

PARLIAMENTARY RESEARCH

STATE BUREAU FOR VERIFICATION AND CONFISCATION OF UNJUSTIFIED ASSETS

OCTOBER 2022





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Transparency International for Kosovo

KDI's mission is to support the
development of participatory
democracy and the fight against
corruption by promoting transparency,
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This research was carried out within the project "Expanding civic space for the upcoming judicial reforms in Kosovo", supported by the Dutch Embassy in Kosovo.

The content of this research is solely the responsibility of the Kosova Democratic Institute (KDI), and under no circumstances will it be considered to reflect the views of the Dutch Embassy in Kosovo.

Prepared for: Committee on Legislation, Mandates, Immunities, Rules of procedure of the Assembly and Oversight of the Anti-Corruption Agency

October 2022, Pristina

Layout and design: **envinion**



Kingdom of the Netherlands

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1. INTRODUCTION

On 19 September 2022, the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency (hereinafter: the Committee on Legislation), through Kosova Democratic Institute (KDI), filed a request to conduct a parliamentary research dealing with the Project for the State Bureau for Verification and Confiscation of Unjustified Assets. This draft law was subject of interpretation by the Venice Commission, following the request by the Assembly of Kosovo, and the same will further be dealt with following the recommendations received by this mechanism.

This parliamentary research deals with five main issues raised by the Committee on Legislation of the Assembly of the Republic of Kosovo:

- What does the Draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets provides for?
- What are the issues that need to be addressed according to the Venice Commission opinion?
- How can the draft law be implemented in practice?
- What are the challenges of establishing and functioning of the Bureau?
- What are the practices from other countries that have established such bodies?

The analysis is based on the Constitution and current legislation of the Republic of Kosovo, findings of Venice Commission opinion (date 17 June 2022), as well as practices of other countries, with a special focus on countries of the European Union.

Each of the issues raised by the Committee on Legislation will be dealt with separately. Initially, the content of the current draft law will be analysed, highlighting its key elements. Afterwards, a summary of the Venice Commission opinion will be presented, with special emphasis on the issues/topics that require further elaboration by the Assembly members. Further, in this parliamentary research, findings and

suggestions on how to implement this draft law in practice will be presented, following its adoption, highlighting the main challenges for the establishment and functioning of the Bureau. Furthermore, the research also provides a brief comparative overview, which includes several European countries (with different levels of corruption), regarding the models they apply for the verification and confiscation of unjustifiable assets. This is done in order to provide MPs with a broader picture on practices and models of European countries for the investigation and confiscation of unjustifiable assets. In conclusion, main findings of the research have been summarized, and some basic recommendations related to the draft law are also presented.

It should be noted that, because it presents only a legal opinion limited in time and extent of elaboration, the analysis focuses on only the most important aspects of the draft law and issues related to its scope.





2. WHAT DOES THE DRAFT LAW ON THE STATE BUREAU FOR VERIFICATION AND CONFISCATION OF UNJUSTIFIED ASSETS PROVIDES FOR?

The Draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets (hereinafter: the Draft Law) is a law of the civil-judicial field, which as its general objective has the strengthening of the fight against corruption and other forms of abusing with public functions, resulting in material benefits. Within this comprehensive objective, this draft law aims to create a special legal basis - through a *lex specialis* - and a special institutional mechanism, for the investigation and confiscation of illegally acquired assets by persons exercising, or having exercised, public functions and persons related to them. To this end, the draft law seeks to identify unjustified assets of public officials and persons related to them and return that asset to public (institutional) control.

This draft law is of a civil nature, because its object is the investigation through civil-judicial procedures of assets, and not criminal or administrative investigation of persons and their assets. Furthermore, the draft law itself determines the appropriate implementation of the Law on Contested Procedure (hereinafter: LCP), for some judicial procedural matters which are not expressly regulated by this draft law (see Article 59 of the draft law).

Another distinguishing feature of this draft law is that it regulates material and procedural aspects, and this makes it quite voluminous.

With the entry into force of the (Draft) Law on the State Bureau for Verification and Confiscation of Unjustified Assets, practically, in addition to the general criminal and administrative procedures, a special civil procedure is also added for the investigation and confiscation of assets, which are



The draft law foresees two procedures, namely assets verification procedure, carried out by the Bureau, and the unjustified assets confiscation procedure, carried out by the courts.

The draft law defines the value of twenty-five thousand
(25.000) EUROS

of unjustified assets, as a threshold to transfer the case from the investigation by the Bureau to the initiation of judicial procedure of confiscation.

suspected to be as a result of corruption and other forms of misuse of public duties and functions.¹

In a substantive sense, as stipulated in Article 1 of the draft law [Purpose], it regulates two fundamental aspects, namely establishing, organizing and determining the powers of the State Bureau for Verification and Confiscation of Unjustified Assets, and determining the procedures for verification and confiscation of unjustifiably acquired assets.

The draft law targets verification and confiscation of unjustified assets of official persons, politically exposed persons, their family members and third parties. In terms of time, the law shall be applied to assets unjustifiably acquired during the period of exercising the function of the above entities (persons), from 17 February 2008; as well as within ten (10) years from the moment when entities in question cease to exercise their function.

The draft law foresees establishment of a new and independent public institution: the State Bureau for the Verification and Confiscation of Unjustified Assets (hereinafter: the Bureau). The Bureau shall have the power to develop procedures for the verification of suspicious assets, to request from the court imposition of a "interim security measure on assets", as well as to propose to the court

permanent confiscation of unjustified assets.

The draft law defines illegal assets as "assets that are not in line with legal income or assets the legal origin of which fails to be established, which the person to the procedure owns, possesses, over which he/he exercises another form of control or which he/she has any benefit thereof" (Article 1.10).

The draft law foresees two procedures, namely assets verification procedure, carried out by the Bureau, and the unjustified assets confiscation procedure, carried out by the courts. The draft law defines the value of twenty-five thousand (25,000) euros of unjustified assets, as a threshold to transfer the case from the investigation by the Bureau to the initiation of judicial procedure of confiscation. The draft law defines remedies that entities can use to contest court rulings against their assets (either the decision on the interim security measure on assets, as well as the decision on confiscation).

¹ Criminal legislation in the Republic of Kosovo for the investigation and confiscation of assets acquired from criminal offenses consists primarily of the Criminal Code and the Code of Criminal Procedure. This criminal legal framework is supplemented by the Law on Extended Powers for Confiscation of Assets, the Law on Money Laundering and Combating the Financing of Terrorism. On the other hand, a limited and indirect administrative investigation of unjustified assets is also carried out on the basis of the Law on the Anti-Corruption Agency, as well as through activity of the Anti-Corruption Agency.



3. WHAT ARE THE ISSUES THAT NEED TO BE ADDRESSED ACCORDING TO THE VENICE COMMISSION OPINION?

The Venice Commission, in its 131st plenary session (17-18 June 2022), approved the Opinion on the Draft Law No. 08/L-121 on State Bureau for the Verification and Confiscation of Unjustified Assets (CDL-REF(2022)015). This Opinion was issued after the request submitted by the President of the Assembly of the Republic of Kosovo, in March 2022.²

The Opinion takes into account relevant provisions of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), human rights guaranteed by the European Convention on Human Rights (hereinafter: ECHR) and additional protocols,³ the rule of law standards developed by the Venice Commission, as well as other relevant norms of international law, such as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS

198)⁴ and the UN Convention against Corruption (UNCAC).⁵

During the review of the draft law, the Venice Commission also took into account the 2012 Financial Action Task Force Recommendations (FATF Recommendations), G8 Best Practices Principles on Tracing, Freezing and Confiscation of Assets (2004), G8 Best Practices for the Administration of Seized Assets (2005), as well as relevant EU regulations, Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property,⁶ and Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of the Proceeds of Crime in the European Union.

² The reporting members of the Venice Commission for the treatment of the draft law and the preparation of the Opinion were appointed: Mr James Hamilton (Ireland), Mr. Dan Meridor (Israel) and Mrs. Angelika Nussberger (Germany). Before the adoption of the Opinion, the Venice Commission held meetings with the President of the Assembly and with representatives of the Legislation Committee of the Assembly, representatives of the Ministry of Justice, the Judiciary, Prosecutor's Office, the Anti-Corruption Agency, the Financial Intelligence Unit, civil society and international organizations in the Republic of Kosovo.

³ According to Article 22 of the Constitution of Kosovo, the human rights and freedoms defined in the European Convention on Human Rights are directly applicable in Kosovo and prevail over the provisions of local law.

⁴ See Article 3 (1) and Article 1.d

⁵ See Article 54 (1) c.

⁶ OJEU, L 68/49, see Article 3(4).





The Venice Commission points out that the proposed new legislation (the law in question) alone cannot be expected to solve all corruption issues.

But, it should be embraced in a broader approach, which would include a range of practical measures aimed at increasing the effectiveness of the law enforcement system.

The Venice Commission, from the structural point of view, first deals with general remarks related to the draft law, and then addresses and gives recommendations for specific provisions. From the analysis conducted, the Venice Commission points out that regardless of the reasonable (justified) purpose of the law, civil confiscation procedures without punishment must be designed and implemented in accordance with the Constitution of the country, which sanctions direct application of the ECHR in Kosovo's legal order, and takes into account European standards regarding the rule of law and respecting of human rights. The Venice Commission points out that the proposed new legislation (the law in question) alone cannot be expected to solve all corruption issues. But, it should be embraced in a broader approach, which would include a range of practical measures aimed at increasing the effectiveness of the law enforcement system.

Moreover, the Venice Commission finds that it is not certain whether the establishment of a new body would actually make the fight against corruption more effective, or if it would further complicate the entire system that already includes a number of bodies, such as the police, the prosecution, the customs authorities and the Anti-Corruption Agency. The Commission finds that the new system of verification and confiscation of assets should be combined with the existing system of asset declaration by senior public officials, a process led by the Anti-Corruption Agency.

The Venice Commission also emphasizes that such a human rights-sensitive draft law is acceptable only if it is built on an independent mechanism with all the necessary powers and resources to effectively fight high-level corruption and organized crime, and that the current provisions (of the draft law) are insufficient in this regard.

In the conclusions of the Venice Commission it is emphasized that the draft law, in its current form, shows certain number of shortcomings and its implementation may result in violation of fundamental rights guaranteed by the Constitution and the ECHR.

Consequently, from the analysis carried out for the draft law, **the recommendations emerging from the Venice Commission are as follows:**

- Wording of general and public interests, aim and purpose of the new law in an accurate and exhaustive manner;
- Reviewing the need and usefulness for establishing a new body, the Bureau, and in case it is continued with this approach (for the establishment of the Bureau):
 - a) ensuring strong guarantees of the Bureau's independence, and
 - b) providing the Bureau with a sufficient number of specialized personnel with adequate competencies;



- Defining precisely:
 - a) under which conditions and on what grounds the Bureau must collect information according to the official duty before the commencement of the official verification procedure;
 - b) under which conditions verification procedure can and should be initiated; and
 - c) priorities for the work of the Bureau, ensuring that the Bureau focuses on high-profile cases;
- Clarifying that the burden of proof is transferred to the party in the procedure only after the competent body (*under the current draft law, the Bureau*) has presented a reasoned proposal and evidence that shows that there is at least a likelihood of illegal appropriation of assets, based on the civil procedure standard of probability assessment; and defining more precisely the civil standard of proof of "probability assessment", which according to the current draft law must be applied by the court;
- Establishing stronger guarantees for the human rights of the party and other persons, among others:
 - a) specifying that the decision to initiate the verification procedure should at least be communicated to the party in the procedure and subject to the legal remedy;
 - b) ensuring that statements made and mandatory documents provided by a party in a civil proceeding cannot be used against him or her during criminal proceeding;
 - c) making it clear that the party's family members are only targeted as "*third parties*";
 - d) reviewing the provision that natural and legal persons can be forced by the court to cooperate with the Bureau;
 - e) regulating how to identify "*third parties that have a legal interest*" and what their rights are in the verification and confiscation procedure;
 - f) ensuring that persons involved in the confiscation are not deprived of all assets; and
 - g) guaranteeing the compensation of damages encountered by the party in case the confiscation procedure is ultimately unsuccessful;
- Establishing an adequate threshold of evidences justifying imposition of interim security measures, making it clear that such measures can be taken under civil procedure even if a criminal investigation has been initiated.





4. HOW CAN THIS DRAFT LAW BE IMPLEMENTED IN PRACTICE?

The implementation of the draft law in practice requires amending and supplementing of the draft law in several aspects.

Initially, in order for the draft law to enter into force and avoid the possibility of its repeal by the Constitutional Court, it must be amended in line with the suggestions of the Venice Commission opinion. These recommendations are presented in the section above.

First suggestion of the Venice Commission, to make the *"wording of general and public interests, aim and purpose of the new law in an accurate and exhaustive manner"*, it has more to do with the need for a stronger clarification of the usefulness of such a law, than with the content of the draft law itself. It should be noted that the Venice Commission does not deny the need to strengthen the fight against crime and corruption in Kosovo, nor does it claim that the new law, in any form, will not contribute in this aspect.

Along with the suggestions provided for by the Venice Commission, the practical implementation of the draft law requires addressing of three general aspects:

- 1 Harmonization with other laws
- 2 Clarification of the draft law
- 3 Reinforcement of guarantees for constitutional rights.

4.1 Harmonization with other laws

The procedures expected to be developed according to the draft law, for the verification and confiscation of assets, as well as the activity of the Bureau, are related to several other basic laws. Consequently, for the implementation of the (draft) law, it may be necessary to amend some other laws. Therefore, it is necessary to firstly identify the laws that should be amended, in order to avoid collision with the Law on State Bureau for the Verification and Confiscation of Unjustified Assets. This may include the Code of Criminal Procedure, the Law on Contested Procedure, the Law on Courts, the Law on Personal Data Protection, the Law on General Administrative Procedure, the Law on Administrative Conflicts.

Hence, in order to create a legal basis for the Basic Court in Prishtina, the General Department, Civil Division, to be able to develop the confiscation procedure, or to impose interim security measure on asset, based on the Bureau's proposal (according to Article 20.11), then the competence of this Court should be defined in the Law on Courts (this is especially related to Articles 12 and 13 of this draft law). Or, Article 60.3 stipulates that *"After the completion of the investigation, the State Prosecutor notifies the Bureau, namely the court, that he/she has suspended the procedure [...]"*. In fact, the Prosecutor's actions in a criminal procedure are determined by the Code of Criminal Procedure. Other articles can also cause confusion for the courts. For example, Article 22 of the draft law provides that *"the court must decide on*





Therefore, it is necessary to firstly identify the laws that should be amended, in order to avoid collision with the Law on State Bureau for the Verification and Confiscation of Unjustified Assets.

This may include the Code of Criminal Procedure, the Law on Contested Procedure, the Law on Courts, the Law on Personal Data Protection, the Law on General Administrative Procedure, the Law on Administrative Conflict.

the proposal of the Bureau for imposing an interim security measure on assets within 24 hours from the receipt of the proposal". Nonetheless, the Court of First Instance - Basic Court in Prishtina, General Department, Civil Division, taking the decision for an interim security measure may tend to rely on the Law on Contested Procedure (hereinafter: LCP), moreover, when Bureau's proposal for an interim security measure can be challenged by the subject whose assets are subject to the proposal - which gives the procedure a contentious nature. Further, Article 34 stipulates that "the party, whose assets are proposed to be confiscated, shall be examined". However, the examination of the party by the court does not coincide with procedures of a civil nature.

Also, it is necessary that the mandate of the Oversight Committee of the Bureau, as defined in Chapter IV, be harmonized with the Rules of Procedure of the Assembly and other relevant acts, which regulate the mandate and functioning of the parliamentary committees (since it is about the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency).

Given what was said above, since the draft law gives a civil-judicial character to a procedure carried out by public institutions (Bureau and courts), while it regulates material and procedural aspects, its harmonization with other related laws is a prerequisite for its successful implementation.

4.2 Avoiding ambiguities in the draft law

The clarity of the law is a fundamental component of the legal certainty principle, embodied in the Constitution, especially Article 31, which guarantees the right to a fair and impartial trial.

Beyond the constitutional dimension, the clarity of the draft law is a condition for its effective and consistent implementation. In certain parts, the draft law lacks the necessary clarity, even in some of its most important provisions, which are presented below:

Entities to which the Law applies: The draft law does not clarify sufficiently who are the entities to which the Law applies. Thus, Article 2.1 stipulates that this "Law shall apply to assets unjustifiably acquired by official persons, their family members, politically exposed persons and third parties". Further, paragraph 2 of this Article states that: "This Law shall apply to unjustifiably acquired assets:

2.1. for the period exercising the function of the subjects from paragraph 1 of this Article, effective 18 February 2008 [...]".





Definition of unjustified assets: Article 3.1.10 states that:

“Unjustified assets - assets that are not in line with legal income or assets the legal origin of which fails to be established, which the person to the procedure owns, possesses, over which he/she exercises another form of control or which he/she has any benefit thereof”.

The two paragraphs above cause confusion, because politically exposed persons and their family members and third parties have not necessarily exercised “functions”. Furthermore, it is necessary to specify the definition of “politically exposed persons”, namely Article 1.13.2 “[...] or equivalent functions”. In relation to this, it is necessary that the definitions used in this article are in line with the Law on Public Officials.

Definition of unjustified assets: Article 3.1.10 states that:

“Unjustified assets - assets that are not in line with legal income or assets the legal origin of which fails to be established, which the person to the procedure owns, possesses, over which he/she exercises another form of control or which he/she has any benefit thereof”.

This article gives the impression that there are two criteria for determining what assets are considered unjustified: firstly, assets that are not in compliance with legitimate income and, secondly, assets whose legitimate origin fails to be proven. In fact, the two sentences are different semantic wordings that describe the same factual situation. This is because, “the assets are not in compliance with legitimate income”, if “its legitimate origin fails to be proven” (take it from regular income, inheritance, legal gift, shares in the enterprise, rent, etc.).

Clarification of the effects of the verification procedure on the affected persons: Two other essential aspects of the draft law that need further clarification, in order to enable its implementation, are the right of affected persons (subjects) to

contest the decisions of the Bureau (this issue is addressed in the following section), as well as the fact that the draft law does not address any possible administrative consequences for state officials for whom it is confirmed by a final judgment that they have acquired assets unjustifiably. So, it is not clear if it is established that a state official has benefited from unjustified assets while exercising an official duty, will he/she continue to exercise the same function/ official duty again after the court’s ruling to confiscate the assets. The draft law does not link the confiscation of assets with the commission of any criminal offense or other illegal act (administrative or civil). Imposing administrative and criminal measures are not within the scope of this draft law, because such a thing cannot be done by a law like this, which is of a civil nature. However, it is entirely expected that if the courts order the confiscation of unjustified assets, ipso facto, suspicions of the commission of illegal acts by the person, who is subject to a procedure, will be raised. It would be useful if, in the case of official persons, draft law (or any by-law of the Bureau) determines at least the obligation for the Bureau to inform the public institution where the official works, at the moment when the Bureau proposes to the Court initiation of the confiscation procedure (this can be regulated by sub-legal acts). This information must contain a clarification that failing to justify the assets by the official person does not mean a priori the illegality of its benefit.

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Ambiguities related to the Director General: Article 10 (paragraphs 4 and 5) does not properly clarify whether the Director General can hold other positions - even by freezing the position - except those that show a conflict of interest. Moreover, Article 13.1.5 stipulates that “the term of the Director General shall end, among others, “if he/she exercises functions that are incompatible with his/her function according to the applicable law”. This implies that the Director General is allowed to perform other functions that “are compatible” with his/her function. It should be borne in mind in this regard that the Law on Labour, as an organic law for the employment relationship in public and private sector, establishes that temporary suspension of employment relationship is allowed, among others, when the employee “is selected or appointed to public functions” (Article 41.1.2). In this regard, whether an employee in the public or private sector will be able to suspend the employment relationship, for the time he/she is exercising the duties of the Director General of the Bureau, will depend on whether the position of the Director is considered a “public function”.

Another ambiguity that needs to be addressed is the effect of the proposal that the Bureau’s official (who initiates the verification) presents to the Director General, for closing the case or filling it to court (Article 20 of the draft law). So, isn’t it clear that the Director General has the right to review the proposal of the Bureau’s official?

Avoiding the confusing wordings: Confusing wording is encountered in some articles of the draft law, such as Article 39 [Types of decisions], which in paragraph 6.7, as one of the reasons for rejecting the proposal for confiscation of assets, states as follows:

“6.7. the assets specified in the proposal for confiscation was not owned, possessed or otherwise controlled by the party to the procedure”.

Such ambiguous wording is also found in Article 40.2 where it is stipulated that:

“Any transaction carried out on illegally acquired assets shall have no effect concerning the State and any such transaction shall be forfeited when the transactions concerned are encumbrance transactions with third parties if the parties concerned knew or could have assumed that the assets had been purchased illegally or if the parties concerned had purchased the assets with the intent to conceal their illegal source or real rights related to them”.

Further, Article 47 [Erroneous application of substantive law], states that *“Erroneous application of substantive law shall exist when the court has not taken into account any provision of substantive law that should have been taken into account, which has to do with the law governing ownership and other property rights, relations of obligations, inheritance, as well as other laws governing other legal-civil relations.”*

This wording is incomplete, because it does not clarify that even the wrong interpretation of legal provisions, and not only not taking them as a basis, results in the wrong application of the substantive law.

Article 60 of the draft law refers, in paragraphs 1 and 3, to the “extended confiscation procedure”. However, it remains unclear what is meant by this procedure.

Furthermore, Article 60 [The effect of other procedures in the implementation of the provisions of this law] should be clearer in regulating the effect of the criminal procedure, separating the criminal investigation phase from the indictment phase. Moreover, this article foresees the effect of the contested civil procedure in the procedure of verification and confiscation, but does not foresee the situations when the assets that are verified by the Bureau are the object of the non-contested or administrative procedure.

As a general approach to drafting legal norms, long wording in legal provisions is not recommended. To avoid undermining of legal certainty, legal provisions (like the one above) should be clarified, perhaps by being divided and re-worded into two or three paragraphs.

Moreover, the draft law should, for certain issues (especially organizational issues of the Bureau), refer to by-laws, which the Bureau should issue.

Regarding this aspect, it is very important that it is clear which issues related to the procedures of verification of unjustifiable assets will be regulated by by-laws. The draft law, in Article 20 [Procedure before the Bureau] describes a large part of these procedures, but, in paragraph 17, it stipulates that *“The procedure for verification of unjustifiable assets shall be determined by a by-law approved by the Director General”.*



First of all, it should be underlined that the establishment of the Bureau and conduct of civil procedures for investigation, namely verification of assets, in itself, does not represent a violation of the Constitution or the ECHR.

The practice of civil and administrative investigation of unjustifiably acquired property is recognized in many countries (as highlighted by the Venice Commission opinion and as elaborated in Section VI of this Opinion).

4.3 Strengthening guarantees for constitutional rights

The draft law affects some fundamental rights and freedoms, guaranteed by Chapter II of the Constitution in relation to the ECHR.

First of all, it should be underlined that the establishment of the Bureau and conduct of civil procedures for investigation, namely verification of assets, in itself, does not represent a violation of the Constitution or the ECHR. The practice of civil and administrative investigation of unjustifiably acquired property is recognized in many countries (as highlighted by the Venice Commission opinion and as elaborated in Section VI of this Opinion).

Moreover, the rights that are limited by this draft law are not so-called “absolute” rights, which mean that these rights can be limited under certain conditions. This draft law specifically affects the protection of property, which is

guaranteed by Article 46 of the Constitution, but also the right to a legal remedy (Article 32) and the right to judicial protection of rights (Article 54), as well as the right to privacy (Article 36).

The Constitution defines in Article 55 [Limitations of Fundamental Rights and Freedoms] the cumulative criteria that had to be met so that rights of a relative nature can be limited. The judicial test set for this purpose by the European Court of Human Rights (hereinafter: ECHR), which is also embraced by the Constitutional Court of the Republic of Kosovo (hereinafter: the Constitutional Court), consists of several conditions that must be met cumulatively: (i) the limitation of rights must be based on a specific law; (ii) must have a legitimate purpose; (iii) must be proportionate and; (iv) must not undermine the essence of the right being limited. So, all these conditions must be met for the ECHR and the Constitutional Court to consider limitation of human rights as permissible.

In light of this, the limitation of constitutional rights through the draft law is based on this law, the legitimate purpose of which cannot be disputed (condition i and ii). Also, the draft law does not permanently deprive people of their property rights or any other right, nor does it prevent them from acquiring property legally (condition iv). The most delicate issue is establishing a relationship between the extent of the limitation and the objective to be achieved (condition iii).

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One of the fundamental guarantees applied by the ECHR, especially in relation to the limitation of the right to property, is the judicial supervision of the decisions of administrative bodies that affect property rights. As noted in the findings of the Venice Commission, the main issues identified in the draft law are the rights of subjects to contest in court proceedings any measure or decision taken by the Bureau that limits their rights, especially the right to property. Article 32 of the Constitution [Right to Legal Remedies] stipulates that *“Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law”*. Further, Article 54 [Judicial Protection of Rights] states that: *“Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.”* The rights embodied in Articles 32 and 54 of the Constitution are related to Article 13 of the ECHR [Right to Effective Remedy]. As long as the Bureau did not confiscate the property nor imposed an interim security measure on assets, these articles were not put into motion.

However, Article 31 [Right to Fair and Impartial Trial], in conjunction with Article 6 of the ECHR, requires that a fair balance be established between opposing parties in judicial proceedings. In this context, the draft law should clarify (in Articles 20 and 21) the possibility that persons whose assets are targeted should have the possibility of opposing in court proceedings the proposal that the Bureau presents to the court for the imposition of an interim measure.

Another issue that must be addressed is the principle of proportionality, in the relationship between the confiscated property and the violation of the economic security (security of life) of the persons who were affected by the confiscation and their families. Depriving those persons and, especially, their family of the sources of existence, can lead to the violation of human dignity (Article 23 of the Constitution).⁷ Therefore, it would be advisable to address this issue in the draft law.

⁷ The jurisdiction of the ECHR suggests that endangering financial income and economic well-being can be related to the right to respect the human dignity.



5. WHAT ARE THE CHALLENGES OF ESTABLISHING AND FUNCTIONING OF THE BUREAU?

The challenges of establishing and functioning of the Bureau are interrelated, and some of them are presented above - especially the need to align the draft law with other laws.

First of all, it is important to re-examine once again the concept of verification and confiscation of assets embodied in it - including the institutional mechanism that this Draft Law creates.

5.1 Review of the institutional mechanism for the verification and confiscation of assets

The essential part of the draft law is dedicated to the establishment and operation of the Bureau, which is given broad powers for the initiation and termination of the procedure for the verification of suspected unjustifiably acquired assets. The first fundamental question is whether there is a need to establish a new public institution, such as the Bureau, or is it more practical and effective that the role of verification of unjustifiably acquired assets is executed by the Anti-Corruption Agency (ACA). This doubt was also raised by the Venice Commission opinion, especially given the fact that the mandate of the Bureau, as pro-

vided for by in the Draft Law, is related to and interfered with the mandate of ACA. Of course, vesting of ACA with powers to implement the project in question would mean amendment of the Law on Anti-Corruption Agency, as well as changing the mandate and structure of ACA (by expanding them). However, ACA is a functional institution that has created experience and standards in preventing and fighting corruption. In this context, ACA conducts administrative investigations regarding assets of certain categories of public officials, conducts procedures and imposes sanctions, files criminal reports with the Prosecutor's Office. All these facts and elements of the work of ACA create favourable premises for its mandate to be expanded, to include the investigation and verification of the unjustifiably acquired assets. This would transfer the issue of asset verification from the civil-legal domain to the administrative field. However, the practice of administrative investigation of assets acquired during or from the exercise of public duties is known in various countries.

5.2 Clarifying the cooperation with other institutions

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Bureau with other institutions, such as: ACA, Kosovo Police, Financial Intelligence, Banking sector (CBK), municipalities, etc. It should be taken into account that the activity of each of the mentioned institutions is regulated by separate laws, which may be in conflict with the draft law.

The activity of the Bureau, from the beginning, will depend on cooperation with other institutions and this cannot be done properly without a clear legal framework - especially in terms of obligations of other institutions to cooperate with the Bureau.

Once the obligations of other bodies to cooperate with the Bureau have been clarified, the practical aspect of this cooperation can be regulated through the signing of memorandums of understanding.

5.3 Functioning of the Bureau

In order to increase citizens' trust for the Bureau and to avoid the risk of its politicization, it is very important that the procedure for electing the Director General is as inclusive as possible. An option that could strengthen the credibility of the Bureau would be if the appointment of the Director General is made with the approval of two thirds (2/3) of the Assembly deputies present and voting (according to the procedure for election of Constitutional Court judges). The draft law, in Article 12.7, defines that *"The Assembly shall, by a majority vote of deputies present and voting, appoint the Director General. Voting of the Director General shall not be done by secret ballot"*.

Another important issue for the functioning of the Bureau is internal decision-making. Thus, Article 16 [Initiation of the procedure] empowers the Director General to decide on the initiation or non-initiation of the verification procedure.

Leaving the decision-making to initiate or not initiate verification procedure under the exclusive power of the Director General bears risks. This would be objectively difficult to be carried out in an efficient manner and, moreover, would expose the Director General to possible external pressures. It would be preferable to include an official or a professional researcher of the Bureau in the decision-making procedures within the Bureau, for the initiation or non-initiation of the verification procedure (the model of the Ombudsperson Institution could be an option).

Furthermore, the draft law establishes the overall time limit of ninety (90) days for the completion of the property verification procedure, allowing its extension to forty-five (45) days if the case is complicated and up to one (1) year when the procedure depends on international legal cooperation. The overall time limit of 90 days should be reviewed, and this purpose can be served by analysing the practice of ACA. Whether this deadline is reasonable or not, it will depend on several objective factors, especially on human capacities that the Bureau will have, as well as on the support and cooperation with other institutions.

Finally, the draft law should define some aspects of the operation of the Bureau - such as the procedures for conducting investigations, collecting data/evidence and ascertaining the factual situation, which need to be regulated by sub-legal acts of the Bureau.





6. WHAT ARE THE PRACTICES FROM OTHER COUNTRIES THAT HAVE ESTABLISHED SUCH BODIES?

International practices and modalities for the verification and confiscation of unjustifiably acquired assets are not uniform. They vary depending on a country's legal system, legislation in force, institutional structure and the need for detailed regulation of the confiscation process. In general, there are some fundamental differences in how states approach the aspect of confiscation of unjustifiably acquired assets.

As noted at the beginning of this analysis, the first distinction between states regarding confiscation of unjustifiably acquired assets lies in the fact whether confiscation is of criminal, civil, or administrative nature. Depending on the nature of confiscation, the corresponding procedures (criminal, civil or administrative) are then conducted, in accordance with the relevant legislation.

The second distinction between the states lies in who initiates the confiscation procedures and how the entire procedure is conducted. Some states initiate such a procedure mainly through the prosecution. Other countries have established special mechanisms or institutions that deal with unjustifiably acquired assets, in cooperation with justice institutions.

Following, we will present some practices of EU member states and other states with regards to the nature of confiscation of unjustifiably acquired assets, institutional actors, as well as other elements that may be useful for legislators when reviewing or analysing the draft law.

6.1 Practices related to civil confiscation

Civil confiscation can serve as an alternative to the instrument of extended criminal confiscation to deprive perpetrators of unjustified assets. This process can either rely on criminal conviction or occur independently of the criminal prosecution of the commission of specific offences. Civil confiscation is sometimes called "extended confiscation" and is carried out in civil proceedings, with all typical attributes of these proceedings.

The international legal basis for the civil confiscation of proceeds from corruption and money laundering are international instruments, in particular, the United Nations Convention against Corruption adopted in 2003. In paragraph 8 of Article 31 of this Convention "*state parties may consider*



the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds or other property liable to confiscation, to the extent that such a requirement is consistent with fundamental principles of their domestic law and with the nature of judicial and other proceedings”.

Similar provisions contain the FATF ‘Forty Recommendations’ (Recommendation no. 3) and in paragraph 4 of Article 3 of the Warsaw Convention adopted in 2005. Provisions of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union are also applicable to civil (extended) confiscation, taking into account relevant specifics of each procedure.

Civil confiscation is mainly used in Anglo-Saxon legal system countries, especially in the USA, Canada, United Kingdom, Ireland, Australia and South Africa. In addition to these countries, non-criminal confiscation is provided for in the legislation of Italy, Slovakia and Greece, as well as in several other countries, such as: Albania, Georgia, Slovenia and Ukraine. However, civil confiscation in Georgia and Ukraine is based only on criminal conviction, while in Albania and Slovenia it is relatively independent.

Civil confiscation in **Georgia** is regulated by the Code of Civil Procedure. In accordance with its provisions, civil confiscation is particularly applicable to: assets acquired through blackmail; assets of illegal origin (acquired as a result of law violation), belonging to the public official, any of his/her family members, his/her relatives or any other person related to him; unjustified asset (legal origin of which the defendant cannot provide with the court), if they belong to a public official, any of his/her family members, his/her relatives or any other person related to him/her. In the last two cases, assets belonging to the person convicted of money laundering are also subject to civil confiscation. The civil confiscation procedure is initiated based on the request of the prosecutor in the court of civil jurisdiction, with the request for the confiscation of asset of illegal or unjustified origin, belonging to a person, convicted of corruption or money laundering, or any of his/her family members, or any other person related to him/her.

Civil confiscation in **Ukraine** has been established in 2015, when the Code of Civil Procedure was amended with a new chapter, “Specific features of proceedings related to the recognition of unjustified assets and their recovery”, consisting of only three short articles.

Pursuant to Article 233 of the Code of Civil Procedure, the re-

quest for the declaration of an asset as unjustified and their recovery by persons specified in this article is presented by the prosecutor for the benefit of the state, during the statutory limitation period of 3 years from the date of entry into force of a conviction judgment against a person authorized to perform state functions or public functions (“Public Official”). Such a lawsuit may be filed against the public official, who has been convicted by a final judgment for committing the crime of corruption or money laundering, or against the legal entity, related to him/her, who owns (uses) properties for which there is evidence that the reported public official acquired this property, was using it or owned (had owned) it.

6.2 Institutions responsible for confiscation of unjustifiably acquired assets

As mentioned above, there is no uniform practice in terms of bodies or institutions dealing with the issue of confiscation of unjustifiably acquired assets. In most EU countries, prosecution is the authority that initiates proceedings related to the confiscation of unjustifiably acquired assets. However, in some other states there are specialized bodies that manage this process, or interact with the prosecution in handling these cases. Even specialized bodies play different roles in different countries, depending on their specifics. In some states, specialized bodies have a broader mandate related to unjustifiably acquired asset, while in other states these bodies either mainly deal with the keeping, management and sale of confiscated assets, or serve to support other institutions in carrying out their work.

Below is presented a table with relevant information from several EU member states regarding the institutions responsible for the confiscation of unjustifiably acquired assets.

COUNTRY	RESPONSIBLE INSTITUTIONS	ADDITIONAL COMMENTS
Belgium	<ul style="list-style-type: none"> ● Prosecutor's Office/Courts ● Central Office for Seizure and Confiscation in Belgium 	<ul style="list-style-type: none"> ● Three different missions under the same "roof": Asset Management; Asset recovery; Special prerogatives to ensure recovery of criminal assets. ● Established by the Law, dated 26 March 2003 for the establishment of a central office for the seizure and confiscation of assets. ● Part of the Public Prosecution Service of Belgium. ● It has no independent legal personality. ● It reports directly to the Minister of Justice. ● Composition: Director, Deputy Director, Two public prosecutors, 2 liaison officers from the Police, 4 liaison officers from the Ministry of Finance.
Bulgaria	<ul style="list-style-type: none"> ● Prosecutor's Office/Courts ● Commission for confiscation of illegally acquired assets 	<ul style="list-style-type: none"> ● Established by the Law against Corruption and Confiscation of Illegally Acquired Assets; ● Chapter 2 of the law is dedicated to the Commission in its entirety; ● The Commission is an independent state body specialized in the implementation of the policy against corruption and the confiscation of unjustifiably acquired assets; ● The Commission is a publicly funded legal entity with headquarters in Sofia. The Commission's budget is planned, implemented and reported according to the procedure defined by the Law on Public Finance; ● The Commission is a collective body consisting of five members: a Chairman, Deputy Chairman and three other members; ● The Commission interacts with the prosecution, the Ministry of Interior; State National Security Agency; State Technical Operations Agency and State Intelligence Agency.

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COUNTRY	RESPONSIBLE INSTITUTIONS	ADDITIONAL COMMENTS
Cyprus.	<ul style="list-style-type: none"> ● Prosecutor's Office/Courts ● MOKAS: Unit for Combating Money Laundering 	<ul style="list-style-type: none"> ● It is not a separate body. ● The Unit for Combating Money Laundering (MOKAS) is the Financial Intelligence Unit of Cyprus. It is the national center for receiving, requesting, analysing and disseminating disclosures of suspicious transaction reports and other relevant information related to suspected money laundering and terrorist financing. ● Main function: collection, classification, evaluation and analysis of information submitted by reporting entities in accordance with legislation and regulations, together with information from international and domestic partners.
Finland	<ul style="list-style-type: none"> ● Prosecutor's Office/Courts ● Legal Registry Center (implements enforcement) 	<ul style="list-style-type: none"> ● It is not a separate body; ● The Legal Register Centre is an agency in the administrative sector of the Ministry of Justice whose function is to act as a controller for information systems and registries; be responsible for enforcement duties related to fines, confiscations, payments and claims; be responsible for the maintenance and development of information systems.
Ireland	<ul style="list-style-type: none"> ● Prosecutor's Office/Courts ● Criminal Assets Bureau 	<ul style="list-style-type: none"> ● The Criminal Assets Bureau was established on 15 October 1996 as an independent statutory body under the Criminal Assets Bureau Act 1996. ● The Criminal Assets Bureau is a corporate body with permanent inheritance and an official seal. It has the power to sue and be sued in its own name. ● In accordance with relevant legislation, all money collected by the Criminal Assets Bureau is transferred to the Treasury for the benefit of the Central Fund. ● The sale of all seized assets is handled on a case-by-case basis and in accordance with the order of the Supreme Court. These orders may specify the method/type of sale and/or other stipulations as the Court deems appropriate. ● The main functions of the Bureau: confiscation, restriction of use, freezing, keeping or sequestration of assets identified or suspected to derive, directly or indirectly, from criminal activity.

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COUNTRY	RESPONSIBLE INSTITUTIONS	ADDITIONAL COMMENTS
Romania	<ul style="list-style-type: none"> ● Prosecutor’s Office/Courts ● National Office for Crime Prevention and Cooperation for the Recovery of Criminal Assets (Asset Recovery Office) 	<ul style="list-style-type: none"> ● Romania included the creation of an agency linking asset recovery and management in its National Anti-Corruption Strategy 2012-2015 and approved a law establishing the National Agency for the Management of Seized Assets; ● The agency was created based on discussions with various actors, national authorities involved and practitioners (eg Ministry of Justice, prosecutors, police) and was based on the experience of similar agencies in other countries. Since Romania had no national asset recovery or asset management agency, ANABI was created to combine the two; ● Main functions: facilitation of tracing and identification of proceeds of crime that may be subject to freezing, seizure or confiscation orders; ensuring the management of movable assets seized in criminal proceedings; the sale of movable assets that are subject to seizure in criminal proceedings. ● The main feature of ANABI is inter-institutional cooperation – all agencies with responsibility in the field of confiscated property are involved in the entire criminal proceedings, including for example the Ministry of Public Finance, the National Agency of Fiscal Administration, the Financial Supervision Authority, National Office for the Prevention and Combat against Money Laundering, etc.



7. CONCLUSION WITH RECOMMENDATIONS

The Draft Law on State Bureau for the Verification and Confiscation of Unjustified Assets envisages verification and confiscation of unjustifiably acquired assets, through a special civil procedure. This form of verification and confiscation of unjustifiably acquired assets, through civil procedure conducted by an independent public body (and regular courts), is not an exception. This is emphasized by the Venice Commission opinion and international comparative overview, which are presented in this Opinion. On the other hand, the legitimacy of the purpose that is aimed through such a law is indisputable – especially in a country like Kosovo, which suffers from corruption and other forms of misuse of public functions and duties. In general terms, the draft law incorporates standards set out by the Council of Europe and other international institutions and instruments, for the verification and confiscation of unjustified assets.

However, analysis presented in this Legal Opinion (also related to the Venice Commission opinion), points out obvious deficiencies and shortcomings, which need to be addressed before the draft law enters into force. In a summarized form, and based on the specific questions addressed in this Legal Opinion, the main findings and recommendations are as follows:

- It is necessary to fundamentally examine the possibility that the procedure for verification and confiscation of assets is carried out through ACA (and courts), without the need to establish a new body, namely the Bureau.
- The Law on State Bureau for the Verification and Confiscation of Unjustified Assets must be harmonized with other laws, the scope of which is interrelated with that of this Law.
- The draft law has ambiguities that should have been avoided, especially in relation to: clear and reasonable definition of subjects to which the law applies; definition of unjustified asset that can be subject to verification and confiscation; proper clarification of effects of the verification procedure on persons affected by the asset verification; clarifying the election and authorizations of the Director General; avoiding confusing wording and unclear language in some articles of the draft law.
- Introducing clear provisions that guarantee efficient protection of the constitutional rights affected by this law, including the possibility of all parties affected by the asset verification to contest in court any measure or decision of the Bureau that limits their rights (especially the proposal for interim security measure on assets); clarification of administrative effect that the verification and confiscation procedure can have to public officials, whose assets are confiscated; determining a minimum threshold of the confiscated asset, if confiscation jeopardises deprivation of persons whose assets are targeted and, especially, their families, of a dignified livelihood.
- Clear sanctioning of obligations of other institutions to cooperate with the Bureau and regulation of the forms of this cooperation.
- Clarification of the Bureau's internal decision-making procedures, especially powers of investigators and Director General; data collection and processing (with the recommendation that the right to initiate or not initiate verification does not depend exclusively on one official, even if that is Director General).
- Determining in the (draft) law which issues should be left to be regulated through by-laws.
- Reviewing the idea that the Director General be appointed by the votes of 2/3 of the deputies of the Assembly present and voting (to increase public trust for the Bureau).
- Setting maximum time limits to conduct investigations (verification), taking into account objective factors, especially human and institutional capacities that the Bureau will have, as well as cooperation and support by other institutions.

