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Organization for
Democracy, Anticorruption
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ACTION VERSUS PERFORMANCE

CONFISCATION OF PROPERTY IN KOSOVO

MARCH, 2016



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This report was made possible with the support of
CRD- CRD-Civil Rights Defenders, and
KFOS- Kosovo Foundation for Open Society



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The original report was written in the
Albanian language

Published by:

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Anticorruption and Dignity, Çohu!
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www.cohu.org



CONTENTS

0 ⁰⁸

**Executive
Summary**

Methodology

1 ¹²

Context Setting

**1.1 Defining the
Problem**
**1.2 Contemporary
Standards**

2 ¹⁸

**Confiscation
of Assets in
Kosovo**

**2.1 Statistics on
Seizure and
Confiscation of
Property in Kosovo
– Contradictory
Data**

NT

3

32

Confiscation of Property in Regional Legislation and Practice

3.1 The content of the legislation on confiscation of assets in countries in the region

3.1.1 Albania

3.1.2 Serbia

3.1.3 Romania

4

36

A comparative legal perspective for the confiscation of property in Kosovo

5

40

Basic Recommendations

EXECUTIVE SUMMARY

Of the topics that are listed as part of policies to combat organized crime and corruption, confiscation of illegally acquired property represents one of the most significant challenges, because confiscation as a concept, is first and foremost a practical activity that testifies to the willingness of institutions responsible for fighting organized crime and in parallel with this, ensures citizens that illegally obtained assets will not be used to increase the level of organized crime.

The Republic of Kosovo is in the process of drafting legislation that regulates the field of confiscation of property, as a matter of social routine and as an obligation to advance the state-building agenda of the institutional framework of European integration.

However, considering the discourse through which the institutional debate has been opened in this regard, we consider that it is necessary that the confiscation of property as a legal category and as a management structure, should be set in a broader perspective, which will correspond with a proper system that responds to the real needs and the domestic socio-politico-economic and institutional characteristics.

In this regard, in order to measure its effects, it is important to analyze suggestions on amending the current legislation based on existing experience, by providing a broader view about the relevant legal changes that cor-

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This study/survey is built on the basis of the interpretation of data on confiscation of property on regional and international best practices regarding confiscation of property, and by analyzing the content of the current legislation regulating this issue.

respond with the preliminary assessment of how this process has gone in the past, and what are the best practices to address the gaps that have arisen.

This study/survey is built on the basis of the interpretation of data on confiscation of property on regional and international best practices regarding confiscation of property, and by analyzing the content of the current legislation regulating this issue.

The basic idea behind this study aimed to provide an authentic interpretation on what the legal format of the confiscation of property in Kosovo is, and what should be changed in this process. This idea has preceded the study design itself, which was built as a parable on how the financing of criminal activities can be challenged and combated through secured revenue by illegally obtained assets.

To build a vision of the concept of confiscation of property, during the drafting of this study, some models of legislation and practices on the confiscation of property were selected and compared, such examples as from Albania, Serbia, Romania, etc., including the international cooperation in this regard.

METHODOLOGY

The design and the scientific procedures of this study, has been and is a current need, in order to build measurable variables in bringing a new argumentative and analytic discourse on the issue of confiscation of property. Based on these parameters, the organization Çohul has administrated this study to further deepen the content, which will contribute to the process of confiscation of property, based on a combined methodology.

In order to analyze confiscation of property in the context of Kosovo, the starting point of the construction of the analysis was **the reviewing of the international standards**. Furthermore, the current **legislation and practice** of confiscation of property were examined, and some statistics were provided in order to evaluate the degree of implementation of the legislation. As a precursor of these analyses, there have been the visits to relevant institutions, and interviews with these stakeholders in the field of confiscation of property.



01

**CONTEXT
SETTING**

1.1 DEFINING THE PROBLEM

Modern countries have established high-level imperative programs to ensure that the perpetrators of criminal acts, respectively organized crime, be precluded from profiting from their criminal activity.

Many countries and jurisdictions have developed adequate legislation to prevent, seize, and confiscate illegally obtained property, and established judicial practices required to assist the implementation of this agenda.

However, despite the efforts and tendencies to build unique standards, socio-cultural diversity and institutional varieties differ from one place to another, either by format or the extent of the power, which has made impossible the unified existence of these standards. This however does not mean there are no unique principles that are valid internationally in regard to confiscation of property. Furthermore, attempts to repeat the “success stories” from one place to another is an increasing trend and the debate on what is a universal value either in law or in practice continues to provoke lawmakers in many countries. This debate often takes concrete shape, and rises on various issues seen by a global perspective. Among the topics constantly taking place in the discourse of lawmakers regarding the issue of confiscation of property on a global scale, the highlights appear to be:

- a) The growing trend to consolidate special teams to investigate illegal property that is obtained by a criminal offense;
- b) The procedures for reclamation of confiscated assets versus violation of human rights;
- c) Managing and preserving the value of the confiscated property;
- d) International cooperation; etc.

These debates are easily defined in Kosovo. Starting from the topic of institutional bodies that are foreseen to implement the scope of confiscation of property, then the nature of the procedures to complete such a process and the management of the confiscated property, are the key topics that we saw a big gap, which is going to be a subject of this study.

In terms of international cooperation, although The Republic of Kosovo is in the process of consolidation, it still needs to increase its institutional capacity, although relevant institutions are currently part of CARIN network, which is not serving any other direct effect so far, but for exchange of information. But the most necessary is to analyze the level of intersectorial cooperation, because the confiscation of property and the return of property acquired by a criminal act requires cooperation and coordination among the disciplinary structures of the rule of law, the tax authorities, customs, financial control authorities etc. This cooperation is required in the first place not only to act against organized crime, but also to prevent it. Therefore, institutions that operate with information to manage activities on security, and those that are specialized in combating crime should have joint intersectional access.

In general, though they set the stage for an action system, not yet well defined are those values which characterize the confiscation of property in Kosovo. In other words, the ambiguities go from the understanding context of the applicable legislation, to the ambiguities on what represents confiscation as a whole, and what represents or to where expands the component parts of this process, such as freezing and seizure of assets.

As we will see below, the legislative tradition of confiscation, by the format as it has been used so far, has not shown satisfactory measures to build a state “agenda” for the addressed problem. There is lack of substantive debate about to whom the seizure is addressed, and whether the same corresponds to the socio-cultural characteristics of the country. Thus, the tendencies of the ori-

entation of the system towards a general inclusion based on the principle “Law the same for all” are not clear, or if it is intended for a “Cleopatra” system to be built, which for a subject will have mainly the private sector and the holders of senior managing positions in it.

Taking into account the above findings, Çohu! anticipated some of these issues to be raised through this analysis and to serve in the process of reviewing the legislation. In this context, starting from theoretical reflections and measurements of institutional reality, the study is built with a tendency to provide answers and alternatives for at least some of the debates that belong to this area, which are listed below:

- Is confiscation of property a priority in the rule of law agenda in The Republic of Kosovo?
- What are the statistics of confiscation of property, the seizure and frozen assets and, can these be indicators to measure the degree of the implementation of the applicable laws?
- Was the Law on Extended Power a wise solution, and what substantive format should a new law have regulating this field
- Are judges and prosecutors in Kosovo prepared to implement the government policy of confiscation of property? Etc.

“

Many countries and jurisdictions have developed adequate legislation to prevent, seize, and confiscate illegally obtained property, and established judicial practices required to assist the implementation of this agenda.

1.2 CONTEMPORARY STANDARDS

In the institutional, legal, and political sense, confiscation of property is an element that takes place in the domestic laws of modern states. While at the international level, despite efforts to unify the character of policies on confiscation, we still cannot say that there exists a unique methodology and standardized in terms of legal proceedings, as well as a substantive structure of the laws nature. However, if it should be noted of what represents, the seizure as an international standard, a starting point and a good base should be referred to the Anti-Corruption Convention of the United Nations (**United Nations, Office on Drugs and Crime, 2004**).

The United Nations Convention against Corruption has been a great incentive to create many legal and institutional mechanisms that address the issue of confiscation of property. Points 1 to 6 of Article 52 of the Convention, affirm and require a good financial control and a good system of declaration as a precursor to identify assets acquired illegally, while Article 54¹ makes way for the establishment of mechanisms that countries should create, so this policy can be implemented properly.

In the European Union context, there were some rules and guidelines that have gradually advanced on confiscation of property policy. Since the initiative for joint action of 1998 (Act 98/699 JHA), money laundering, identification, freezing and confiscation of assets acquired through crime ², the European Union has repeatedly issued a number of directives that aimed to advance this agenda and mobilize member states to set standards in the fight against organized crime, along with the process of confiscation of property. In 2001, the EU adopted the Council Framework Decision on money laundering, the identification, investigation, freezing and confiscation of assets acquired through crime, which act aimed to encourage member states to further the implementation

of the 1990 EU Convention on the same topic. In 2005, after an analysis was made on the implementation of to-date guidelines, and considering that certain sectors of organized crime (such as the trafficking of migrants) were still applicable; in February 24, 2005, the European Council approved the 2005/212 / JHA Act on Confiscation of Property acquired through crime and further advanced the discourse, particularly giving it a full criminal character. Through this act, the EU placed some well defined standards as to when a confiscation should take place³. However, in addition, a feature of this legal act also offered alternatives that member states could use other legal measures not necessarily with a criminal character. Other important EU acts that are in the field of confiscation of property may be considered the decision of Member States on the Principle of Mutual Recognition to Confiscation Orders (2006/783 / JHA), then that Coordination and Cooperation between the confiscation offices of member states and those that are part of CARIN network (2007-845 JHA).

In 2014, the European Parliament adopted the Directive 2014/42/EU ⁴ which summarizes the European Union's commitment to transform the issue of confiscation of property at a higher priority and the requirements to achieve concrete results in this regard. In this directive, it is important to note that some aspects relating to the confiscation, again it is attributed to the Member States responsibility.

As it can be seen, confiscation of property cannot be defined in a unique standard, but from a number of systems substantially similar and tendencies toward unification. It is important to highlight some of the models applied to confiscation of property, and generally includes three models:

1 United Nations Convention Against Corruption, Chapter V, Return of Property, Articles 51-59, pp 42-48, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

2 Official Journal of the European Union Act 2001/500 / JHA, dt.05.07.2001, L 182/1, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001F0500:EN:HTML;](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001F0500:EN:HTML;_ga=2.147111111.147111111.147111111.147111111.147111111.147111111)

3 Official Journal of the European Union Act 2005/212 / JHA dated. 15.03.2005, L 68/49, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:en:PDF;](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:en:PDF;_ga=2.147111111.147111111.147111111.147111111.147111111.147111111)

4 Official Journal of European Union, Directive 2014/42/Eu, 29.04.2014, L 127/39, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0042;](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0042;_ga=2.147111111.147111111.147111111.147111111.147111111.147111111)

- 1) Criminal based confiscation;
 - a) Collection of information, evidence and asset tracking;
 - b) Asset Protection;
 - c) Judicial review;
 - d) Implementation of judicial decisions; and
 - e) Return of assets;
- 2) Mixed confiscation (a combination of civil and penal model which initiated the administrative order from prosecutors taking into account indications such as the declaration of assets etc.;
- 3) Confiscation as a result of civic action (civil);

These models are applied in different measures depending on the legislative format, but generally some of the actions deriving from them include actions such as:

- a) Orders by courts or other state bodies to direct freezing or confiscation of property;
- b) Confiscation of property not necessarily based on a criminal conviction, especially in cases of death or absence of the perpetrator;
- c) Confiscation of the property of foreign origin, arguing act of money laundering;
- d) Court orders for compensation of property damage or recognition of a party against another party, since it is established that the party has been the beneficiary of wealth through corruption;
- e) International cooperation and return of assets; etc.⁵

Depending on the model and legal regulation on confiscation of property, there are legal procedures and a methodology. If viewed in a generalized way, these legal procedures are followed by several steps, which mainly include⁶:

In general, if we analyze the legal basis and institutional policies related to confiscation of property, it appears that the trend at the international level about the establishment of unique principles and standards mainly generates and advocates around the following⁷:

- 1) Establishment of confiscation models that correspond to the characteristics of the specific countries;
- 2) Establishment of specialized bodies that implement the confiscation system;
- 3) Guarantee that all steps will be respectful of human rights;
- 4) Ensure that the confiscation of property to be the result only when a court order is issued, either in criminal proceedings or civil; etc.

Furthermore in this analysis, we will present the contextual reality in Kosovo on the perspective of the standards mentioned above, in order to see the institutional awareness developed in this direction, and to understand how the system of confiscation of property in Kosovo works, in comparison to these standards and principles that are applied internationally.

⁵ J.P. Brun, L. Gray, C. Scott, K.M. Stephenson "Asset Recovery Handbook: A guide for Practitioners" World Bank, STAR, 2011, fq 1;

⁶ J.P. Brun, L. Gray, C. Scott, K.M. Stephenson "Asset Recovery Handbook: A guide for Practitioners" World Bank, STAR, 2011, fq 6;

⁷ Transparency International, Bulgaria, Rumania, Italy, "Confiscation of Criminal and Illegal Assets: European Perspectives in Combat Against Serious Crime" Policy Paper available at: http://www.confiscation.eu/site/wp-content/uploads/2015/03/Policy_Paper_EN_ëeb.pdf



02

**CONFISCATION
OF PROPERTY IN
KOSOVO**

Kosovo is a new country and is still being consolidated. The background of the process of confiscation of property in Kosovo is rather older than its declaration of independence.

Kosovo legal provisions for confiscation of property after the war, and the establishment of international administration are initially defined by the Criminal Code of 2004. More so, the legal basis for the confiscation of property existed in earlier periods during the administration of Kosovo from the legal system of former Yugoslavia.

However, provisions for confiscation roughly as they are now and which have been since 2004⁸ in the Criminal Code and the Criminal Procedure Code, have not shown success in combating unjust enrichment. Therefore it is more than necessary to draft the new legislation, which in fact will change even more basic aspects of the legal nature, rather than to focus on the structure of the process of confiscation of property.

The precursor to the conclusion of the need for new legislation and a new spirit in Kosovo, regarding the issue of confiscation of property, is the analysis of the current legislation and the previous one, along with the trajectory of their evolution and the results achieved during their implementation. The main grounds of the confiscation of the material acquired by a criminal offense in the past have been the Criminal Code and Code of Criminal Procedure, to be completed later by the Law on Extended Powers for confiscation of property acquired by criminal offense. In a critical and analytical look at these legal tools, there are some significant deficits that we have considered and which are as follows:

a) The Criminal Code does not mention at all the freezing of assets, but only the confiscation of the material acquired by a criminal offense. Freezing of assets is provided only in the Criminal Procedure Code, Article 264, which states that the assets can be frozen if “the property was used in the criminal investigation – if it is an evidence of the offense under investigation, – it was acquired by the offense under investigation “. Thus, we present a real paradox as it can be seen in the Criminal Procedure Code, the procedure of temporary frozen assets, while the Criminal Code which should make the codification

of each offense, consequently the confiscation of assets, does not mention either freezing or seizure of assets. This implies that our Criminal legislation’s does not recognize (or partly recognizes), the judicial institution of freezing of property, but only the confiscation of property institution, and this only after the issuance of a judicial decision with which the suspect has been convicted of a criminal offense. After the conviction of a criminal offense, the public prosecutor of the case can initiate within 30 days the based request to investigate the suspicious property that the convicted person for the criminal offense may possess. This implies that no ones property can be investigated, frozen or confiscated, until there is pronouncement of a sentence for a criminal offense by the court;

- b) The Criminal Code expressly states that⁹: “no one can retain a material benefit acquired by committing a criminal offense, the material benefit acquired by a criminal offense shall be confiscated by the judgment of the court, if it is determined the commission of the offense “. This implies that in principle, the legal basis for the confiscation of property acquired by criminal offense exists in the Criminal Code. However, this legal basis, together with the Law on Extended Powers, deals only with the cases of confiscation of property acquired by criminal offense, in this case expressly excludes any confiscation of property for which there is evidence that is derived from criminal activity, although the same has not been the subject of investigation and court decisions. This brings the debate on the need to have a new law that enhances the confiscation agenda beyond the connectivity with a criminal offense;
- c) In the current legislation, the burden of proof on verifying the origin of the property if it is acquired illegally or not, (through criminal offense) falls generally to the prosecution. In this case, the expected results of the cases emphasize the ability of prosecutors to issue the necessary evidence regarding a criminal offense, and consequently their performance as an indicator on fighting organized crime and confiscation of property obtained through criminal offense. By this legal infrastructure, there is no possibility

⁸ Reg. 2003/25 Official Gazette 6 July 2003, the Criminal Code of Kosovo, Chapter VII, Sections 82-85, http://gazetajnk.com/repository/docs/RA2003_25_CCintranet_295748.pdf;

⁹ Code no. 04 / L-082, Criminal Code of the Republic of Kosovo, Article 96, <http://www.kuvendikosoves.org/?cid=2,191,914>

of confiscation of property acquired by criminal offense when the prosecutor fails to collect facts and sufficient evidence to link the asset with the criminal activity, and therefore leaves room for the sophistication of organized crime actors to cover up and cut off their property from their criminal activity. A debate on alternatives of burden of proof is extremely necessary, and stimulates a more efficient combat of this phenomena;¹⁰

- d) The manner of confiscation of property acquired through commission of criminal offenses according to the methodology prescribed in the Criminal Code of the Republic of Kosovo is as follows: Material benefits shall be confiscated from the perpetrator or when confiscation is not possible, the perpetrator shall be obliged to pay an amount of money corresponding to the material benefit acquired¹¹. Similarly, it is regulated by the Law on Extended Powers for confiscation of property acquired by criminal offense. This law gives the right to the prosecutor of the case to request the procedure of property of material benefit, but first it needs to have a judgment convicting the suspect. **Property can be confiscated even if there is no association with punishable criminal offense, if in similar a circumstances one cannot justify the owned property.** But in all these the prosecutor should make a based claim, otherwise the application is rejected by the trial chamber¹². Criminal Procedure Code, unlike the Penal Code and the Law on Extended Powers for confiscation of assets acquired by criminal offense, besides confiscating also foresees

procedures for temporary freezing of assets, and seizure of assets. From these three mechanisms until now, the eligible cases on freezing assets did not materialize for various reasons. According to a legal standpoint, cases such as the one of Natali Veliajt, Medicus Clinic, then the alleged corruption cases involving senior officials of government departments such as the Ministry of Transport, asset freezing measures were not implemented¹³. Reasons for hesitating on the procedure of freezing of property stiffness are not very clear, but generally this is due to lack of direct court orders on freezing of assets. Under the Criminal Code, any building, immovable property, movable property, or asset that the state prosecutor has articulated evidence indicating suspicion if:

- a) The building, immovable property, movable property or asset was used in the crime offence that is under investigation;
- b) The building, immovable property, movable property or asset is evidence of a criminal offence under investigation; or
- c) The building, immovable property, movable property or asset was acquired by criminal offence under investigation. Any financial account belonging to the defendant under investigation, in which there may be means which are: the income by criminal offence under investigation; or used in the constant commission of the criminal offence under investigation.¹⁴

10 These models are known, as it may be the case with some regional countries such as Albania, Law on Preventing and Combating organized crime and trafficking through Preventive Measures against Property Article 21, paragraph 3 says: "The burden of proof to prove that the properties are acquired legally, belongs to the person, against whose properties are on the confiscation process. (on Preventing and Combating organized crime and trafficking through Preventive Measures against Property of the R. of Albania Article 24 paragraph 2 says: The court can decide the request for seizure of property when: a) criminal proceeding initiated against a person dismissed from the proceeding because: i) the insufficiency of the evidence; ii) the death of a person; iii) that person can not be taken as a defendant and can not be punished; b) declared innocent person liable for: i) the insufficiency of the evidence; ii) the offense is committed by a person, who can not be charged or convicted; c) the person is prosecuted for an offense, which is included in the scope of this law, but during criminal proceedings changed the legal qualification of the offense and the new work is outside the scope of this law.)

11 **Penal Code of Kosovo**, Article 97, <http://www.kuvendikosoves.org/common/docs/ligjet/Kodi%20penal.pdf>

12 Law on Extended Powers on confiscation of property acquired through criminal offense Article 6.

13 Portali Telegrafi: <http://www.telegrafi.com/lajme/deshtojne-urdheresat-per-ngrirje-dhe-konfiskim-pasurie-2-56172.html>

14 Criminal Procedure Code, Article 264, http://www.kpk-rks.org/assets/cms/uploads/files/Kodi_i_procedures_penale.pdf;

1. If an investigative stage is authorized for a criminal offence listed in Article 90 of the present Code, the state prosecutor may issue an order to prevent the sale, transfer of ownership, or withdrawal from an account any item that is described in paragraph 2 or 3 of this Article.
2. Any building, immobile property, mobile property or asset that the state prosecutor has articulable evidence which demonstrates grounded suspicion that:
 - 2.1. the building, immobile property, mobile property or asset was used in the criminal offence being investigated,
 - 2.2. the building, immobile property, mobile property or asset is evidence of the criminal offence being investigated, or
 - 2.3. the building, immobile property, mobile property or asset is a proceed of the criminal offence being investigated.
3. Any financial account belonging to the defendant of the investigation that may contain funds which are:
 - 3.1. proceeds of the criminal offence being investigated, or
 - 3.2. used in the continuing commission of the criminal offence being investigated.
4. An order by the state prosecutor under this Article shall have the following effect:
 - 4.1. any bank or financial institution which receives the order under this Article shall imme-

Thus as it can be seen, the three pillars of legislation regulating the issue of confiscation of property in Kosovo, have discrepancies between them and thus cause confusion to understand the face of the system. As a result of these discrepancies, there is a lack of proper identification when operating with the logic of the Penal Code, Criminal Procedure Code, or the Law on Extended Powers. To this effect institutional debates are raised. The Government of Kosovo, respectively the Ministry of Justice, for a long time had proclaimed rhetorically that soon it will draft and adopt a so called “**anti-mafia**” law, but in fact it turned out to be exactly the Law on Extended Powers, the effects of which have not been measured yet due to lack of the reference during the review of proce-

diately prevent any further activity from occurring with the bank account described in the order. The bank shall not be responsible to the owner of the bank account for compliance with the order under this paragraph.

4.2. Any other party which receives the order under this Article shall take any reasonable step to comply with the order.

5. An order from the state prosecutor under this Article may only be issued once and shall be effective for only seventy-two (72) hours from the issuance of the order.

6. The order of the state prosecutor shall describe the building, immovable property, movable property, financial account or asset and shall command the recipient to prevent the sale, transfer of ownership or withdrawal from the account for seventy-two (72) hours from the issuance of the order. The order shall state the time of issuance and the time of expiration of the order. 7. An order under this paragraph may only be issued by the state prosecutor if he or she also submits a request to the pretrial judge for an attachment order under Article 265 of the present Code for the asset described in the order.

Article 265 Attachment Order

1. The state prosecutor who issues an order to temporarily freeze assets under Article 264 of the present Code shall immediately submit to the pretrial judge a request for an attachment order for the asset described in the order to temporarily freeze assets.

2. The request for an attachment order shall contain the following:

- 2.1. a copy of the order to temporarily freeze assets,
- 2.2. a description of the articulable evidence that justifies the order,
- 2.3. a description of the necessity of the attachment order to prevent the sale, transfer or withdrawal from the account of the asset described, and
- 2.4. the identity of all persons with a financial or property interest in the asset described, as listed in cadastral records or other government records.

3. The pretrial judge shall issue an attachment order for each asset requested if the state prosecutor demonstrates with articulable evidence grounded cause to justify the order.

4. The pretrial judge shall deny or issue the attachment order prior to the expiration of the order to temporarily freeze assets.

5. An attachment order issued by any pretrial judge in Kosovo shall have jurisdiction throughout Kosovo.

6. The attachment order shall describe the building, immovable property, movable property, financial account or asset and shall command the recipient to prevent the sale, transfer of ownership or withdrawal from the account for thirty (30) days from the issuance of the order. The order shall state the time of issuance and the time of expiration of the order.

7. The attachment order shall be served on the financial institution or other party on whom the order to temporarily freeze assets was served.

8. The attachment order shall also be served on the defendant and all other persons with an interest in the asset described. The attachment order shall schedule a hearing within three (3) weeks and shall state the following: “The property listed in the attachment order has been frozen for thirty (30) days. A hearing has been scheduled. If you intend to challenge the freezing of this property, you should attend the hearing and you will have the opportunity to argue for the release of the property. The long-term attachment of the property may be ordered at this hearing and this will affect your interest in the property.”

9. An attachment order under this Article shall have the following effect:

9.1. any bank or financial institution which receives the order under this paragraph shall immediately prevent any further activity from occurring with the bank account described in the order. The bank shall not be responsible to the owner of the bank account for compliance with the order under this paragraph.

9.2. any other party which receives the order under this paragraph shall take any reasonable step to comply with the order.

dures and the models of confiscation of property. Despite the rhetorics to issue such a law to “meet the European standards” which was considered a major achievement of the ministry and government, we have analyzed the flow and logic from which this law has derived, for which we will talk below, and which in fact, even after three years of entry into force has not produced any real effect. **But before** we come to the measurement of the effects of the law, it is important to address the complete agenda which has evolved over the confiscation of property in Kosovo. Initially, the Ministry of Justice in late 2009 adopted the Law on Managing Sequestered or Confiscated Assets by which law has foreseen the establishment of the Agency for the Administration of Seized and Confiscated Assets. The question in this case is actually the lack of understanding to establish an institution that will deal with the management of confiscated property, while a law did not exist by which that property, would be confiscated. Consequently, from the first steps it was clear that there was a proper “policy” regarding confiscation being built, but the mechanisms that this “policy” established did not have the adequate consistency. Despite the signs that the process of consolidation of the system of confiscation of property in Kosovo is placed, and the completion of a first draft of the law by the MoJ which has risen for discussion, it was noted that the willingness to accept the recommendations of civil society did not meet expectations. Civil society gathered on a forum of several non-governmental organizations and developed some recommendations, which if not included in the draft law then the law would be considered totally useless, since it was not targeting anything new. As we concluded above, the main provisions that this law contained were already regulated by the applicable legislation in Kosovo (Kosovo Criminal Code, Code of Criminal Procedure). Part of the recommendations of civil society actors were:

1. *To change the name of the draft law, which at the same time should reflect its scope and purpose. The recommendation was that the qualification “assets obtained by commission of the offense” be changed to “property obtained illegally” (even when not related to a criminal offense).*
2. *Assets acquired illegally to be verified by the suspect, not ex officio. By transferring the burden of proof to the suspect, it would increase the possibility of more efficient fight against organized crime and illegal property. Such ex-*

perience that was recommended already was proven successful in countries in the region, such as Albania ¹⁵, Slovenia, and Bulgaria.

3. *The draft law should also apply to assets acquired illegally by suspects, created before the enactment of this law, so it would allow its retroactivity, starting in December 1999, after the establishment of the new political environment in Kosovo.*
4. *The creation of special mechanisms within the existing institutions (police, prosecution, courts) in order to implement efficient legislation in this area, etc.*

With all the media rhetoric that attempted to balance the substantive deficit of the law with the anti-mafia terminology that the MoJ promoted and the willingness to include a number of recommendations that would make this law more efficient, it was not accomplished. Furthermore, the coverage of the content of this draft under that title to meet all European Union standards was unreliable, since as we have explained in the first chapter, there is no unique system within the European Union under which confiscation of property operates and member countries of the EU, have regulated this area through national legislations.

Law on Expanded Power of the confiscation of property acquired by criminal offense¹⁶, regulated in a way that only assets acquired by criminal offense can be confiscated. There should be initially a judgment by which a person was found guilty of a criminal offense, and then if the assets of the convicted were acquired by a criminal offense or in similar circumstances to those of a criminal offense, only then confiscation of that property can be requested. Such provisions have been and are applicable in the Criminal Code of Kosovo since April 2004, when it entered into force of the Provisional Criminal Code, and then the Criminal Code of the Republic of Kosovo. Experience has shown that very few cases of confiscation have been

implemented based on these criminal norms. Legally it has been and remains difficult to prove the connection of cause and effect, in order to prove whether by a criminal offense certain property has been acquired. It must first be verified and proven guilty of a specific criminal offense and then verified that through that criminal offense, the person convicted has acquired that property. Moreover, the new law except that has repeated and is based on the existing legal basis, excluding the possibility to deal with that “kind of property” possessed by people with higher official functions, or what modern theory recognizes as a “kleptocratic system.”

Thus, the Law on Extended Powers can be considered first and foremost an annex on the powers of prosecutors, judges, investigators, and institutional framework on confiscation of property, just as an alternative extension when the Criminal Procedure Code was not enough, but it was not a fundamental law that would establish a proper basis of state policy on confiscation. The character of this law pretends to visualize a clean penal system, referring mainly to persons who have committed a criminal offense. ¹⁷ This undermines the debate whether this is the right format, and if it can guarantee that the actors of organized crime and economic crime at the institutional level known as “white collar” may be its subject. However, before we prepare to debate, the issues that we consider important to be treated and which should take place in future reviews of the Law on Confiscation of Property, it is important to know the extent to which the existing law has been implemented, and what effects have been achieved. To build such an image, Çohu! has undertaken a series of interviews with implementing stakeholders and institutional position holders who fight organized crime.

Thus, according to the National Coordinator for Combating Economic Crime ¹⁸, the nature of confiscation of property based on the Law on Extended Powers until now, does not serve as a proper base for understanding whether the system is functioning. According to him, there are a number of problems that accompany the entire structure of confiscation, because of the legislative, implementation and managing nature, among which are listed as follows:

¹⁵ As in the case with some regional countries such as Republic of Albania, Law on Preventing and Combating Organized Crime and Trafficking through preventive measures against property article 21, paragraph 3 says: The burden of proof to prove that the assets were acquired legally, belongs to the person, against whose properties the confiscation is being made.”

¹⁶ Official Gazette of the Republic of Kosovo Nr. 5, 8 March 2013, Law Nr. 04/L-140, <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=8651>;

¹⁷ Po aty, Neni 2;

¹⁸ Interview conducted with the State Prosecutors Office, with the National Coordinator for Combating of Organized Crime and Corruption, z. Shqipidon Fazliu, on 24 agusut, 2015 at 10:00.

- Law on Extended Powers, although intended to give more space to prosecutors, investigators and judges, and basically indicated a good and meaningful law, in reality failed as a mechanism to provide results even after three years of its adoption. So far, no case has been solved exclusively by reference to this law, and the confiscation of property has continued to be based on principles and procedures defined in the Penal Code and Criminal Procedure Code. Thus, it follows that the review of legislation on confiscation of property, which is now initiated by the Ministry of Justice, was made without knowing in any case what represents the existing law.
- Problems with the poorly defined terminology have often been an obstacle to prosecutors and investigators to undertake independent investigations concerning the nature of the criminal offenses to which it should follow the confiscation of property. To illustrate this, Fazliu cites a case in which “ 86 kg of drugs have been confiscated, but the vehicle in which the amount of substance is found was not confiscated”.
- The nature of confiscation so far mainly has been associated with criminal offenses of organized crime, the property of the holders which was based in buildings, houses, motels, and cars, of which, excluding cars, real estates could not be confiscated. In addition, Fazliu criticizes the method of the management of seized or confiscated property, for which there is no efficient operation, precisely as a result of prolonged procedures arising from this legal basis.
- According to Fazliu, the Law on Extended Powers had to be accompanied by institutional capacity building, respectively specialized prosecutors and investigators that would deal exclusively with the implementation of the directives emanating from it. However, such a thing is not done. Excluding some training at the local level in which participated a number of prosecutors and investigators, generally there are no specialized prosecutors and investigators who deal exclusively with confiscation of property;
- Incentive indicators, to start a process of confiscation according to contemporary practice should

be derived from some parameters such as lifestyle, real estate and financial, which would represent a discrepancy with the standard of work and career of an official or a particular citizen. Although it is specified while the system of confiscation in Kosovo has a criminal basis, then no indication can not be taken as long as their holders have not been previously convicted of a criminal offense;

- According to Fazliu, it is really necessary for the existing legislation on confiscation of property to be reviewed and amended, respectively, a new law with the full character of the concept known as “anti-mafia”, that would fulfill the gaps faced until now in the field of confiscation of property;

One of the chain actors for implementing confiscation of property is the judicial sector. A confiscation of property perspective and assessments related to legislation was taken from interviews with the President of the Basic Court in Ferizaj, Bashkim Hasani.¹⁹ According to him, the current law has been a repetition of existing legislation, and that a new law is extremely necessary. Hasani also considers that the cases dealt with criminal basis that exist in the Law on Extended Powers, were mainly cases related to criminal offense of organized crime, or a criminal nature such as prostitution, drugs, and trafficking, in which case judges and prosecutors, according to him, still have not addressed and have not built an image that looks like a case of confiscation related to senior public officials. The need for a new law should be guided by experience so far, and to overcome notions closely related to criminal offense, i.e having the features of the “anti-mafia” law, where the nature of confiscation to be passed gradually to the model based on a civil aspect.

A closed and reserved perspective regarding the functioning of the Law on Extended Powers reflects the Minister of Justice, Hajredin Kuçi.²⁰ For Kuçi, the law has been very good, an advanced standard and not only for Kosovo, but comparable with the best laws at the EU level, and which regulates the field of confiscation of property according to parameters and institutional capacity that the Republic of Kosovo is currently has. However, Kuçi, whose ministry is trying to draft

¹⁹ Interview conducted with the President of the Basic Court in Ferizaj, Bashkim Hasani on September 2, 2015, at the offices of the Basic Court in Ferizaj;

²⁰ Interview conducted on 26 august, 2015 with the Minister of Justice, Hajredin Kuçi, in the Ministry of Justice premises;

“

One important indicator to understand the degree of implementation of the current law, and to have a deeper understanding on how it is implementing the policy of confiscation of property in Kosovo, are the statistics of confiscation of property, and their accompanying analyzes.

the new “anti-mafia” law, admits that it is possible to make a number of changes that will contribute directly to judges, prosecutors, and investigators, giving them a more systematic approach. For the Minister of Justice, there is a need of specialized teams that would deal with confiscation of property (which during the last two years have not been built: Çohu! comment) and will be addressed in the new law. Despite a desire to have a pro “anti-mafia” law rhetoric that would change the base of the system of confiscation from entirely criminal into a combined system of criminal and civil, and where the burden of proof is shifted from the investigating bodies to the suspect, Minister Kuqi is more reserved and reluctant to accept that the ministry he leads is thinking on these lines. One of the problems that Kuçi considers as an obstacle to cross, is a civil confiscation system that connects with many cross-cutting issues for which there is still no compliance. For example, ownership of undefined and without legalized real estate, allocated in the traditional way, according to him, is a problem that argues that a system of civil confiscation that applies to all citizens of Kosovo would be difficult to implement. Minister Kuçi insists on advancing and changing the law, the main changes of which will be raised regarding the issue of burden of proof, then enforcement mechanisms and harmonization of the legal terminology of the law in the Criminal Code and the Criminal Procedure Code, but not in a new spirit of the concept of “anti-mafia”.

One important indicator to understand the degree of implementation of the current law, and to have a deeper understanding on how it is implementing the policy of

confiscation of property in Kosovo, are the statistics of confiscation of property, and their accompanying analyzes.

2.1 STATISTICS OF SEIZURE AND CONFISCATION OF PROPERTY IN KOSOVO - CONTRADICTIONARY DATA

In the general policy of the inclusive category of confiscation of property, there are three basic concepts: freezing, seizure, and confiscation. Naturally as separate categories, each represents a column with different features and procedures. In Kosovo, these notions often appear similar in how institutions interpret statistical data. More specifically, the present tendencies to work effectively with major seizure digits as confiscation are often present. As a result, often we came across different numbers of confiscation of property over the years, these contradictions are provided in the following table. (See table no. 1)

The data presented in the table below shows a statistical discrepancy to the fact that on one hand we have the numbers of seizures, and on the other hand those of confiscation which in most cases are larger. Consequently, for example, if in 2012, we have 2 cases of seizures, in the same year we have 21 cases confiscation. Here the question arises, by the logical course confiscation was the final act after the final court decision while seizure was a temporary act, the high and disproportionate numbers of confiscating in relation to the seizure tend to misguide an independent analyst who deals with such measurements.

Moreover, from the same source, except in a separate report, it appears that the nature of the confiscated assets in the period, before the adaption of the current law, which was generally transitory, dealt mostly with pets, vehicles, and tools that the perpetrators were

caught with in the criminal act.²¹ So, until the adoption of the new law, confiscation of property had followed a trend such that only dealt with property and assets which were used during the commission of a criminal offense, without entering deeper into the nature of organized crime and the property that was acquired from criminal activity.

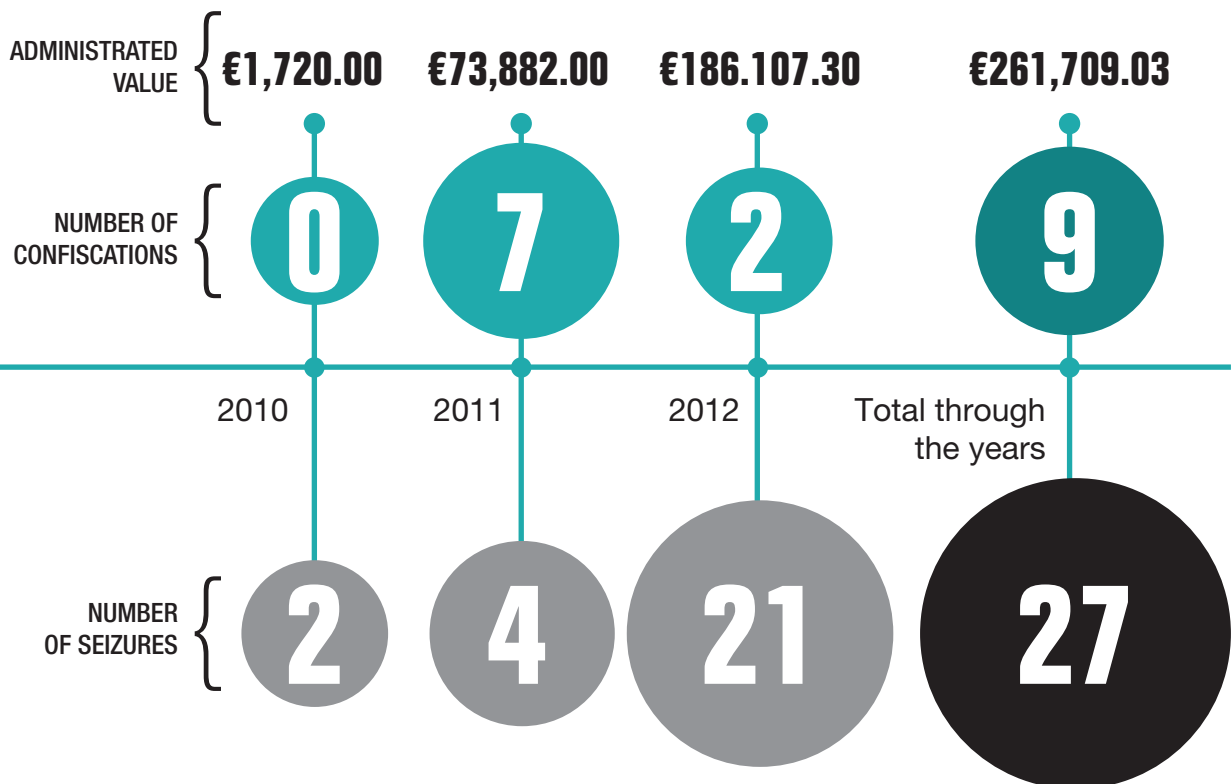
After the amendment of the Law on Extended Powers, through which it was alleged for the system of confiscation of property in Kosovo to be built, there could be seen some substantial effects of the nature of confiscation and values of confiscation. However, even at this point it is difficult to specify the values of property that the state froze, seized, and confiscated. The most that can be done by the statistical data, is to build an image that there was a true rising trend of seizure and confiscation. Thus, for example, the following table shows the confiscation of property for 2013, 2014, and 2015, from a report by the Group for Juridical and Political Studies. (See table no. 2)

²¹ Ministry of Justice, the Public Auction Invitation, AAPSK dated. 07.03.2011: http://www.gazetajnk.com/repository/docs/23_02_2011__Ftes_per_ankand_publik_Referenca_AAP-SK-003-1.pdf

“

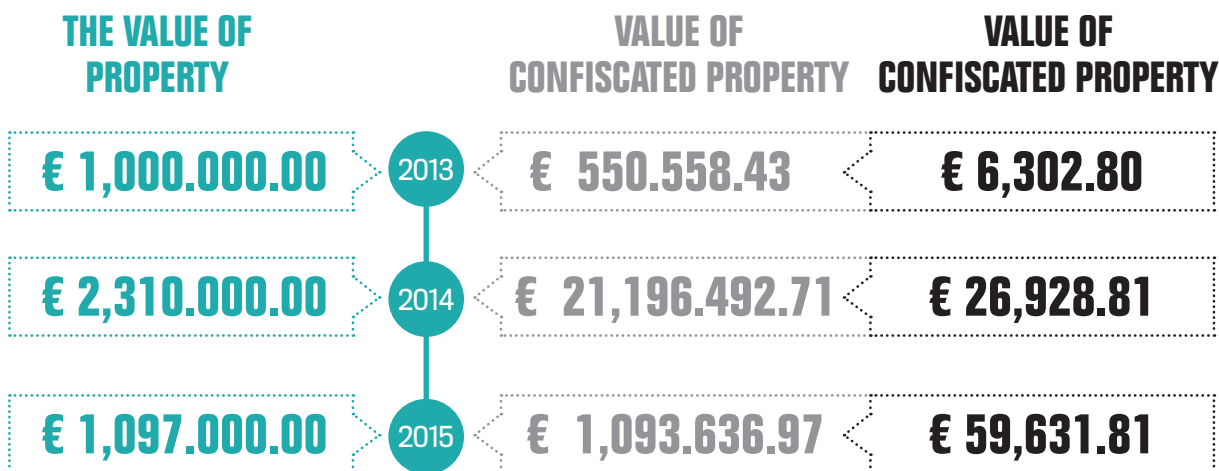
After the amendment of the Law on Extended Powers, through which it was alleged for the system of confiscation of property in Kosovo to be built, there could be seen some substantial effects of the nature of confiscation and values of confiscation.

TABELE NO. 1. STATISTICS OF THE ADMINISTRATION OF SEIZED AND CONFISCATED PROPERTY BEFORE THE ENTRY INTO FORCE OF THE LAW ON EXTENDED POWERS. *



* Report on statistical data for the administration of seized or confiscated property on 30.04.2012, Document obtained by Gazeta Jeta ne Kosove: <http://www.gazetajnk.com/repository/docs/RAPORTI.pdf>;

TABLE NO. 2. STATISTICS ON FREEZING, SEIZURE, AND CONFISCATION OF PROPERTY IN KOSOVO**



** Group for Legal and Political Studies "Illegal Confiscation of Property in Kosovo: Time to think of a new policy," Policy Report No. 6, Author: Albana Rexha, October 2015, p 14;

According to these statistics processed by the Group for Juridical and Political Studies, results that the total amount of the confiscated property in the last three years is 92,863.42 Euros. Nevertheless, these data do not correspond with the data that the National Coordinator for Fighting Economic Crime, Shqipdon Fazliu has. Mr. Fazliu, who was contacted by e-mail gives different numbers regarding the amount of seized and confiscated property in the mentioned years. (See table no. 3)

According to the data provided through e-mail, the numbers of confiscation that the Coordinator possesses are higher in comparison to those that are presented by the Group for Juridical and Political Studies, especially when we talk about Confiscation.

However, we came across this diversity of the statistical data more than one time. In a roundtable organized by Fol movement, on November 14, 2014, the National Coordinator Against Organized Crime, for 2014, has given different statistics regarding the seizure and confiscation for 2014 in comparison with the ones we received through e-mail. It was cited by the newspaper Koha Ditore, which reported on the organization Fol Movement, seizure and confiscation statistics for 2014 were 28,968.000.00 Eu-

ros.²² Generally, such confusion occurs because there is still not a certain and centralized database regarding freezing, seizure, and confiscation of property. Availability of data from the Agency for the Administration of Seized or Confiscated Property separately from those of the National Coordinator for Combating Organized Crime often makes it difficult to have final statistics. However, we arrived at official statistics data based on reports of the National Coordinator for Combating Organized Crime, which are described in statistical manner but also to the nature of the assets seized or confiscated. (See table no. 4)

As it can be seen, the data from the official report are more complete, and except the detailed statistics, the report indicates also the nature of seized property. In this period there was still no final court decision on confiscation in the report, the National Coordinator did not give the amounts of confiscation but has revealed the number of charges that have been filed and the amount for which they were set up to which the decision of the court is expected. (See table no. 6)

In the period from April to June, we can see the degree of seriousness and efforts to seize property acquired from criminal offenses continued on a positive trend. In this

22 Koha Ditore, dt. 16 November, 2014.; <http://koha.net/?id=27&l=33462>;

TABLE NO. 3. THE FOLLOWING TABLE PRESENTS THE DATA PROVIDED BASED ON CORRESPONDENCE OF THE AUTHORS OF THIS REPORT AND MR. FAZLIU: ***

	VALUE OF THE SIZED PROPERTY	VALUE OF THE CONFISCATED PROPERTY
2013	No Data	No Data
2014	€ 31,000.000.00	€ 500.000.00-1,000.000.00
2015 until June	€ 16,000.000.00	€ 100.000.00

*** Email Correspondence exchanged on 01 October, 2015;

period we also have a seized factory, the factory for the processing of steel “FAN”, regarding the case of which were investigated and seized property of some members of the Board of the Kosovo Privatization Agency. The value of the seized property in the case of FAN is considered to have been millions contained in the bank accounts, land, and real estate as well as various machinery.²³

Another case that represents a success story of the seizure in the above mentioned period is the case of former judge Kole Puka, who was sentenced to 10 years for crimes related to abuse of official authority, issuing falsified and fictitious documents etc. After sentencing for criminal offenses against Puke, authorities seized a luxury house in the town of Klina, and a mansion in Ulcinj.

In general, 2014 was a significant year with an increasing trend. The total value of the seizure and confiscation of property for 2014 according to the official report of the National Coordinator was 31,000.000.00 Euros, of which 500.000.00- 1,000.000.00 were confiscated property, respectively 30 kg gold.²⁴

In 2015, in the first quarter-unlike the previous years, there have been cases completed by courts in the form of cut decisions where there were also seizures. The nature of the seizure and confiscation of property in January-March 2015 according to the report of the National Coordinator has been as follows: (See table no. 5)

As it can be seen from the statistical data and the nature of the assets seized or confiscated, generally the final value of confiscations is very low compared with the seizure. This shows the problems in the justice system in general, as there are numerous cases and a lack of flexibility to handle these cases with priority, lack of legal arguments and evidence to link the criminal offense to the property of the party, or simply the inability of judiciary to handle cases that are of a high level and directly related to senior public officials.








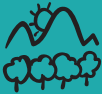
Although numbers of seizure and confiscation of property for 2015 until the reporting period from July to September 2015 totaled EUR 20 million,²⁵ the final seizures remain incomplete. However, in the recent period, at the beginning of November, the Basic Court of Fer-

23 Zëri Newspaper, 23.07.2014; <http://old.zeri.info/artikulli/42781/pasuria-30-milione-she-e-sekuestruar>;

24 Kosovo Prosecutorial Council, of three months report on the activities of the National Coordinator for Combating Organized Crime, October-December . 2014, p. 17, [http://www.psh-ks.net/repository/docs/Raporti_\(tetor_-_dhjetor_2014\)_shqip.pdf](http://www.psh-ks.net/repository/docs/Raporti_(tetor_-_dhjetor_2014)_shqip.pdf)

25 The report of the National Coordinator in Kosovo Prosecutorial Council, quoted by the electronic portal of the newspaper Koha Ditore on November 5, 2015, <http://kohane.net/?id=27&l=82956>;

TABLE NO. 4. DATA FROM THE REPORT FOR THE PERIOD JANUARY- MARCH 2014****

SEIZED	 5 HOUSES	 IMMOVABLE PROPERTY
	 9 APARTMENTS	366.227 M2
	 1 MOTEL	 MONEY: €577.222
	 7 STOREY RESIDENTIAL BUILDING	 6 VEHICLES
		 LAND 16.63 ACRES
	FREEZING	€258.006
CONFISCATIONS	0	

**** State prosecutor, three months Report January - march 2014, the National Coordinator for Combating Economic Crime, http://www.psh-ks.net/repository/docs/Nr.499.2014-Raport_tremujor_Janar-Mars_2014-Per_aktivete_dhe_rekomandi....pdf;

TABLE NO. 5. THE NATURE OF THE SEIZURE AND CONFISCATION OF PROPERTY IN JANUARY-MARCH 2015 ACCORDING TO THE REPORT OF THE NATIONAL COORDINATOR HAS BEEN AS FOLLOWS: *****

FREEZING	SEIZED	CONFISCATED
23,250 EURO, 500 CHF, 300 USD;	241.420 EURO	ASSETS WORTH 64.487 EURO
13 BUSINESSES-BUILDINGS-PETROL COMPANIES;	APARTMENT 76.3 M2;	
VILLA SWISS, 14.500 M2;	1 VEHICLE	
5 VEHICLES		
14.500 M2 LAND		
74 OIL RESERVOIRS;		

***** Kosovo Prosecutorial Council, of three months report on the activities of the National Coordinator for Combating Organized Crime January-March 2015, p. 17, [http://www.psh-ks.net/repository/docs/Raporti_\(janar_-_mars_2015\)_shqip_-_per_publicim.pdf](http://www.psh-ks.net/repository/docs/Raporti_(janar_-_mars_2015)_shqip_-_per_publicim.pdf);

TABLE NO. 6. DATA FROM THE REPORT FOR THE PERIOD APRIL-JUNE 2014*****

SEKUESTRIMET



2 HOUSES



8 APARTMENTS



3 VEHICLES



**IMMOVABLE
PROPERTY
17.254 M2**



4 LOCAL BUSINESSES



FACTORY “FAN”



CLINIC (MEDICUS)



1 RESTAURANT



**COMMODITIES WORTH
30,000.00 EURO**

FREEZING

0

CONFISCATIONS

0

***** State prosecutor, three months Report April-June 2014, the National Coordinator for Combating Economic Crime, http://www.psh-ks.net/repository/docs/_Nr.856.2014._RAPORT_TREMUJOR_PRILL_QERSHOR_I_KOORDINATORIT-_KPK.PDF;

izaj, confirmed the decision final for the confiscation of property in the amount of 1.5 million Euro,²⁶ among the biggest cases to date of confiscation a single act, and that presents a additional incentive to hope that such a trend will continue to grow.

A problem that occurs in periodic reports from the National Coordinator, and that is a direct indicator of a lack of more cases of confiscation derives from the lack of commitment by the judges and prosecutors to pursue a strict and significant agenda to the cases of seizure or confiscation. Generally, a large number of cases that tends to be potential cases of confiscation of property often remain untreated or postponed indefinitely. As a result, despite the efforts of the National Coordinator to encourage as much as possible the discourse on the importance of the confiscation of property as a tool to directly strike organized crime, there is still not an institutional agenda to prioritize this field.

To see and compare the current mindset and the challenges of the Republic of Kosovo to build such a policy, we have briefly treated in the next chapter of confiscation of property, the systems of several countries in the region, of which there are many success stories.

²⁶ Koha Ditore Newspaper, 9 november, 2015, p. 5;



03

**CONFISCATION
OF PROPERTY
IN REGIONAL
LEGISLATION AND
PRACTICE**

3.1 THE CONTENT OF THE LEGISLATION ON CONFISCATION OF ASSETS IN COUNTRIES IN THE REGION

Countries in the region with which Kosovo is bordered have approximately common features of institutional policy. Basically, except Croatia, which already is a member of the EU, Serbia, Bosnia, Montenegro, Albania, Macedonia and Kosovo are all in the trajectory of such clear tendencies to integration in the European Union. As a result of this integration agenda, these countries have taken into account the development of many fields that approximates the EU, particularly in those related to the rule of law. Confiscation of property is also one of the areas of institutional policies in which these states have legal grounds, and are building their corresponding systems. Further, we will give a brief overview of the systems of confiscation of property in some of the countries of the region that represent different systems in between them.

3.1.1 Albania

The Republic of Albania in 2009 adopted the Law on “**Prevention and Suppression of Organised Crime and Trafficking Through Preventive Measures Against Property**”²⁷ This law, known in rhetoric as the “anti-mafia law”, foresees confiscation on the basis of a criminal

offense, but in addition, provides the civil confiscation proceedings. Article 6 of the Law defines the object of its verification by listing financial assets, properties, economic, trade and professional activities, economic level and also the income source. Through these verification objects, the tendency to materialize the logic of the “anti-mafia” law can be seen and the verification list is quite inclusive in principle, and can serve as a good basis for seizure and confiscation of property. Anti-mafia law in Albania is applicable to individuals and their relatives, as well as legal persons. The fundamental principle of the base established by the anti-mafia law in Albania is that civil confiscation procedures are independent from “the conditions, the level and the outcome” of the criminal proceedings filed against media.²⁸

The aforementioned Law is a continuation of the logic of the rule of law set earlier in the Law on Prevention and Suppression of Organised Crime of 2004. Consequently, it preceded changes aimed to fight organized crime in a larger scale as a permanent internal need, as well as a demand of the European Union. These tendencies are quite openly shown in the existing law.

The mixed system of Albania is structurally more advanced than that of Kosovo or the majority of countries in the

²⁷ Republic of Albania, Law nr 10.192, dt. 03.12.2009; http://www.pp.gov.al/@eb/ligj_per_parandalimin_dhe_goditjen_e_krimet_te_organizuar_dhe_trafikimit_neperm_jet_masave_parandaluese_kunder_411.pdf;

²⁸ Alan Bacarese and Pedro Gomes Pereira, “*Technical Paper on Criminal Asset Recovery System in Serbia and Comparative Analysis with other Systems in Central and Western Europe*” Council of Europe, July, 2010, fq. 13; https://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/car_serbia/Technical%20papers/2358-CAR-TP18_%202010.pdf;



As a result of this integration agenda, these countries have taken into account the development of many fields that approximates the EU, particularly in those related to the rule of law.

region, especially based on the possibility of confiscation of civil procedure. It has produced up to now some effect, and is expected to have an impact even greater while recent trends were observed and are continuously growing on combating organized crime, money laundering, and combating corruption and decriminalization of political actors.

3.1.2 Serbia

After efforts to consolidate democracy, Serbia has shown her allegation to be part of the European Union, aiming to fulfill the obligations that derive under the conditions for membership. The consolidation of democratic governments is however associated with many problems of a different nature. For a long time Serbia has been a place where organized crime has been so powerful that it has managed to prevent the transition from former socialism to a free market economy.²⁹ In this regard, various governments over the past ten years have undertaken efforts to reduce the scale of organized crime. As a result, a series of legislative initiatives that have been taken are of a European model, in which the tendency to align domestic legislation with the European Union. One of such laws, is also on the **“Retention and Confiscation of**

Property Acquired through Crime”.³⁰ This law treats property acquired through criminal offenses defined in Articles 13 of the Criminal Code of Serbia, giving the features of a policy based on criminal confiscation. For the management structure and implementation of the law, there are two defined basic bodies that exercise its implementation, namely the Financial Intelligence Unit and the Department for Management of Confiscated, within the Ministry of Justice.³¹ The uniqueness of the Law on Confiscation of Property in Serbia is the fact that in addition to the criminal character and linking judged confiscation offense to the competences to initiate investigations are defined within the scope of the Financial Intelligence Unit, respectively, suggestions to investigate a property develop by the parameters of this unit. Law on Confiscation of Property of the Republic of Serbia also defines pronouncedly all levels of procedures and particularly those dealing with the confrontation of the parties in court. Despite the legal basis continuously being the subject of progressive trends, cases of confiscation of property derived from organized crime are still within the regional margin. Respectively, confiscation of property in Serbia range on average between 6-10 times per calendar year.³²

29 OSCE “Policing the Economic Transition in Serbia” Belgrade, Feb, 2005, fq 6-7; <http://www.osce.org/serbia/18312?download=true>;

30 LAW ON SEIZURE AND CONFISCATION OF THE PROCEEDS FROM CRIME: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Serbia/LawOnSeizure.pdf>;

31 Same law, article 6 and 8;

32 See the progress report for Serbia, 2013:

3.1.3 Romania

Romania until recently was considered one of the most corrupt countries of the European Union.³³ However, recent years have made great efforts and a number of agencies are operational and relevant institutions to combat corruption and organized crime, which have given satisfactory results. In terms of confiscation of property, unlike Albania and Serbia, in Romania there is a central law for confiscation of property.³⁴ Legal provisions for confiscation can be found in several different legal acts, while in a general overview, Romania applies three types of seizures:

- Confiscation of Criminal Base defined in the Penal Code which includes acts of organized crime, corruption, money laundering, trafficking with human beings, trafficking with guns and drugs, etc. Subject to confiscation in this case are all assets derived from the commission of the above criminal offenses, and property or assets which have been obtained;
- Confiscation Based on Administrative Procedure, includes property acquired from participation in the determining of a decision of the administrative procedure and that the same was illegal; and
- Confiscation on the basis of the assessment of the National Integrity Agency, which in the context of valuation, in case of a discrepancy between the declaration of assets with amounts over 10,000 Euro to discrepancies between assets declared and those found, this confiscation is transmitted through civil proceedings by the decision of the court;

From this standpoint, the Romanian system of confiscation even though there is not a unique act of determining all the norms and procedures, it still offers some possibilities for confiscation of property that would be

effective for other countries in the region. In particular, the confiscation procedure on the basis of assessments of declaration of property is a very useful mechanism, which could be applied in Kosovo.

Cases treated above, represent a combination of perspectives and models of confiscation of property which have worked and work very well in the implementation of the policy of confiscation of property obtained illegally. Except the penal based systems, as Kosovo and Serbia are, other mixed systems have an advantage in this respect and respond more readily to the real needs of confiscation of property, not necessarily related to the final judgment of an offense.

Considering the current policy and the nature and results of confiscation of property in Kosovo, necessarily becomes clear that a move towards reviewing of this policy is more than necessary.

³³ Centrul de Resurse Juridice *“Corruption, Confiscation and Asset Recovery policy in Rumania”* Policy Report, 2013, <http://www.crj.ro/userfiles/editor/files/Raport%20CRJ%20-%20Recuperarea%20produselor%20infractiunilor%20de%20coruptie.pdf>

³⁴ Transparency International Brochure on Confiscation of Assets in Italy, Rumania and Bulgaria: http://www.transparency.org.ro/proiecte/proiecte_in_desfasurare/proiect_13/Brochure_EN_web.pdf

04

**A COMPARATIVE
LEGAL PERSPECTIVE
FOR THE
CONFISCATION
OF PROPERTY IN
KOSOVO**

In June 2015, the Ministry of Justice, in a survey conducted by internal experts and intersectorial working groups, has concluded that it is necessary for a discussion to be raised and to draft a new law on confiscation of property in Kosovo. In a concept paper prepared by the MoJ as a precursor to the need for a deeper debate about the format of the new law to be drafted, it was highlighted the need to give a chance to confiscation of property related to economic crime activity, but not necessarily associated with a final sentence. This is the first time that such tendencies emerge from the Ministry of Justice and opens opportunities to debate regarding a complete character “anti-mafia” law. However, in the best case, we must explore alternatives to those the Ministry of Justice has shown the willingness to debate.

The idea which is intended has to do with achieving such a legal status that confiscation of property can be reached without court decisions. However, such a system would have some effects in other dimensions, yet the basic pillars of the system, for instance, the burden of proof, Minister Kuçi was not optimistic that this can be directly passed to the persons charged or to the subjects of confiscation. The issue of **Burden of Proof** in fact constitutes one of the pillars of the debate that should take place during the process of reviewing the anti-mafia law in Kosovo.

So far, the burden of proof has been in the hands of investigators, police and judiciary, which through the data and evidence collected by the investigation process, with the declaration of a final decision on the subject of

crime, have undertaken procedures of confiscation only to the extent of the possession of evidence they could justify that certain property is obtained by crime. This of course makes the work of the investigative and judicial bodies difficult, and consequently produces smaller effects on confiscation of property. In the other case, through this new law and in order for this law to have the complete “anti-mafia” character, the burden of proof should be transferred from the investigator and prosecutor to the suspect for criminal offense. Particularly if to this system of confiscation we intend to enhance the aspect to confiscation on a civil basis, it is more than necessary that parallel to the system structure, the issue of burden of proof should be regulated, and especially for the civil confiscation procedure, in order for it to be a total responsibility of the investigation subject. This approach was rejected by the Minister Kuçi during the meeting in the Ministry of Justice, with the justification that a transformation of responsibility or burden of proof and moreover in a civil confiscation procedure would be very difficult to implement in Kosovo due to general circumstances and the lack of documentation, lack of registration of property and assets, or division into districts according to the traditional model of family heritage and for which there is no data etc. Apart from burden of proof, an important topic that needs to be raised for debate is the **Harmonization in Practice Of The Confiscation Of Property** (Criminal Procedure vs. Civil Procedure). Considering that until now Kosovo has applied to the system of criminal based confiscation, and is showing a tendency to move to a mixed system, it is very important to clearly define the terms, procedures and practices when and how to

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Moreover, it is necessary to define good suggestions or “red flags” for a policy of confiscation on the civil basis, in order to have a balance of well defined respect for human rights, namely privacy, and a prosecutor’s right to initiate an investigation procedure.

overlap it a criminal and a civil confiscation procedure. Moreover, it is necessary to define suggestions or “red flags” for a policy of confiscation on the civil basis, in order to have a balance of well defined respect for human rights, namely privacy, and a prosecutor’s right to initiate an investigation procedure. More specifically well defined-as to what are the factors that can promote a prosecutor to undertake an investigation with civil character. The system of declaration of property, for example, can be one of the key indicators on the basis of which a prosecutor can conduct a research and draw stable, grounded indicia before conducting a full investigation of civil confiscation of illegal property. Another element that should characterize the process of drafting the anti-mafia law in Kosovo is the discourse logic on the nature of the law, namely the debate between the term **“proceeds of crime”** or **“property acquired illegally”**. Naturally from the standpoint of the procedure on the criminal basis, subject to confiscation is the one who has committed criminal offense, or to whom the confiscated property obtained by crime is defined in the Criminal Code. In a situation where, criminal procedure and civil procedure is introduced, it is important to examine the terminology and logic determining the effect of law. In such a situation, the terminology is very important because we are not only dealing with confiscation of property obtained by crime, but with confiscation of unjustified or illegally obtained. According to this logic, the debate should take place between the term “unjustified property” and “property obtained illegally”. Because on one hand, unjustified property presents the tendencies of confiscation of any property for which the company has no proof of origin,

which would probably be to much in this current situation, but on the other hand, the notion property acquired illegally, would be comprehensive and would mean the criminal base and civil confiscation itself.



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**BASIC
RECOMMENDATIONS**

Within our efforts to contribute to a democratic society, the rule of law and a responsible governance are willing to fulfill the institutional mandate, this survey research, intended to study the modalities and to open debates regarding the issue of confiscation of property, seen by a new perspective, respectively the need for the a new law with a full anti-mafia character. The need for such a package was confirmed weeks ago by the negative comments of the European Union on visa liberalization for Kosovo, supporting their arguments precisely the lack of a serious approach to combating economic crime and corruption. Consequently, the necessity of a new law that aims to meet all of the unfunctionalized aspects so far, so that the fight against organized crime and generated property by it acquires meaning, is no longer a goal, but a necessity imposed on the Republic of Kosovo on its path towards further European integration. As part of this research, there was a tendency to measure the degree of satisfaction of stakeholders responsible for the implementation of legislation in the field of confiscation of property. Also they studied some regional practices and relevant legislation which served as a good basis to compare systems to understand various models of confiscation of property, and more imaginative options that could be applicable in Kosovo. Consequently, after several months of work, Çohu! through this study/analysis, has developed some recommendations for the process of drafting the policy of confiscation of property and Anti-Mafia Law in general.

Recommendations:

- a) **The New Legal Framework.** Despite the intentions to understand the nature of the current legislation and the possibility of its adoption and review of certain aspects to improve the legal basis, it is already insufficient and therefore, the need for a an entirely new legal base that would address all the issues raised above, is more than necessary. However, this new legal base should include a process of substantial consultation with stakeholders in order to reflect this combination of perspectives and serve as a functional tool, unlike the Law on Extended Powers, whereby after three years of adoption not a single case of confiscation has been solved;
- b) **Understanding the Anti-Mafia Law.** The new law, in order to have the anti-mafia character-as the Ministry of Justice claimed, necessarily needs to be included in the discourse as mentioned in this paper: the burden of proof, civil procedure, retroactivity, recognition of the legal instruments for freezing, seizure and confiscation, etc. Only with the inclusion of these elements this law serve the purpose of confiscation of property, and will achieve such effects that respond to policy objectives of confiscation in general;

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The new law, in order to have the anti–mafia character, as the Ministry of Justice claimed, necessarily needs to be included in the discourse as mentioned in this paper: the burden of proof, civil procedure, retroactivity, recognition of the legal instruments for freezing, seizure and confiscation, etc.

- c) **Burden of Proof.** As mentioned above, our recommendation is that the burden of proof to be subject to extensive discussion, and to reach the balance that on one hand obliges the subject of the investigation to provide evidence and testimony about the origins of their property, while on the other hand, ensures that during the investigation, the investigator reflects objectively corresponding to the general circumstances in Kosovo, and therefore respecting the rights of privacy and human rights in general;
- d) **Retroactivity.** In order for the law to take the anti-mafia character, one of the basic issues that it should contain is retroactivity. The time when retroactivity should enter into force in our opinion, is from January 2000. In addition, to strengthen the retroactivity as an entity it would be necessary to legally avoid the possibility of prescription of cases related to property and its confiscation;
- e) **Implementation structure.** During the study visits, we have concluded that in situations where we need to bring a new law which includes civil based confiscation, then parallel to this it is necessary to build professional capacities of the institutional actors that are responsible for its implementation. Consequently, it is recommended that for the implementation of the anti-mafia law, there is a need to build separate teams of prosecutors, investigators and even judges, who will deal exclusively with the implementation of this law;
- f) **Legal Instruments.** The current legal basis is not unified in terms of recognition of juridical entities and policy instruments of confiscation of property. For this reason, in the new law it is necessary to specify in detail the three legal instruments, respectively: **freezing, seizure, and confiscation;**

