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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

KOSOVO

DRAFT FOLLOW-UP OPINION

**TO THE OPINION ON THE DRAFT LAW N°08/L-121
ON THE STATE BUREAU
FOR VERIFICATION AND CONFISCATION
OF UNJUSTIFIED ASSETS (CDL-AD(2022)014)**

on the basis of comments by

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I. Introduction

1. By letter of 18 November 2022, Mr Glauk Konjufca, President of the Assembly of Kosovo requested a Follow-up Opinion of the Venice Commission on the Draft Law N°08/L-121 on the State Bureau for Verification and Confiscation of Unjustified Assets, [\(CDL-REF\(2022\)069\)](#); hereinafter “the Draft Law”),¹ which was revised further to the Joint opinion of the Venice Commission [\(CDL-AD\(2022\)014\)](#) adopted at the 131st Plenary Session of the Venice Commission, in June 2022.
2. Mr Dan Meridor, Ms Angelika Nussberger and Mr James Hamilton acted as rapporteurs for this Follow-up Opinion.
3. Given the fact that this is a follow-up opinion, no additional country visit or online consultations with the authorities and other stakeholders were organised. Broad consultations had been organised on 10-11 May 2022, during the drafting of the initial opinion.
4. This Opinion was prepared in reliance on the English translation of the Draft Law (comparative table) provided by the authorities of Kosovo. The translation may not accurately reflect the original version on all points.
5. *This Follow-up Opinion was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its ... Plenary Session (Venice, ...2022).*

II. Background

6. During its 131st plenary session the Commission adopted the Opinion on the Draft Law N°08/L-121 on the State Bureau for Verification and Confiscation of Unjustified Assets submitted by the authorities on 4 March 2022 [\(CDL-AD\(2022\)014\)](#). The opinion recalled that, despite their justified purpose, non-conviction based civil confiscation proceedings must be designed and implemented in compliance with the national Constitution, which includes the direct application of the European Convention on Human rights and taking into account European standards concerning the rule of law and respect for human rights.
7. The Commission welcomed the initiative of the authorities to seek remedies to combat organised crime and corruption, to prevent the exploitation of illegally acquired funds and to prevent the use of such funds for further criminal activity. However, it also stressed that the proposed new legislation alone could not be expected to resolve all the problems of corruption and needed to be embedded in a broader approach which would include a range of practical measures aimed at enhancing the effectiveness of the law enforcement system.
8. The draft law examined in the Opinion of the Venice Commission adopted in June 2022, presented a certain number of shortcomings; its implementation might result in infringements of fundamental rights guaranteed by the Constitution of Kosovo and the ECHR. Based on these considerations the Venice Commission made the following recommendations to the authorities:
 1. to formulate the general and public interests, the aim and purpose of the new law in a precise and exhaustive manner;
 2. to reconsider the need and usefulness of establishing a new body, the Bureau for Verification and Confiscation of Unjustified Assets (hereinafter “the Bureau”), and in case this approach is maintained:
 - a) provide for strong guarantees of the Bureau’s independence and

¹ The first opinion was requested by letter of Mr Glauk Konjufca, President of the Assembly of Kosovo (the national Parliament) on 4 March 2022, on the Draft Law N°08/L-121 on the State Bureau for Verification and Confiscation of Unjustified Assets, [\(CDL-REF\(2022\)015\)](#).

- b) provide the Bureau with a sufficient number of specialised staff and with adequate powers;
3. to define precisely:
- a) under what conditions and according to what criteria the Bureau should collect information *ex officio* before starting the formal verification procedure;
 - b) under what conditions the verification procedure can and must be initiated; and
 - c) priorities for the Bureau's work, ensuring that the Bureau will focus on high-profile cases;
4. to make clear that the burden of proof shifts to the party to the procedure only after the competent authority (under the previous draft law, the Bureau) has presented a reasoned proposal and evidence showing that there is at least a probability of illegal acquisition of assets, on the basis of the civil standard proof of the balance of probabilities; and defining more precisely the civil standard of proof of the "balance of probabilities" which, under the current draft law, is also to be applied by the court;
5. to introduce stronger guarantees of the party's and other persons' human rights, *inter alia* by:
- a) specifying that the decision on initiating the verification procedure is at least communicated to the party to the procedure and subject to legal remedy;
 - b) ensuring that the statements made and documents provided compulsorily by the party in civil proceedings cannot be used against him or her in a criminal proceeding;
 - c) making it clear that the party's family members are targeted only as "third persons";
 - d) reviewing the provision that natural and legal persons may be compelled by court to cooperate with the Bureau;
 - e) regulating how "third parties who have a legal interest" are identified and what their rights are in the verification and confiscation procedure;
 - f) ensuring that the persons concerned by confiscation are not deprived of all assets; and
 - g) guaranteeing compensation of damages suffered by a party in case of an ultimately unsuccessful confiscation procedure;
6. to introduce an adequate evidentiary threshold for interim security measures and make it clear that such measures can be taken under the civil procedure even if criminal investigations have been initiated.

9. Following the adoption of the Venice Commission's opinion [CDL-AD\(2022\)014](#), on 14 July 2022, the Assembly of Kosovo adopted the Draft Law in first reading and in accordance with the Rules of Procedure of the Assembly sent the text to the Committee on Legislation for review. The Committee established a working group in charge of the preparation of the new version of the Draft Law in co-operation with the Ministry of Justice in line with the recommendations of the Venice Commission's opinion. According to the information provided by the authorities, the process of amending the Draft Law involved representatives of civil society as well as international partners, such as the EU Office in Kosovo, the Council of Europe, OSCE, UNDP and other organisations. The Commission welcomes the inclusiveness and transparency of the process of revision of the Draft Law.

III. Analysis of the Draft Law based on previous Opinion

10. The Assembly has thoroughly discussed the necessity of the Law and potential improvement of its provisions. The scope of the present Opinion is to analyse if this new version of the Draft Law has taken into account the opinion of the Venice Commission and its recommendations.

1. Clear definition of the general and public interests, the aim and purpose of the new law

11. Following the recommendations of the previous opinion of the Venice Commission² the definitions contained in the draft law have been substantially revised. The new draft applies to the assets of official persons and third parties: the previous separate treatment of family members and politically exposed persons not in either of these categories is abandoned. A new Division of Civil Confiscation within the Basic Court in Pristina will be established. Ambiguities in the definition of the burden of proof on the balance of probabilities are clarified. The Draft Law provides that the standard of proof is *“when the court, based on the evidence, believes that something is more likely to be, or to have happened than not”*. Asset verification is defined as *“the assessment of the amount of assets in relation to the legal income”* and unjustified assets are defined in accordance with this. The mere exercise of control over property no longer constitutes the controller as a third party. Third parties are only to be regarded as such if the property has been transferred to them or they have a legal interest in it.

12. Article 3.1.10 could be reviewed. It is not enough that the assets are not in accordance with the legal income but also to meet the criterion that *“the origin fails to be proven as legal”*. Drafters could consider amending the provision which would establish that “unjustified assets” are those which are *“not in accordance with the legal income and whose origin fails to be proven as legal”*. In Article 3.1.12 it is not clear whether “public institutions or enterprises” include also foreign or only Kosovar institutions and enterprises. This issue could be clarified in the Draft Law.

2. The need of establishing the Bureau as a new body; assurance of its status as an independent and efficient institution

13. In its June 2022 opinion, the Venice Commission raised the issue of the necessity to establish the Bureau as a new body in charge of fighting against corruption.³ The reason for the Venice Commission’s doubts was that the fight against corruption in Kosovo was already carried out by other bodies such as the police, the prosecution service, the tax and customs authorities and the Anti-Corruption Agency.

14. The Commission understands that the Assembly of the Republic of Kosovo remains convinced of the necessity of the establishment of the Bureau and that the Draft Law aims at improving the interaction of the different authorities involved in the fight against corruption. One important factor in this context is the new composition of the Oversight Committee (including the Director of the Corruption Prevention Agency and the Director of the Financial Intelligence Unit). Another important aspect is the involvement of the other bodies active in corruption prevention in the initiation of the procedure by the Bureau (Article 17.2 of the new Draft Law).

15. Concerning the question of independence, the main change in the draft law is the new configuration of the oversight of the Bureau’s work by a newly composed Oversight Committee. According to the first draft it was composed of elected members of the Assembly and thus risked to be politicised.⁴ Now the Bureau is to be responsible to the new Bureau Oversight Committee of which the General Auditor is a member together with a Supreme Court Judge nominated by the Supreme Court President as chair, the Director of the Corruption Prevention Agency, a deputy Ombudsman nominated by the Ombudsman, and the Director

² Venice Commission, [CDL-AD\(2022\)014](#). Opinion on the Draft Law N°08/L-121 on The State Bureau for verification and confiscation of unjustified assets, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022).

³ See [CDL-AD\(2022\)014](#), paragraph 21.

⁴ *Idem*, paras 38 and 39.

of the Financial Intelligence Unit. This appears to be an appropriate solution (Article 10 of the new draft Law). In the view of the Venice Commission, the new body proposed in the draft law provides a better guarantee for independence as all Committee members come from outside the political sphere. As the General Auditor is also a member this responds to the Venice Commission's remark that the General Auditor should be implied in the control of the budget of the Bureau.⁵

16. Furthermore, it is to be commended that the Oversight Committee is also responsible for proposing the appointment and dismissal of the Director General of the Bureau and to evaluate his or her work and approve the by-laws. At the same time, the Committee cannot intervene in the verification procedure (Article 12.2 of the Draft Law). The criteria for appointment as Director General are established in Article 13 of the Draft Law and at least two and not more than five candidates are to be recommended. To be recommended a candidate must qualify under all three headings of integrity, competence and managerial ability. It is not expressly stated that the results of the assessment are to be published but the reasons for the priority given to each candidate by the Committee must be stated which seems to have a similar effect. The Assembly then elects one candidate by majority vote in a secret ballot. However, a better solution might be to provide for a qualified majority with an anti-deadlock mechanism being the appointment of the Committee's first choice if the threshold is not reached.

17. The improvement of the selection procedure is very important as the Director General is still the dominant figure in the whole process; the mandate has even been prolonged from five to seven years. The seven-year term without the right to re-election and a prohibition to exercise any other public function are very positive steps. This is also true for the definition of the reasons for the end of the mandate of the General Director. They are now more specific and there are more safeguards against abuse.

18. Therefore, the Venice Commission is of opinion that the changes fully implement the recommendations of its previous opinion. The composition of the Oversight Committee and its role in the selection of the Director General, *inter alia*, is a significant improvement compared to the previous draft.

19. Concerning the institutional capacity of the Bureau to adequately fulfil its task the Venice Commission takes note that the Bureau now contains at least four units, a Legal Department, a Risk Analysis Department, a Department of Verification and Forensic Accounting, and a Department for Finance and General Services. This follows the recommendation of the Venice Commission.

20. In line with the Venice Commission recommendations all substantial comments in regard to the organisation of the Bureau were addressed: first the provision of strong guarantees for the independence of the Bureau, and second the provision of the Bureau with a sufficient number of specialised staff and with adequate powers.

3. Precise definition of preconditions for initiating a verification procedure

21. In its June Opinion the Venice Commission proposed to clearly define the conditions and criteria for collecting information *ex officio* as a precondition for starting the formal verification process.⁶ It also held it necessary to define the conditions for initiating the verification procedure and the priorities for the Bureau's work, ensuring that it will focus on high-profile cases.

⁵ *Idem*, para 36.

⁶ *Idem*, paras 43 – 45.

22. Important changes are proposed to the previous Draft in the verification process. Article 17 of the new text now provides that the Bureau initiates the verification procedure “on the basis of credible and reliable information regarding unjustifiable assets”. In the following paragraphs the draft law sets out who collects the relevant information and who decides on its reliability. Information can be brought to the Bureau by natural and legal persons, by institutions of Kosovo; the Bureau can also take into account other public and accessible information. However, the Draft Law still does not provide for a threshold - does the evidence need to give rise to the probability that the asset is unjustified or is some test such as reasonable suspicion enough? This matter should be given further consideration during the preparation of the final version of the Draft Law.

23. The Draft Law provides a list of institutions which are “*actively obliged to provide the requested information without delay*”, such as the Agency for Prevention of Corruption, the Tax Administration of Kosovo, the Customs of Kosovo, the Central Bank of Kosovo, the Financial Intelligence Unit, Notaries and Private Enforcement Agents, thus integrating all bodies working in this field (Article 17.2). Such information must also be provided by other institutions and persons who possess it. This is a duty on other persons (including natural persons) to provide relevant information and documents, but not in violation of the rights to privacy and non-self-incrimination (Article 19.1). A court order to provide such information and documents may be issued but not to the extent that this would violate national security or constitutional human rights (Articles 19.3 and 19.4) or would affect a criminal investigation. These changes are very positive.

24. Article 17.5 provides that “*reliable information*” is defined as “*any information, document, evidence, testimony or data, which suggests that there is a discrepancy between the legal income and the assets created*”. The role of the Director General in this context is also specified (Articles 17.6 and 17.7). Prioritisation in the work is regulated by the law, as recommended by the Venice Commission. In this context, the law refers to “the height of the discrepancy between the assets and the legal income, giving priority to the cases with the highest value of the discrepancy”.

4. Clarification of provisions concerning the burden of proof

25. One of the central elements for a fair balancing in civil confiscation procedures is the regulation of the burden of proof. Therefore, the Venice Commission’s recommendation no. 4 has put emphasis on a clear regulation of this issue.⁷ It indicated a need for a clear definition of the civil standard of proof which has now been integrated in Article 1.8 of the new Draft Law specifying that it is the “*standard of proof when the court, based on the evidence, believes that something is more likely to be, or to have happened than not.*”⁸ It is now also clear that the Bureau has to present the evidence before the court and to prove, based on this standard, that the ownership of the asset cannot be justified. The party can then prove the contrary in the hearing (Article 33 of the new Draft Law). In the view of the Venice Commission the question of burden of proof has thus been regulated in a satisfactory way in the new version of the Draft Law. The uncertainty in the duplicity of formulae has been removed and now there is a sufficiently clear definition of balance of probabilities.

⁷ Idem, para 57.

⁸ It might be a matter of translation, but “court **concludes** rather than **believes** that something is more likely to be” might be more appropriate term to be used.

5. Improvement of the human rights guarantees for those involved in the procedure

26. For an adequate safeguard of the human rights of the parties involved in the procedure the Venice Commission's Opinion recommended regulating the communication of the initiation of the procedure to the party involved. According to the Draft Law this information must be accessible to the party subject to verification except where this *"would endanger the verification procedure, would damage the evidence and may violate the public interest."* (Article 17.9.) In such a case the decision whether such information need not be disclosed should lie with the court. It does not seem, however, that there is a separate legal remedy against the initiation of the procedure. It is also not clear if there is a mechanism to ensure that the statements made, and documents provided compulsorily by the party in civil proceedings cannot be used against him or her in a criminal proceeding. This might, however, follow from other laws applicable. This should be clarified.

27. The position of third parties has been very much improved by removing politically exposed persons and family members of official persons from the draft. This makes the whole law much clearer. "Official persons" and "third parties" have now been clearly defined in Article 3 (items 1.12 and 1.15). The Venice Commission is of opinion that the rights of third parties and their involvement in the procedure have been clarified and do not raise any more major concerns.

28. Article 21.2 permits the extension of the verification period for up to five years after the end of office. It is true that the payment of a bribe could be deferred- or, for that matter, advanced in anticipation of an appointment. However, there should be some reasonable basis for suspicion, in the case of an extension for a period as long as five years. In principle, a court should rule on such an extension. This provision would even allow the disregarding of the statute of limitations. This could be reasonable, but there should some time limitations, such as control by a court. These issues could still be considered by the drafters in the final version of the Draft Law.

29. Article 22.4 deals with the situation where assets have been transferred to a third party. There should at least be a basis for a reasonable suspicion that this was not a transfer made in good faith and arguably opening an inquiry should require a court order.

30. The question of compensation has been regulated on the basis of a reference to "other legislation" (Article 62); the details of the regulation can therefore not be checked in this follow-up opinion.

6. Introduction of an adequate evidentiary threshold for interim security measures

31. Following the recommendations of the Venice Commission's Opinion concerning the interim measures some very short time-limits have been improved (e.g. appeal within 48 instead of 24 hours; objection against the imposition of interim measures within 15 instead of 5 days). The preconditions for the interim security measures are now clearly set out in Article 23: *"Whenever before or after the presentation of the proposal for confiscation, upon the proposal of the Bureau official, the Court may set the temporary measure of securing the asset, without prior notification and hearing of the party in the procedure, if the Bureau makes a credible claim [for] the existence of unjustifiable assets and that the temporary measure is based on evidence collected in the verification procedure and is urgent and that if acted otherwise, the assets can be alienated, destroyed or in any form will not be available to that person."*

32. The Commission welcomes the deletion of the provisions on the withdrawal of the proposal and the re-submission of the withdrawn proposal (Articles 36 and 37 of the previous Draft Law).⁹

7. Other issues which could be considered by the authorities

33. The Draft Law now provides that the Bureau may not withdraw from the procedure (see for comparison former Article 36 of the Draft Law). The drafters could consider adding a provision that would cover situations when the proceedings by the Bureau prove to be clearly unfounded, providing for a possibility to withdraw from the case but without the right to re-submit the case. Secondly, where it is not possible to confiscate assets the replacement value as at the time of confiscation is to be paid (Article 40). It may be useful to consider introducing specific provisions covering cases when irrecoverable assets are involved, such as perishable items or businesses which are forced to cease trading during the legal proceedings. Thirdly, the Venice Commission notes that the suggestion to simplify the Draft Law by reference to general procedural law in appropriate cases has not been followed.

IV. Conclusion

34. The amended Draft Law N°08/L-121 on the State Bureau for Verification and Confiscation of Unjustified Assets represents a considerable improvement on the earlier text. Most of the more serious problems identified in the June opinion of the Venice Commission have been addressed. However, the Venice Commission recommends to the authorities to consider the following issues during the preparation of the final version of the Draft Law:

- a. to provide in the text that “unjustified assets” are those which are “not in accordance with the legal income and whose origin fails to be proven as legal”;
- b. to clarify whether “public institutions or enterprises” include also foreign or only Kosovar institutions and enterprises;
- c. to provide for a qualified majority with an anti-deadlock mechanism for the election of the Director General of the Bureau;
- d. to clarify the mechanism ensuring that the statements made, and documents provided compulsorily by the party in civil proceedings cannot be used against them in criminal proceedings;
- e. consider adding a provision that would cover situations when the proceedings by the Bureau prove to be unfounded, providing for a possibility to shorten matters by withdrawing the case.

35. While there is still some room for improvement the new Draft Law represents a workable system of non-conviction-based asset forfeiture in Kosovo.

36. The Venice Commission remains at the disposal of the authorities of Kosovo for further assistance in this matter.

⁹ See [CDL-AD\(2022\)014](#), paragraph 60.