for confiscation and seizure of illegal assets. The report also explains the European Union Directives and presents models practiced by other countries for the confiscation of illegally acquired assets. Finally, the report provides recommendations for the necessary changes in the applicable legislation, and further steps to be taken to enhance the efficiency of the management of public finances and seized assets.

## 2. International conventions and European Directives

For results in identifying and preventing practices of misuse of public funds and illicit gain, a legal basis is needed which is in line with international standards. The process of freezing or confiscating assets can be complicated due to non-harmonization of laws and the heavy burden of proof. Therefore, the need to align legislation with international law is imperative to increase efficiency in the fight against illicit assets. The United Nations Convention against Corruption is considered the starting point of national legislation in the fight against organized crime and corruption.<sup>14</sup> The three main purposes of this Convention are:

- To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and
- To promote integrity, accountability, and adequate asset management and other public affairs.

The European Union has a number of Directives in the field of confiscation of illegal assets. Among the best known is Directive 2007/845/JHA of 2007.<sup>15</sup> This Directive aims to accelerate exchange of information between Member States that could lead to the tracking or confiscation of illegally acquired assets, as well as direct communication and increased cooperation between countries in the tracking of illicit proceeds. To achieve these goals, EU Member States must have national Asset Recovery Offices which are able to exchange information more rapidly with each other.<sup>16</sup>

Another Directive, adopted in 2014 by the European Parliament, is Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU.<sup>17</sup> This Directive aims to neutralize the proceeds of crime by extending to any asset arising from criminal activity through the extension of

<sup>13</sup> Regarding the terminology used in this report, 'confiscation' means the permanent appropriation of assets by the state after a court decision, whereas 'seizure' means the temporary freeze of assets until a final court decision.

<sup>14</sup> United Nations Convention Against Corruption – pg 7. Source: <https://bit.ly/3LdlV1d>

<sup>15</sup> Official Journal of the European Union (Acts adopted under the EU Treaty) Council Decision 2007/845 / JHA. Source: <https://bit.ly/3rtpt8W>

<sup>16</sup> The legal basis for asset exchange should be based on the CARIN network, which aims to increase mutual knowledge on the necessary methods and techniques in the field of cross-border cooperation in cases of information, freezing, seizure and confiscation of proceeds and assets related to organized crime. Criminal groups operate without borders and are increasingly gaining ground by further expanding their criminal activity. Therefore, CARIN network is essential to increase international cooperation in the fight against criminal phenomena, as it enhances efficiency in tracking such occurrences and the level of exchange of information between countries.

<sup>17</sup> Official Journal of the European Union – Directive 2014/42 / EU of the European Parliament and of the Council. Source: <https://bit.ly/3smx2gR>

powers and the establishment of minimum rules for national regimes regarding the confiscation of illicit assets. Section 11 of this Directive clarifies the concept of direct proceeds from crime and indirect benefits, which may be illegal assets or proceeds which have been transformed into other sources and intermingled with legal income.

Unlike the 2007 Directive, Directive 2014/42/EU also allows member states to confiscate assets transferred to third parties, as well as confiscate and seize assets in the absence of parties. The directive also clarifies the management of frozen or confiscated assets, requiring EU member states to take necessary measures to ensure adequate asset management and subsequent seizures. This is envisaged to be done through the establishment of centralized offices or other equivalent mechanisms, which enable the sale or use of property by the state for public or social interest.

## 2.1. Legal basis for confiscation of illegal assets in Kosovo

Public finance management in Kosovo is regulated by law (Law No. 03/L-048 on Public Finance Management.<sup>18</sup> Public money under this law means money that is under the management of a budget organization, public authority, publicly owned enterprise, or public official with powers to administer them.

Furthermore, this law determines the manner public money is used, requiring that it is used only for approved public purposes, and that no public authority should divert or misuse such funds.

However, despite the legal regulation, the possibility for misuse of public funds is rather high due to the lack of continuous control and poor transparency which has consistently featured the budget process in Kosovo. In addition to the misuse of public finances, another issue the country faces is the high degree of informality, enabling individuals and interest groups to expand their activities and illegal benefits.

The basis for confiscation of illegally acquired assets was first established in 2003 with the Provisional Criminal Code of Kosovo.<sup>19</sup> According to Article 82, "No person may retain a material benefit acquired by the commission of a criminal offense", otherwise the property is confiscated by a judgment of the court which establishes the commission of the criminal offense.

Later, the Provisional Criminal Code of Kosovo was replaced by the 2012 Criminal Code of the Republic of Kosovo, which serves as the basis for the laws on seizure and confiscation of illegal assets. The two main laws that serve as a starting point for the confiscation and administration of illegal assets Kosovo are Law No. 05/L-049 on the Management of Sequestered and Confiscated Assets<sup>20</sup> adopted by the Assembly of Kosovo in 2016, and Law No. 06/L-087 on Extended Powers on Confiscation of Assets<sup>21</sup> which entered into force in January 2019.

<sup>18</sup> Law No. 03/L-048 on Public Financial Management and Accountability. Source: <https://bit.ly/3qwRKFe>

<sup>19</sup> Criminal Procedure Code of the Republic of Kosovo. Source: <https://bit.ly/3quZms5>

<sup>20</sup> Law No. 05/L-049 on Administration of Sequestered and Confiscated Assets. Source: <https://bit.ly/3Lgtk1d>

<sup>21</sup> Law No. 06/L-087 on Extended Powers for Confiscation of Assets. Source: <https://bit.ly/3so2X00>

Law No. 05/L-049 designates AASCA as a state administration central body with the duty of administering seized assets and operates under the Ministry of Justice.<sup>22</sup> Article 18 of this law defines the management of seized assets, listing the steps to be taken from the moment of asset seizure until the final decision of the court. This law defines the duties of AASCA regarding the maintenance and preservation of the value of seized assets and is obliged to inform the court within ten days on the receipt of the property, the location of the seized asset and submit a copy of the asset registration with the specifics and value of the asset.

According to this Law, AASCA is independent in performing its functions and no body or institution has the right to influence its work. In terms of the use of immovable property, with the proposal of the Ministry of Justice, the Government defines the criteria, measure and manner of such use, for economic, commercial or professional activities, within the confines established under the Law No. 05/L-049.

The sale of confiscated assets according to this law can be done in two forms:

- through public announcement on the Agency's website; or
- through public auction.

From the data published on the official AASCA website, twelve public auctions were held last year. Proceeds from the sale of confiscated assets go to the AAPSK bank account in the Central Bank of Kosovo. These revenues are stored in a special account of the Agency, until a final decision is made by the court, and are then transferred to the state budget.

In order to realize the sale of confiscated assets, two public auctions are organized. In case of an unsuccessful sale, the movable asset can be sold through direct settlement, in accordance with the law, and donated to charity, or disposed. Article 15 of this law defines international cooperation of AASCA, as needed. For instance, where a request is received by Kosovo courts from another country, and assets forming the subject of the request have been transferred to the Agency for management, the Agency will have responsibility for those assets as if the case had originated in the Republic of Kosovo.<sup>23</sup>

In order to further improve the efficiency in the fight against illegal assets, in January 2019 Law No. 06/L-087 on Extended Powers on Confiscation of Assets entered into force, which is in line with Directive 2014/42/EU. on the freezing and confiscation of assets and proceeds of crime.<sup>24</sup> This aim of this law is to expand the competencies of prosecuting authorities in the field of confiscation of assets, in cases where the procedures of the Criminal Code of the Republic of Kosovo are not sufficient. The target of the law is the property of persons convicted of any criminal offense under the Criminal Code of the Republic of Kosovo, which includes: criminal offenses of gains through organized crime, criminal offenses of corruption by public officials, human trafficking, terrorism, cyber attacks, and any other criminal offense that brings material gain in the amount of over 10,000 Euro.<sup>25</sup>

Article 10 of this law clarifies the temporary measures to secure the assets, which include keeping the property in a safe or warehouse, appointing an administrator to maintain the assets, and other steps necessary to maintain the assets and prevent any decline in value.

<sup>22</sup> Law No. 05/L-049 on Administration of Sequestrated and Confiscated Assets. Article 5. Source: <https://bit.ly/3Lgtk1d>

<sup>23</sup> Ibid, Article 15.

<sup>24</sup> Law No. 06/L-087 on Extended Powers for Confiscation of Assets. Source: <https://bit.ly/3so2X00>

<sup>25</sup> Ibid, Article 2.

Despite this, the depreciation of assets remains a major issue with the administration and resale. The laws in force do not provide for concrete actions to be taken in cases of depreciation of assets. It can take years, from the moment of seizure and until the final decision by the court on their confiscation or return to the previous owner, which undoubtedly affects their depreciation and makes it impossible to maintain the value of assets. For instance, in the case of seized vehicles, most vehicles exposed to sun, wind and rain until a court decision is made. Such exposure and poor maintenance leads to the value of the assets to drop significantly over time. For example, Article 16 of Law No 05/L-049 envisages that at when the Decision is made on the revocation of seizure, or return of asset to parties, minutes are taken in relation to the owner of the asset, the state of the asset at the moment of the receipt, the value of the asset, time of receipt, manner of storage of asset, and other relevant information on the asset.<sup>26</sup>

In case of a sale of the asset, the Agency must return the money secured from the sale to the parties, while in case of disposal of assets, parties are compensated according to the provisions of applicable legislation.

However, the law falls short of clearly defining the term 'compensation', as compensation of assets can be done based on the current market value rather than the previous value. Furthermore, the word 'equivalent' is not mentioned in the compensation process, which would imply the equivalent compensation of the asset to the value it had at the time of seizure. Another weakness of these laws is that the role of AASCA in the assets seized by other institutions is not determined, namely the Tax Administration of Kosovo (TAK) and Kosovo Customs, which during routine controls often encounter illegal assets.

## 2.2. Draft Law on the Establishment of the State Bureau for Verification and Confiscation of Unjustifiable Assets

To show efficiency in the fight against illegal property, the Ministry of Justice announced the start of work on the preparation of a concept document for confiscation of illegal property, which was approved on April 13, 2021 by the Government of the Republic of Kosovo. Through this concept paper, the Government demonstrated its institutional readiness to confiscate illegally acquired assets, giving strong indication to citizens that persons engaged in illegal activities will not be able to enjoy the material benefits deriving from such activity, as well as expressing the readiness of institutions in combating informality through the definition of ownership and origin of wealth.

This concept paper has been drafted based on similar provisions on confiscation in England and Ireland, and aims to establish a new Agency with the duty of identifying discrepancies between legal income and acquired assets of officials. Thus, unlike AASCA, the focus of this Agency is only on public officials, namely civil servants and public representatives who are part of the institutions of the Republic of Kosovo.

The concept paper identifies the weaknesses with the current legal basis and the current process of confiscation of assets, which include the lack of coordination between responsible institutions, loss of value of confiscated assets, etc. Data published in this concept paper indicate that the value of freezes and seizures in the last six years is 180 million Euro, of which only 3.5 million were ultimately confiscated, namely only 1.94% of the total amount.

<sup>26</sup> Law No. 05/L-049 on Administration of Sequestered and Confiscated Assets. Article 16.  
Source: <https://bit.ly/3Lgtk1d>

On December 29, 2021, the Government approved the Draft Law No. 08/L-121 on the Establishment of the State Bureau for Verification and Confiscation of Unjustifiable Assets.<sup>27</sup> According to Article 2 of this draft law, the target of the Bureau will be:

- official persons and their assets acquired from February 17, 2008;
- politically exposed persons;
- their members of family; and
- third persons.

This Draft Law allows for an official person to be the target of asset verification 10 years after he/she ceases to exercise his/her function. The Bureau is an independent public institution and has the status of a legal entity. Article 8 also defines its powers and responsibilities, according to which the Bureau has the duty to:

- initiate the procedure of asset verification;
- submit a motion for confiscation to the court;
- cooperate with other relevant institutions.
- publish judgments on the official website of the Bureau;
- publish data related to property confiscation figures;
- report to the Assembly of Kosovo annually, except when the Assembly requests more frequent reports from the Bureau; and
- perform other tasks defined by the legislation in force.<sup>28</sup>

According to the Draft Law, any discrepancy between revenues and assets exceeding the value of 25,000 Euro is considered as a basis for the authorized official of the Bureau to submit a proposal for confiscation of assets. The course of confiscation provides that after analyzing the information and data on the case, the suspect is invited to the proceedings to justify the property within thirty days.<sup>29</sup> Thus, this shifts the burden of proof to the suspect, and if it is proven that the asset was acquired illegally and there is no evidence from the party proving the legal source of the asset, the Bureau officials will send the case to court for confiscation. After submitting the case file to the court, a temporary measure for securing the property may be requested, if it is suspected that the asset may be alienated or destroyed by the accused person.<sup>30</sup>

The Bureau is headed by the Director General who shall be appointed, through a vote by the Assembly of Kosovo, to exercise this function for a term of five years. The work of the Bureau shall be overseen by a commission tasked with reviewing the Bureau's reports, as well as with evaluating, selecting and dismissing the Director General, but shall have no right to intervene in cases that are in verification procedures in the Bureau. On the other hand, a specificity of the Draft Law is the replacement value which is confiscated in cases when it is impossible to confiscate the original asset due to destruction or alienation, as well as the fact that assets now, unlike other laws, include cryptocurrencies.

<sup>27</sup> Draft Law on State Bureau for Verification and Confiscation of Unjustifiable Assets 29.12.2021

Source: <https://bit.ly/3uMKihA>

<sup>28</sup> Ibid, Article 8.

<sup>29</sup> Ibid, Article 20.

<sup>30</sup> Ibid, Article 21.

According to Article 61, confiscated property is administered by the relevant agency for the administration of unjustified assets, which means that AASCA is responsible for administering assets confiscated by the Bureau. Although the concept paper also mentions terms freezing and seizure of assets, the draft law makes no mention of neither, as the focus of the Bureau, according to the draft law, is only on civil confiscation, which means immediate confiscation with a conviction.<sup>31</sup>

However, the terms freezing and confiscation have been replaced by the term 'temporary measures' issued by the court to secure the property. Thus, apart from the impossibility for immediate confiscation until a decision on temporary measures by the court, this draft law does not fully meet the goals of the concept paper, as the minimum value that must be subject to verification under this concept paper and the Law No. 06/L-087 was 10,000 Euro, whereas with the Draft Law it increases to 25,000 Euro.

### 3. Responses to the new legal initiative on the establishment of the Bureau

To date, given the heavy burden of proof, prosecutors have been reluctant to file requests for confiscation and seizure of assets. Therefore, the main purpose of the Bureau is to shift the burden of proof to the accused person in whom there is a discrepancy between revenues and assets. If this burden of proof is automatically shifted upon the initiation of confiscation proceedings, and the accused party is considered guilty without having first the initiating body arguing that there is evidence of unjustifiable property, a conclusion may be drawn that there is a violation of human fundamental rights and freedoms. As a result, attention must be made to ensure that such rights are not violated in confiscation proceedings, namely the principle of 'presumption of innocence', which means that 'anyone charged with a crime must be presumed innocent until proven guilty according to law.'<sup>32</sup>

There were responses on these developments and the idea of the establishment of a new agency by EU officials, who in interviews with local media stressed the need to protect fundamental human rights and freedoms in the process of confiscation of assets.<sup>33</sup> In addition, according to the European Commission report, the legal framework established in 2019 is in line with European standards, namely Directive 2014/42/EU, and thus is rather effective in increasing the amount of confiscated assets following the required criminal proceedings that simultaneously guarantee the protection of fundamental human rights and freedoms.<sup>34</sup>

Article 26 of the Draft Law on the Establishment of the Bureau, which gives right to the court to issue temporary measures to secure assets without prior notice to the party involved in the proceeding, may also be deemed problematic. In addition to the restriction of the work of the Bureau only to public officials and not to other non-public persons who have illegally benefited from any criminal offense under the Criminal Code of Kosovo, the powers of the Director General and the manner of his/her selection remain a concern, as the possibility of ruling political parties seeking to select a politically biased Director through their votes in the Assembly cannot be ruled out.

<sup>31</sup> Ibid, Article 62.

<sup>32</sup> The European Union Agency for Fundamental Rights (FRA) – Article 48 – Presumption of innocence and right of defence. Source: <https://bit.ly/3rCu4WA>

<sup>33</sup> Gazeta Express – Kurti wants confiscation of assets without a conviction, EU speaks to Express. Source: <https://bit.ly/3zKB2xg>

<sup>34</sup> European Commission – Commission Staff Working Document, Kosovo\* 2019 Report. Source: <https://bit.ly/3sQGFVn>

To address these issues, on February 24, 2022, the Assembly of the Republic of Kosovo continued its work with the first reading of the Draft Law No. 08/L-121 on the State Bureau for Verification and Confiscation of Unjustifiable Assets. There were disagreements between MPs of the governing party and the opposition in this hearing too, with the latter often stressing that the draft law is in violation with the Constitution of the country.<sup>35</sup> Therefore, before being sent to the Assembly for approval, the draft law has been submitted for review to the Venice Commission, which issued an official opinion, on June 17, 2022.<sup>36</sup>

According to the Venice Commission, the establishment of a State Bureau aimed at civilian asset confiscation could be an effective step in fighting organized crime and corruption, as well as preventing the use of illegally acquired funds. However, given that such legislation is sensitive in terms of human rights, the Commission calls for civil confiscation proceedings to be based on the Constitution of the Republic of Kosovo, which includes the implementation of the European Convention on Human Rights and other European standards regarding the rule of law and respect for human rights.<sup>37</sup>

The Commission also notes that the low number of confiscation cases can be explained by the lack of implementation of current legislation rather than legislative weaknesses. According to them, the new proposed law alone cannot be expected to solve all the problems of corruption. Hence, a broader approach should be applied, which would include a series of practical measures aimed at increasing the effectiveness of the law enforcement system. Furthermore, it remains doubtful whether the establishment of a new body would make the fight against corruption more effective or would further complicate the system in which a number of bodies are already involved, such as the police, prosecution, tax administration, customs, and the Anti-Corruption Agency. Thus, the Venice Commission proposes a combination of the new system of verification and confiscation of assets with the existing system of asset disclosure of senior public officials, managed by the Anti-Corruption Agency.<sup>38</sup>

In conclusion, the Venice Commission notes that the Draft Law, in its current wording, presents a number of shortcomings. The implementation of this Draft Law may result in violation of fundamental rights guaranteed by the Constitution of Kosovo and the European Court of Human Rights. Consequently, the Venice Commission offers several recommendations, among other things requiring a reconsideration of the need to establish a new body dealing with matters of illegal assets. Should such a mechanism be established, its independence, specialized personnel, conditions for collecting information, which is expected to take place prior to the start of the official verification procedure, determination of the conditions on how the verification procedure should be initiated, as well as the focus of the mechanism on high profile cases should all be ensured. Another important recommendation is the shift of the burden of proof. According to the Commission, the shift of the burden of proof to the party in the proceeding should only take place after the competent authority (according to the current draft law, the Bureau) has presented evidence that indicate that there is at least a probability that the party misappropriated assets.<sup>39</sup>

Based on the findings, the Venice Commission is not categorically against the

35 Assembly of Kosovo – The Assembly reviewed the Draft Law on State Bureau for Verification and Confiscation of Unjustifiable Assets. Source: <https://bit.ly/3OfbEn7>

36 Venice Commission – Opinion On The Draft Law N.08/L-121 On the State Bureau For Verification And Confiscation of Unjustified Assets. Source: <https://bit.ly/3y8hUb8>

37 Ibid.

38 Ibid.

39 Ibid.

establishment of the Bureau, however, it identifies weaknesses in the proposed law which, according to the Commission, should be addressed as they violate fundamental human rights and freedoms, as well as the legal certainty of the country. However, despite these concerns raised by the Venice Commission, the Assembly of the Republic of Kosovo with 58 votes in favor and three abstentions on July 14, 2022, voted in principle the draft law that paves the way for the creation of the State Bureau for the Verification and Confiscation of Unjustified Assets.<sup>40</sup>

## 4. International practices on confiscation of assets

As there is no single international standard on the confiscation of assets but rather a series of national laws of various countries which must be continuously amended and updated to align with international legislation, the following are a number of methods and mechanisms that various countries apply for seizure and confiscation of illegal assets.

### 4.1. In rem model of confiscation of assets

The in rem confiscation model is an initiative of the Legal Aid Program for Latin America and the Caribbean (LAPLAC) and is based on the long tradition of the United Nations Office on Drugs and Crime, UNODC, which aims to fight drugs, organized crime, corruption and terrorism.<sup>41</sup> In rem confiscation is aimed at property or assets acquired from a criminal activity or have an illegal destination rather than the person, implying that such assets acquired through illegal capital cannot gain legitimacy. Thus, the task of prosecutors in the in rem model is to prove that the asset in question was involved in an illegal activity. According to this model, if prosecutors suspect that a certain asset has been acquired illegally, a decision for confiscation can be made on the basis of the evidence that prosecutors have that the property in question was acquired through a criminal offense. The advantage of the in rem model is that it does not require civil or criminal punishment against any individual, and the 'fault' is assigned to the asset. It is a model that can also be used in cases where a suspect is unlikely to be apprehended, has died or is immune from prosecution, thus allowing authorities to confiscate assets or funds without a criminal order, avoiding lengthy court proceedings that may take years, while also preventing asset depreciation.

### 4.2. In personam model of confiscation of assets

In addition to the in rem model, states also use the in personam model when seeking to recover stolen assets by filing a civil lawsuit against a person.<sup>42</sup> This is a process that can be used by citizens or corporate entities with a claim against another, in the context of fraud or illegal acquisition of assets. The in personam model has been a particularly successful mechanism in international cases involving persons or entities where criminal proceedings for corruption, fraud or criminal activity have been difficult to carry out by national courts.

40 Koha.net – Votohet në parim Byroja për konfiskimin e pasurisë, opozita s'e mbështet. Source: <https://bit.ly/3xhKKF4>

41 UNODC Model Law on In Rem Forfeiture. Source: <https://bit.ly/3HzweM5>

42 Council of Europe – Impact Study on Civil Forfeiture. Pg. 12. Source: <https://bit.ly/34FzFSI>

### 4.3. Unexplained Wealth Orders (UWO)

In addition to the two methods mentioned above, there are also other methods that states can use to seize or confiscate illegal assets. One of the most popular and successful methods is that of United Kingdom through Unexplained Wealth Orders (UWO).<sup>43</sup> Unexplained Wealth Orders are a combination of two traditional methods, in rem and in personam, that has found application relatively late in developed countries.<sup>44</sup> The creation of UWOs has been quite effective in combating illicit gains due to their focus on public officials or politically exposed persons.

Two categories of people can be targeted by UWOs:

- Politically exposed persons who run public institutions such as ministers, MPs, ambassadors, or their families; and
- Persons suspected of involvement in serious crimes or persons related to someone involved in these activities.<sup>45</sup>

UWOs differ from traditional laws on confiscation of illicit assets in some respects. For example, even if there is no evidence that the asset was acquired illegally or a criminal indictment, if the state so requests then the asset owner must prove a lawful source of his/her asset so as not to lose it. The order requires the defendant to explain the source of his/her asset property within a certain time frame as determined by the court; in the absence of asset evidence by the defendant, the court wins the argument. In court proceedings, assets are temporarily frozen so that the defendant, knowing that he/she cannot prove the source of his/her asset, does not sell the asset and does not leave the country.<sup>46</sup> As a model it is very effective in the fight against organized crime, as it allows quick responses of state authorities and short court proceedings.

## 5. Practices of the countries of the region

According to Transparency International 2021 Corruption Perception Index, of the Western Balkan countries, Montenegro ranks best at 64th in the world, followed by Kosovo and Northern Macedonia in 87th position, Serbia in the 96th position, whereas Albania and Bosnia and Herzegovina are considered as the most corrupt countries in the region, taking the 110th position.<sup>47</sup> According to the ranking above, the Western Balkans countries are considered to have a very high level of corruption, which has both led to economic damage and hindered their EU membership process. Countries in the region have used various methodologies regarding the necessary steps taken to fight corruption, organized crime and seize illegally acquired assets.

<sup>43</sup> Unexplained Wealth Orders / Briefing Paper Number CBP 9098, 1 October 2021.

Source: <https://bit.ly/3HqKsyR>

<sup>44</sup> Booz Allen Hamilton, Comparative evaluation of unexplained wealth orders. Pg. 1 Source: <https://bit.ly/3HëQtdr>

<sup>45</sup> Unexplained Wealth Orders / BRIEFING PAPER Number CBP 9098, 1 October 2021. Pg. 10.

Source: <https://bit.ly/3B2l53R>

<sup>46</sup> Ibid.

<sup>47</sup> Transparency International, corruption perceptions index / 2021. Source: <https://bit.ly/3qs62qG>

## 5.1. Albania

With the adoption of the Anti-Mafia Law aimed at preventing and combating organized crime, trafficking, and corruption, Albania has shown its determination to confiscate illegal assets.<sup>48</sup> The Albanian Anti-Mafia Law is considered rather advanced due to the fact that in addition to criminal confiscation, which may be initiated with a decision of the state prosecutor, it also provides for confiscation through civil proceedings, through the filing of a civil lawsuit against a person who has acquired assets in the context of fraud or another illegal form.

Article 11 of the law defines the criteria for seizure of assets, including assets for which there is a reasonable suspicion that they were acquired through criminal activities or there is a discrepancy between legally declared income and the value of the property or assets in question. In addition, assets are also subjected to seizure when there is a risk of alienation of funds, assets or other details upon which the confiscation measure has been applied, as well as in cases when the assets or the exercise of a certain economic activity is under the influence of certain criminal groups.

The Anti-Mafia Law is rather advanced in the field of asset management. The Law provides for the appointment of a list of administrators of seized assets who, within a period of 15 days from their appointment, have the duty to present to the court the detailed elements and the state of assets. On the other hand, in addition to preserving the value of assets, each administrator has the duty potentially increase their value. The law also provides for the measures to be taken by the Agency in case of a revocation of the seizure decision and return of assets to the parties. Unlike in Kosovo, these two articles allow the defendants to replace assets with equivalents, if the parties give their consent and the court deems it appropriate, thus preserving the value of the assets for the accused.<sup>49</sup>

## 5.2. Serbia

Like most other regional countries, Serbia is known for its high level of corruption and organized crime. In recent years, as part of the implementation of EU accession reforms, Serbia has reformed its legislation to increase its effectiveness in reducing organized crime and increase the seizure of illegal assets. One of the basic laws used by Serbia is the Law on Seizure and Confiscation of Proceeds of Crime.<sup>50</sup> According to this Law, the competent authorities in charge of tracking, identifying and managing proceeds of crime include: Prosecution, Courts, Financial Intelligence Unit of the Ministry of Internal Affairs, and the Directorate for the Management of Seized and Confiscated Assets.

What is interesting in the Serbian law is the Financial Intelligence Unit, under the Ministry of Internal Affairs, which has the task of detecting proceeds of crime, and other activities in accordance with this law. The law clarifies the procedures that must be followed by competent institutions in the fight against illegal assets. These procedures include financial investigations, temporary seizure, and permanent seizure of assets. Chapter IV is also very important, as it explains the procedures for managing confiscated assets. Article 40 of this Chapter clearly defines where the seized assets should be addressed. For instance, according to this article, objects of historical, artistic and scientific value will be handed over to the competent institutions for protection.

48 Law No. 10192, dated 3.12.2009 on Preventing and Striking at Organized Crime, Corruption and Trafficking through Preventive Measures against Assets. Source: <https://bit.ly/3siRvDe>

49 Ibid.

50 Law on seizure and confiscation of the proceeds from crime / Published in "Official Gazette of the Republic of Serbia" No. 97/08. Source: <https://bit.ly/3AYG2gh>

Possessions in foreign currencies and cash, precious objects, metals, precious stones and pearls will be handed over to the National Bank of Serbia for safekeeping until a final court decision.

Unlike Kosovo and Albania, in addition to having a clear definition of movable and immovable assets, Article 42 of the Law allows the competent authorities in Serbia to sell movable assets immediately in order to preserve their value. Exceptions are made where the court accepts a 'pledge' offered by the asset owner or a third party. The level of the pledge is determined by the value of the seized asset. After receiving the 'pledge', the asset is handed over to the pledgor.

### 5.3. Northern Macedonia

There are a number of laws in the Republic of Northern Macedonia that regulate the issue of confiscation and administration of illegal assets. Law on managing the confiscated property, material benefit and confiscated property in criminal and misdemeanour procedure, adopted in 2008, serves as a starting point and the basis for confiscation proceedings.<sup>51</sup>

According to this law, the powers for the management, use and administration of confiscated assets lie with the 'Agency for the Management of Confiscated Assets'. Article 6 of this law defines the scope of the Agency, which has the duty to manage confiscated assets, implement procedures for confiscation of assets, assess, maintain and sell confiscated assets, and to perform other work as provided by this law. According to 35, in the event the sale fails, the Agency shall hold a new auction through which the assets may be sold below the appraised value but not at a price reduced by one-fourth of the appraised value. Similar to the Serbian law, Northern Macedonian law clearly defines where the assets should be addressed at the time of seizure. For instance, objects of historical and artistic value are delivered to competent institutions, while precious stones are sent for safekeeping at the National Bank of Macedonia.

## 6. Conclusions and recommendations

Current Kosovo laws addressing the issue of seizure and confiscation of illegal assets must be continuously amended to comply with international norms.

Recently, the Government of Kosovo has undertaken a new legal initiative to improve the effectiveness of institutions in the fight against the phenomenon of illegal gain. This new law paves the way for the establishment of the Bureau for Confiscation of Illegal Assets. The draft law on the Bureau introduces new elements to facilitate the tracking, freezing, seizure and confiscation of illegal assets. However, the Venice Commission found serious weaknesses in this Draft Law, which, if adopted, would pose a risk of violation of fundamental human rights and freedoms guaranteed by the Constitution of the Republic of Kosovo and international conventions.

<sup>51</sup> Law on managing the confiscated property, material benefit and confiscated property in criminal and misdemeanour procedure (Official Gazette of the Republic of Macedonia No. 98/08). Source: <https://bit.ly/3JaH1fZ>

Therefore, to be effective in the combat against illegal assets, GAP Institute recommends as follows:

- To comply with the opinion of the Venice Commission, thus ensure that the Government of Kosovo withdraws the draft-law from parliamentary procedure and, in turn, make advancement in the issue of seizure and confiscation of assets by amending the current legislation and enhancing institutional coordination and efficiency. Moreover, this may be the easiest and most efficient way if the vetting process in judicial and security institutions is managed according to the recommendations of the Venice Commission;
- To comply with the 'presumption of innocence' principle, ensuring that the party is not found guilty until proven so according to law;
- To reduce lengthy court proceedings and prevent depreciation of assets, the example of Albania should be followed, where, if the party is acquitted, when returning the assets, equivalent compensation to the value of the asset at the moment of seizure will be ensured;
- To follow the in rem confiscation model, which enables confiscation without a criminal basis, and is usually used in cases where a suspect is unable to be apprehended, is dead or is immune from prosecution, thus allowing the authorities to confiscate assets or funds without a criminal decision, thus preserving their value;
- To better clarify the form of organizing auctions. The example of Northern Macedonia could be followed here, according to which efforts should be made to sell the assets with the higher rather than a lower value;
- Enhance cross-agency cooperation between relevant institutions that have the task of dealing with the prevention of illegal gains and misuse of public finances. In this context, particular attention should be paid to the management or administration of other illegal assets which fall into the hands of TAK or Kosovo Customs, as the applicable laws do not clearly define the role of AASCA with such assets;
- To operationalize the Confiscation Fund, and clearly define how are the confiscated assets used, and what is their value;
- To create a concentrated fund for all institutions dealing with the issue of confiscation and seizure of assets, as currently costs of all actions on the ground are borne by individual institutions separately.







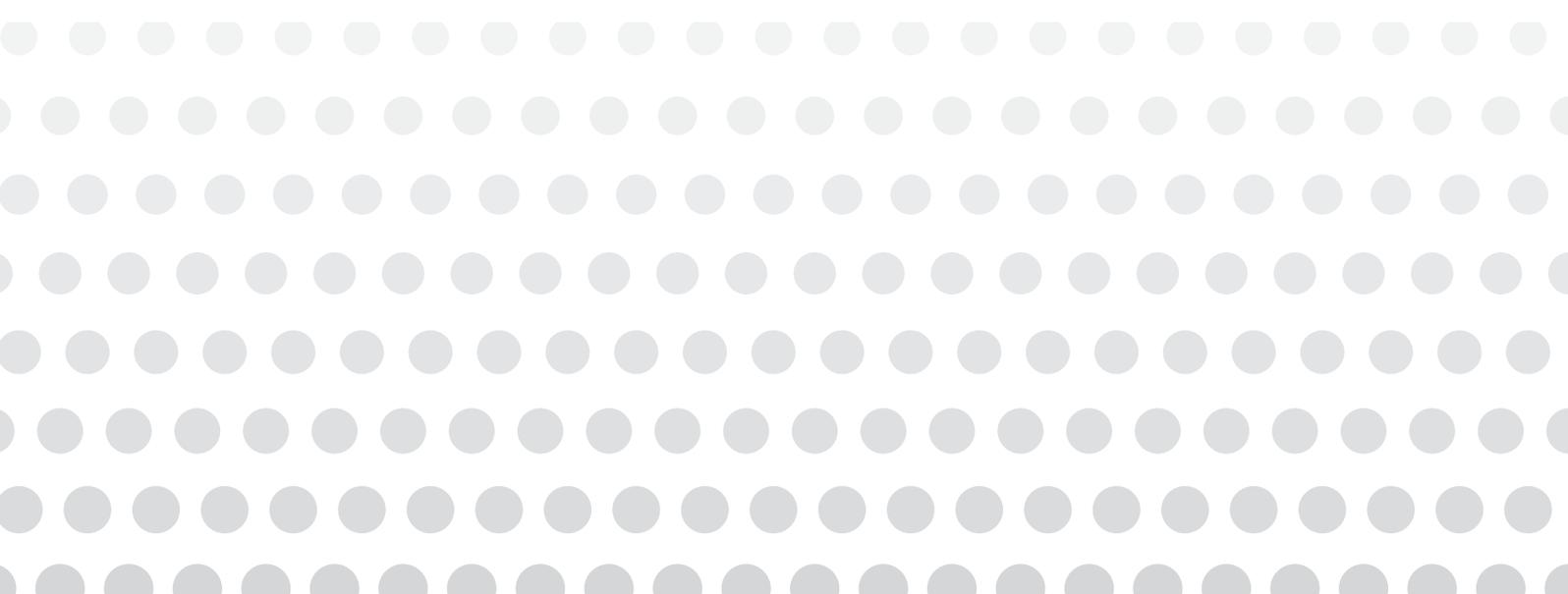
GAP Institute is a Think Tank established in October 2007 in Kosovo. GAP's main goal is to attract professionals to create an environment of professional development and research, as seen in similar institutions in Western countries. This also provides Kosovars with opportunities to research, develop and implement projects in order to advance the Kosovo society. Priority for this Institute is the mobilization of professionals to address the country's economic, political and social challenges. GAP's main goals are to fill the gaps between government and citizens, and between problems and solutions.

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