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Konfiskimi i pasurisë së pajustifikueshme: problemet juridike të Projektligjit aktual

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ABOUT KLI

KLI, Kosovo Law Institute, is a nongovernmental and non-profit organization of public policy, a think tank specialized in the justice sector.

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I. Executive Summary

The Government of the Republic of Kosovo, on December 29, 2021, approved the Draft Law on the State Bureau for Verification and Confiscation of Unjustified Assets. The Draft Law will soon be considered by the Assembly of Kosovo. Given that this Draft Law contains certain legal shortcomings, the Kosovo Law Institute (KLI) deemed it necessary to publish this paper in order to help the relevant stakeholders have a well-informed position regarding this Draft Law.

This Draft Law creates the civil confiscation mechanism in Kosovo, enabling the confiscation of unjustified property without the need for a criminal conviction. The main purpose of the Draft Law is to enable that assets deriving from illegal activities, related to official corruption, are returned to the state even when the successful prosecution of persons, for various reasons, cannot be achieved. Although its purpose is legitimate, the Draft Law does not fully respect the Kosovo Constitution and is not entirely in line with international standards in this area.

The main problematic aspects of the Draft Law in the legal sense include:

- One of the main authorities for the implementation of the Draft Law, the State Bureau, is not independent in the objective sense. The Bureau's Director, who is the main authority for initiating the verification and confiscation procedures, is appointed by the Assembly with a simple majority of votes and can be easily dismissed. Thus, the Director General—and consequently the Bureau—will be objectively dependent on the political parties that hold the majority in the Assembly. The governing body of the Bureau should be collegial and pluralistic.

- The investigative powers of the Bureau for gathering information are not fully in line with the Constitution. There is no adequate judicial control over the measures that the Bureau can take to collect information. At the same time, some investigative measures do not seem to be justifiable.

- In confiscation proceedings, the Draft Law establishes the exclusive jurisdiction of the civil divisions in the Basic Court in Prishtina and (in the second instance) the Court of Appeals. All civil divisions in the place of dwelling or emplacement of the party to the procedure should have jurisdiction. Or, alternatively, the Draft Law should establish a distinct unit, specialized in handling cases of civil confiscation.

- The standard of proof in the confiscation procedure, necessary for the imposition of the interim measure and the final confiscation, is not adequate. This inadequacy may lead to a violation of the right to peaceful enjoyment of possessions and/or of the right to a fair trial.

- The scope of the Draft Law is limited to assets acquired by public officials after 2008. This adjustment will practically dilute the positive effects that the non-conviction based confiscation of unjustifiable assets may have.

- Criminal guarantees of the right to a fair trial do not apply in non-conviction based confiscation proceedings, which are of a civil nature. However, the Draft Law should regulate more adequately the relationship of the civil confiscation procedure with the criminal proceedings that may be conducted against the owner of the property. This so that in other (criminal) proceedings there is no potential interference with the constitutional guarantee of presumption of innocence and the right against self-incrimination.

- The imposition of the interim security measure does not fully respect the party's right to property. In order to be in line with human rights and international standards, the party should be able to access the secured property for reasonable expenses, when the party can prove that they are in need and no other property is available to them. Also, the possibility of compensation of the party should be explicitly provided if they have suffered a loss due to the inability to use their property, if ultimately the assets are not confiscated.

- In order to respect the rights of all third parties in the procedure, firstly, their notification must be adequate. The notification under the Draft Law is not as such.

- The draft law should provide for the court's possibility to not entirely conduct the confiscation procedure in certain unnecessary cases but issue decisions analogous to the judgment due to absence and the judgment based on confirmation under the Law on Contested Procedure.

Addressing these problematic issues of the current Draft Law will contribute on bringing the civil confiscation mechanism in Kosovo in line with the Constitution and international standards in this area.

II. Introduction

Through the Draft Law on State Bureau for Verification and Confiscation of Unjustified Assets, the Government of the Republic of Kosovo aims to build the mechanism of confiscation of unjustified assets from certain subjects. The confiscation established by this Draft Law is generally controversial as it enables the confiscation of a person's questionable property without the need for a criminal conviction.

The general aim of this Draft Law is completely legitimate. Civil confiscation of unjustified assets can be particularly effective in reaping the rewards of crimes committed by corrupt officials, to return that wealth to the citizens of a country. In fact, civil confiscation can often be the only means by which crime proceeds can be obtained so that, to some extent, justice can be brought.[1] This because in certain cases a successful prosecution may not be possible, either because the perpetrators have managed to distance themselves from their criminal activities, to hide the illegal origin of the proceeds, or because they were too powerful to be prosecuted. This also applies in the case of Kosovo, where a large number of public officials have been "amnestied" by the justice system, due to a lack of courage to investigate and prosecute their criminal wrongdoings. Therefore, such a system of civil confiscation aims to prevent the possibility of illegal property circumventing law enforcement, for the simple fact that a criminal proceeding against the owner of the property, for whatever reason, may not be successful.

Given the legitimate aims mentioned above, such initiatives have been supported at regional and multilateral level by various international organizations. At the same time, a growing number of countries have established systems of civil confiscation of assets. These countries include Australia, Bulgaria, Canada, Colombia, Georgia, Ireland, Italy, the Netherlands, South Africa, the United States, the United Kingdom, etc.

However, although the purpose of such a mechanism is legitimate, civil confiscation clearly impacts human rights and raises well-founded debates about its procedural fairness. Therefore, any framework of civil confiscation must be developed with the utmost care, in order to respect the human rights guaranteed by the Constitution and to be in line with international standards. The current Draft Law—which the Government approved without adequate public consultation[2]—raises some concerns in this regard.

[1] European Commission for Democracy Through Law (Venice Commission), "Interim Opinion: On the Draft Act on Forfeiture in Favour of the State of Illegally Acquired Assets (of Bulgaria)" CDL-AD(2010)010, Opinion no. 563/2009: ¶20.

[2] In light of the provisions of the Government Regulation on Minimum Standards for Public Consultation Process (RPC), the Ministry of Justice, on the grounds that this Law must be approved within 2021, has shortened the time of public consultations to six working days. The reasoning of the Ministry in this case is not based on Law and RPC. Thus, for a voluminous law establishing a separate institution, building a new confiscation system and implicating many human rights issues, the Ministry has asked the public to submit comments within six working days. (It is a very problematic issue that such a controversial Draft Law was passed in the Government without an adequate public consultation, despite the fact that previously there were reactions from civil society and international partners on some controversial aspects of this initiative.) On the other hand, according to the RPC, the received comments had to be treated by the working group for drafting this Draft Law and, after reviewing

This paper aims to address these concerns and problematic aspects of the said Draft Law, in order to serve as a guide for the Assembly of Kosovo and relevant actors prior to its adoption by the Assembly.

III. Legal Issues of the Draft Law

1. The independence and impartiality of the Bureau

The Draft Law creates the State Bureau for Verification and Confiscation of Unjustified Assets, as the competent authority to conduct investigations and initiate civil confiscation proceedings. The Bureau is supposed to be an independent public institution (Article 6 of the Draft Law), which must perform its functions "independently from any other body or authority in the Republic of Kosovo" (Article 142 of the Constitution). But the way the Bureau is set to function makes it impossible to be considered objectively independent.

The Bureau is headed by the General Director. Pursuant to this Draft Law, the General Director is the main authority for initiating the verification of assets (Article 16) and initiating confiscation proceedings (Article 20). The problem is that the Director General is appointed by a simple majority of the Assembly (by a majority vote of the deputies present and voting), upon the proposal of the oversight Committee of the Assembly. Thus, among the main authorities to implement the Draft Law is easily appointed by the ruling parties. Add here that the mandate of the Director has very minimal guarantees, where he can be dismissed on the basis of the vague ground of "failure to fulfill the legal mandate" (Article 15 (4 and 5)). In such circumstances, it is impossible for the Bureau to qualify as an independent and impartial institution in the exercise of its duties. The General Director will depend entirely on the ruling parties; that is, with the change of the parliamentary majority in the Assembly, under the current Draft Law, the General Director will also change.

In the relevant opinion of the Venice Commission on Bulgaria cited above, the Commission considered that it was an adequate adjustment that the Bulgarian authority responsible for initiating the civil confiscation procedure (IAAC) was headed by a collegial body consisting of five members, one of whom was elected by the Prime Minister, three by the Assembly, and one by the President. The Venice Commission considered that such an arrangement of the IAAC would contribute to guaranteeing the independence and impartiality of this authority. But, because the three members coming from the Assembly were elected by a simple majority, the Venice Commission considered that this would negatively affect the independence of the IAAC and enable the direct intervention of the ruling parties. Therefore, the Commission

the comments, to publish the final report. None of these obligations in this case has been respected by the Ministry of Justice.

recommended that the three members appointed by the Assembly be elected by a qualified two-thirds majority.[3]

In line with the views of the Venice Commission, the Director General of the Bureau should not be appointed with a simple majority by the Assembly. In fact, for the whole process of verification and confiscation of unjustified assets to not depend essentially on an individual, the governing body of the Bureau should be collegial and pluralistic. This would be ensured, for example, by providing for some members of the Bureau's governing body to be delegated by various state institutions, or by providing for them to be elected by a qualified two-thirds majority in the Assembly.[4] (Furthermore, the Draft Law also does not regulate how other officials of the Bureau, responsible for verifying assets and conducting confiscation proceedings in court, will be appointed.)

2. The Bureau's investigative powers and the obligation for cooperation

The Draft Law sets out a range of investigative measures that the Bureau may take during the asset verification procedure, in order to collect information (Article 17). At the same time, the Draft Law stipulates the obligation of all entities to cooperate with the Bureau in providing the required information and documents (Article 18).

Of course, a successful case of confiscation of unjustified assets can only be built if the Bureau has access to certain data.[5] However, in a constitutional order based on the rule of law (Article 7 of the Constitution), it must be ensured that access to such data is lawful and adequate. An important guarantee that access to such data would be in accordance with the rule of law would be that investigative measures could only be taken under judicial control, as the court could assess the proportionality of the investigative measure.

The Draft Law—after stipulating the obligation of certain entities (including the parties to the proceedings) to cooperate with the Bureau in the collection of information—stipulates that the provision of such information is made at the request of the Bureau. Only if the Bureau's request

[3] Venice Commission, "Interim Opinion: On the Draft Act on Forfeiture in Favour of the State of Illegally Acquired Assets (of Bulgaria)": ¶45-6.

[4] In the opinion of the Venice Commission on Kosovo on the amendments to the Law on the Prosecutorial Council (CDL-AD(2021)051), the Venice Commission had argued that the Constitution of Kosovo defines the specific cases when a decision of the Assembly can require a qualified majority of votes. Therefore, according to the Commission, constitutional amendments are needed in order to determine that non-prosecutor members of the Council should be elected by a two-thirds majority of the Assembly (¶30). However, KLI estimates that even by law it can be determined that the governing body of the Bureau is appointed by a qualified majority in the Assembly. As the Venice Commission pointed out in another opinion on Bulgaria (where this issue is regulated by the Constitution in the same way as in Kosovo), "a national Constitutional Court generally intervenes when there is a lack of guarantee, not when the ordinary law sets forth a stricter guarantee such as this one, which would strengthen the independence and representative character of [the competent authority for initiating civil confiscation]." Therefore, the Venice Commission recommended the "reintroduction of the qualified majority requirement in Art. 4§2 [of the Law]. Such provision might also have the positive effect of easing the procedure for the amendment of Art. 81(2) of the Bulgarian Constitution." European Commission for Democracy Through Law (Venice Commission), "Opinion on the Sixth Revised Draft Act on Forfeiture of Assets Acquired through Criminal Activity or Administrative Violations of Bulgaria" CDL-AD(2011)023: ¶17-9.

[5] Venice Commission, "Interim Opinion: On the Draft Act on Forfeiture in Favour of the State of Illegally Acquired Assets (of Bulgaria)": ¶55.

is not implemented then the court can be activated, if the Bureau asks the court to order the subjects to implement the request of the Bureau for collection of information (through the order for submission of information and documents) (Article 18).

At least for certain invasive requests, it should be determined that the collection of information can only be requested if the court issues an order in advance. Thus, the court would assess in advance whether "the request of the Bureau is grounded and justified" (Article 18 (8)). Meanwhile, for other measures for which a court order would not be required in advance, the law should explicitly stipulate informing the subject that if it does not fulfill the request of the Bureau, the same will be attempted to be fulfilled by a court decision. As is currently the case—where the Bureau may request certain information directly, without the initial involvement of the court and under the legal obligation of the subjects to provide information (Article 18 (1))—there is a risk that certain investigative measures may be applied unjustifiably.

Also, the necessity and proportionality of some requests for information gathering should be reconsidered (such as "expenses for the maintenance of the natural person and family members of the party in the procedure," "costs for travels abroad," "other expenses," etc.) (Article 17). In this way the investigative powers of the Bureau would be more in line with the rule of law as a fundamental constitutional value.

3. The incorrect jurisdiction

According to the Draft Law, the Civil Division of the General Department of the Basic Court in Prishtina and the Court of Appeals will have exclusive jurisdiction over cases submitted by the Bureau. This adjustment has several drawbacks related to the effective implementation of human rights and the good administration of justice.

The General Department, within which the Civil Division operates, is located in all Basic Courts and their branches. The GD in Prishtina has no difference in relation to other GDs. Thus, establishing exclusive jurisdiction for all cases of civil confiscation in only one basic court, has practical shortcomings in relation to this Draft Law and the proper administration of justice.

Currently, the most loaded court is that of Prishtina, where out of all cases in the judicial system about 40% of them are in this court.[6] The unnecessary further burden of this court with a large number of new cases, only worsens the backlog cases situation and the efficiency of this court.

According to the Law on Contested Procedure, the court where the defendant has his residence or domicile is generally competent for the processing of civil cases (Article 37 (1)). The reason why such a provision is constructed has to do with the fact that the defendant and his property are located in his place of residence or stay and this makes it easier to proceed with the case and execute the decision. Thus, the solution defined in the Draft Law that all cases will be tried

[6] Këshilli Gjyqësor i Kosovës, "Raporti statistikor i gjykatave për vitin 2020"; Këshilli Gjyqësor i Kosovës, "Raporti statistikor i gjykatave për gjashtë mujorin e parë të vitit 2021"; Ministria e Drejtësisë, "Rishikimi Funksional i Sektorit të Zbatimit të Ligjit në Kosovë: Rritja e efikasitetit të sistemit gjyqësor dhe prokurorial": p. 35.

by only one court will reduce the efficiency and effectiveness in handling civil confiscation cases. On the other hand, this solution does not seem to have any particular positive effect.

The adjudication of the cases of the Bureau in the Civil Divisions, under the circumstances in which the judicial system is currently functioning, risks violating the right to a hearing within a reasonable time. According to the findings of KLI, the average handling of a civil case is 8.3 years.[7]

On the other hand, for the proper implementation of civil confiscation, a more specialized professional knowledge is required, due to the fact that we are dealing with a new system, unimplemented before by judges. Until this profiling takes place, it is recommended that judges be trained in the field of civil confiscation.[8] This would guarantee the professional handling of civil confiscation cases.

In these circumstances, it would be more reasonable to establish a separate unit in the judicial system, which would specialize in handling these cases. In addition to guaranteeing professionalism, the existence of a special unit for handling these cases would also guarantee the focus and stability of the judges who handle these cases. By dealing only with cases of this nature in a specialized manner, judges would treat these cases with increased efficiency.

4. The standard of proof: burden of proof and rebuttable presumptions

The issue of the standard of proof is very important for a civil confiscation mechanism. If this standard is high, it will be difficult for the Bureau to temporarily secure the suspicious property or to have the property permanently confiscated. However, if the standard of proof is low, it could lead to unjustifiable interference with the human rights of the parties to the proceedings.[9]

Thus, the issue of the standard of proof in the civil confiscation of unjustifiable property is very important, as it serves as a guarantee that there is no violation of the right to peaceful enjoyment of possessions, the right to a fair trial, or equal treatment. Adequate precision of the standard of proof is also important to guarantee legal certainty, foreseeability and uniform application of the law, because it enables that the law is applied in accordance with the intentions of the legislator and not to depend on individual judges on a case-by-case basis. The latter, as the Venice Commission points out, is particularly important to avoid in systems without adequate experience of judges in civilian confiscation schemes and where corruption has permeated the justice system.[10]

[7] Mirvet Thaqi dhe Driton Nocaj, "Drejtësia e Vonuar në Kosovë" (IKD, 2021): p. 36.
[8] Theodore S. Greenberg et al, *Stolen Asset Recovery: A Good Practices Guide for Non-conviction Based Asset Forfeiture* (World Bank Publications, 2009): p. 84.
[9] Venice Commission, "Opinion on the Sixth Revised Draft Act on Forfeiture of Assets Acquired through Criminal Activity or Administrative Violations of Bulgaria": ¶57.
[10] Venice Commission, "Interim Opinion: On the Draft Act on Forfeiture in Favour of the State of Illegally Acquired Assets (of Bulgaria)": ¶75.

The current Draft Law contains some problematic aspects in the standard of proof (in the burden of proof and rebuttable presumptions), both in the phase of interim security measures and in the phase of final confiscation.

a) In the interim security measure

The Draft Law stipulates that at any time "before or after the proposal for confiscation by the Bureau officer, the court may impose an interim security measure on the assets ... if the Bureau makes credible the claim that the interim measure is grounded and urgent and that by acting otherwise, the assets may be alienated, disposed of or otherwise will not be available to that person" (Article 21 (1)). Such an arrangement is not entirely in line with international standards and violates the rights of the parties to the proceedings.

In cases before the proposal for confiscation is submitted by the Bureau, it appears that the court may impose an interim security measure without an adequate evidentiary threshold. Specifically, it is sufficient that the claim of the Bureau (that if the interim measure is not imposed the property may no longer be available to the subject) is valid.[11] But no evidentiary standard is required to prove that the property sought to be temporarily secured is, in fact, of dubious origin. Of course, the standard of proof in this case may be lower than that for the final confiscation of property. But in this case there is no standard of proof at all: it is enough for the property to be endangered by alienation, annihilation, and the like. In fact, any property may be at risk of being alienated by the owner, who is free to dispose of his property as he or she likes; therefore, such a standard alone is inadequate for the imposition of the security measure (before submitting the confiscation proposal). It must also be proven, even at this stage, that there is a certain discrepancy between assets and income, evidenced with concrete documentation, which raises doubts that the assets may not have a legal origin. As it is, the imposition of interim security measures without an adequate evidentiary threshold constitutes in particular an unjustifiable interference with the right of peaceful enjoyment of possessions. (That the standard of proof is not adequate applies only to requests for interim measures that the Bureau may submit before submitting the proposal for confiscation to the court. Whereas after the proposal is submitted the standard of proof is that in Article 20(8): that "from the data collected from the verification procedure and the data, evidence and testimony provided by the party to procedure … there is a discrepancy between income and assets exceeding twenty-five thousand (25.000) Euro." Such a standard for the imposition of an interim measure after the submission of the proposal for confiscation, in addition to the risk of alienation or destruction of the property, seems to be adequate.)

[11] That the request must be "grounded" (Article 21(1)) is not an adequate wording to establish an evidentiary threshold, as the Draft Law does not define the obligation of the Bureau to argue that the proposal for an interim measure is grounded (Article 21(3)), nor does the Law stipulate the possibility for the Court to reject the proposal due to the fact that the proposal is not grounded (Article 22(1, 1.2)), whereas what is considered "grounded" is not even defined as a term. On the other hand, since the Bureau will not offer evidence at this stage that the property is of dubious origin, the Court will not have any indicator of what to consider as a "grounded" proposal.

b) In the final confiscation

The Draft Law stipulates that after the proposal for confiscation is submitted to the court, the party in the procedure "must prove that the assets subject the proposal have a justified origin. Any assets of the person to the procedure shall be presumed to have been unjustifiably acquired until otherwise proven by the person" (Article 31). Thus, as soon as the confiscation proposal is submitted to the court—on the basis of a 25,000-euro discrepancy between income and assets—the burden of proof is reversed to the party to the proceedings and they must rebut the above presumption.

The reversal of the burden of proof to the party in the procedure should not be automatic, upon the commencement of the confiscation procedure. The burden of proof should be reversed to the other party only after the Bureau has convincingly argued before the court that there is a necessary basis to suggest that the property in question is unjustifiable.[12] Not every confiscation proposal should be considered *a priori* grounded to reverse the burden of proof to the party in the proceedings. The Bureau must first submit a proposal which, at first sight, appears to be grounded for the court. Only then should the burden of proof be reversed to the party in the proceedings and to continue with other procedural steps.[13]

Also problematic is the standard of proof required to rebut the presumption that, once the burden of proof is reversed to the party to the proceedings, the property is "presumed to have been unjustifiably acquired until otherwise proven by the person" (Article 31). The standard of proof required by the party to the proceedings to rebut the presumption appears to be higher than the standard of proof applicable for final confiscation. It should be explicitly stated that a certain presumption can be rebutted according to the applicable standard of proof, in this case according to the "balance of probabilities" (Article 39 (2)), and not simply that the party must prove" that the dubious property is justifiable.[14]

The very standard of "balance of probabilities" as presented in the Draft Law is questionable. Thus, "[w]hen the court, according to the balance of probability, finds that the proposal for confiscation of assets is founded and that the assets are unjustified, it shall render a judgment finding that the assets are not justified and shall order confiscation." Such an arrangement does not seem very helpful for the court that applies the law in concrete cases, therefore the standard of proof for confiscation should be further specified. It would be helpful, for example, to determine that there is a likelihood that the assets are illegal if a reasonably cautious person, based on the evidence elaborated in court, has sufficient elements to believe that the assets in question derive from illegal activities.[15]

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[12] Directorate General Human Rights and Rule of Law, Council of Europe, "Expert Opinion on: Draft Law of Ukraine On amendments to certain legislative acts of Ukraine regarding the ensuring of unjustified assets recovery into the revenue of the State" (2016): p. 20.
[13] See also *Gogitidze and Others v. Georgia*, application no. 36862/05 (ECtHR, 2015): §122.
[14] Greenberg, *Stolen Asset Recovery*, p. 60.
[15] See European Commission for Democracy Through Law (Venice Commission), "Second Interim Opinion: on the Draft Act on Forfeiture in Favour of the State of Criminal Assets of Bulgaria" CDL-AD(2010)019: ¶31-2; and European Commission for Democracy Through Law (Venice Commission), "Final Opinion: on the Third Revised

These problematic aspects of the standard of proof may lead to a violation of the right to a fair trial as well as the right to peaceful enjoyment of possessions, as rights guaranteed by the Constitution (Article 31 of the Constitution in conjunction with Article 6 (1) of the ECHR [right to a fair trial], as well as Article 46 of the Constitution in conjunction with Article 1 of Protocol 3 of the ECHR [protection of property]).

5. The unreasonable "year 2008"

The Draft Law applies "to unjustifiably acquired assets: a) for the period exercising the function of the subjects from paragraph 1 of this Article, effective 17 February 2008; and b) within ten (10) years from the period when the subjects from paragraph 1 of this Article cease to exercise their function" (Article 2(2)). Thus, the Draft Law refers to the property which was unjustifiably acquired from 2008 onwards or within 10 years from the moment when the subjects cease to exercise their function.

According to the Draft Law, unjustified assets are "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/[s]he exercises another form of control or which he/she has any benefit thereof" (Article 3 (1, 1.10)). This conception of unjustified assets is significantly reduced by the restriction from Article 2(2), which stipulates that the Draft Law applies only to assets acquired by officials from 2008 onwards. Thus, all assets acquired before 2008, even if presumably they are assets derived from criminal activity, are considered justified. But how to deal with revenues after 2008, that derive from illegal activities before 2008 (for example, revenues from businesses that were created with illegal assets)? Their source will be considered "justified," so it cannot be argued that they, in turn, are "unjustified." It is in these dubious revenues derived from sources outside the scope of the law (prior to 2008) that revenues derived from illegal sources after 2008 may also be camouflaged. Such an adjustment would pose a problem for the Bureau to argue before the court that the assets created after 17 February 2008 are of dubious origin as well. In most cases, this risks bringing only minor effects of civil confiscation.

6. The relationship between civil confiscation proceedings with criminal proceedings: implications for the right to a fair trial

The right to a fair trial under Article 6 of the ECHR does not apply in all its elements in cases of civil confiscation. This is because this type of proceedings is of a civil nature and the other guarantees of Article 6, applicable for persons charged with a criminal offence (such as, e.g., the guarantee of presumption of innocence), do not apply.[16] However, even in civil confiscation proceedings, the non-criminal guarantees of the right to a fair trial still apply: that the case of the party to the proceedings is heard fairly and publicly, within a reasonable time, by an

Draft Act on Forfeiture in Favour of the State of Assets Acquired through Illegal Activity of Bulgaria" CDL-AD(2010)030: ¶31.

[16] The Economic Crime and Cooperation Division (ECCD), Council of Europe, "The Use of Non-Conviction Based Seizure and Confiscation" (2020): p 21.

independent and impartial tribunal established by law.[17] Also, civil confiscation should be challengeable in court and a civil confiscation mechanism should be reasonable and proportionate.[18] KLI considers that the non-criminal components of Article 6 are sufficiently respected in the Draft Law, with the exception of the standard of proof elaborated in subchapter 3 above.

As for the criminal guarantees of Article 6, as stated, they cannot be activated in a civil confiscation procedure. However, depending on how a civil confiscation system manages the relationship between the civil confiscation procedure and the criminal procedure, there may also be interference with the criminal guarantees under Article 6 of the ECHR (in the other, criminal, procedure), in particular with the presumption of innocence and the right not to incriminate oneself.

The Draft Law stipulates that "[w]hen the Bureau, namely the court, is informed that the asset subject to verification or confiscation according to this law, is at the same time subject of a criminal investigation or an extended confiscation procedure, then the Bureau, namely the court, suspends the verification procedure, namely the confiscation" (Article 60(1)). Whereas, "[i]f, on the occasion of the completion of criminal proceedings with a final decision, the asset has not been confiscated by a court decision, the Bureau, namely the court, resumes the suspended procedure for that asset" (Article 60(5)).

Determining that the civil confiscation procedure will be suspended until the criminal proceedings are completed, firstly, dilutes the advantages that civil confiscation has in combating crime.[19] At the very least, such suspension should not be automatic. The procedure of civil confiscation of property and the criminal procedure against the party in the procedure should be conducted in parallel, if the Bureau deems it viable.

The Draft Law should more precisely regulate the relationship between the civil confiscation procedure and the criminal procedure, so that there are no negative impacts firstly on the right not to incriminate oneself. With the current Draft Law, all the data obtained in the civil confiscation procedure can be used against the party in the procedure in an eventual criminal process against him. In order not to infringe the right of a party not to incriminate itself, guaranteed by the ECHR and the Constitution, the statements given and the documents provided (compulsorily) by the party in civil proceedings, both before the Bureau and before the Court, should not be used against him in a criminal proceeding.[20]

On the other hand, according to the current Draft Law, if the criminal proceedings against the party have been unsuccessful, for example, because the person has been acquitted, the civil confiscation proceedings can be initiated against their assets. Such a solution is welcome,[21] as

[17] id. p. 22.
[18] id. p. 20.
[19] Venice Commission, "Interim Opinion: On the Draft Act on Forfeiture in Favour of the State of Illegally Acquired Assets (of Bulgaria)": ¶52.
[20] Venice Commission, "Final Opinion: on the Third Revised Draft Act on Forfeiture in Favour of the State of Assets Acquired through Illegal Activity of Bulgaria," ¶22-3; Greenberg, *Stolen Asset Recovery*, p. 30.
[21] Greenberg, *Stolen Asset Recovery*, p. 30, 33.

different rationales apply to these procedures, as well as different standards of proof. However, the possibility of conducting independently civil proceedings against the property and criminal proceedings against the defendant, may pose certain problems regarding the presumption of innocence as guaranteed by Article 6(2) of the ECHR in conjunction with Article 31(5) of the Constitution.[22] For example, in cases where a person is acquitted of charges, then on the same grounds and facts is traversed in the civil confiscation procedure, this can be seen as an attempt to go beyond the acquittal in criminal proceedings, thus violating the presumption of innocence. Such an issue is not entirely clear and has not yet been addressed in detail by the ECtHR.[23] However, in such circumstances where the party to the proceedings has already been acquitted in a criminal proceeding, civil confiscation proceedings on the same facts must proceed with caution so as not to infringe the guarantees of Article 6(2) by raising doubts to the innocence of the individual.[24] (Among other things, this is why it is important that the civil confiscation procedure is not suspended in cases where criminal proceedings are initiated.)

A different argument applies to the relationship between the civil confiscation procedure and the extended confiscation procedure. Assets that have been subject to an extended confiscation procedure, in which it has been found that the property is justified, should not be subject to the civil confiscation procedure. That matter is already a closed case and a different arrangement, among other things, would violate legal certainty. The Draft Law does not contain any explicit prohibition in this regard.

7. The interim security measure: interferences on the right to property

The interim security measure, as well as the final confiscation, constitute an interference with the right to peaceful enjoyment of possessions, guaranteed by the ECHR and the Constitution. Such interference will be considered justifiable if it meets the following conditions: a) is prescribed by law; b) pursues a legitimate aim (to serve the general interest); and c) is proportionate to the aim pursued (proportionality in the narrow sense). It will also be essential for the party to participate in the confiscation procedure, to have the right to appeal, as well as to have received concrete (grounded) reasons for securing or confiscating the property.[25] The current Draft Law raises some concerns in this regard, in addition to those elaborated above in subchapter 3 (on the standard of proof).

In the current Draft Law, the party in the procedure does not have access to their temporarily secured property. The Draft Law should provide for the possibility that, in cases where the party proves that they are in need, they may be able to use the secured property to cover reasonable living expenses, legal expenses or essential business expenses—provided that the

[22] Venice Commission, "Interim Opinion: On the Draft Act on Forfeiture in Favour of the State of Illegally Acquired Assets (of Bulgaria)": ¶63-4.
[23] ECCD, "The Use of Non-Conviction Based Seizure and Confiscation," p. 24. But *cf. Gogitidze and Others v. Georgia*: §125.
[24] ECCD, "The Use of Non-Conviction Based Seizure and Confiscation," p. 24.
[25] id, p. 20.

party has no other property available.[26] The lack of such a possibility for the party may present a disproportionate interference with their right to property.[27]

While the property is under temporary administration, the same, for various reasons, may be reduced in value. The Draft Law should provide for the possibility that, if the party in the proceedings has suffered losses as a result of inability to dispose of their property, they may seek compensation if ultimately the property is not confiscated.[28]

The duration of the interim security measure also seems to be an issue, in cases when the party has not objected to the imposition of this measure. In such cases, the Draft Law contains contradictory provisions: it is initially determined that when the person does not object to the measure, the ruling is valid "until another decision on the assets is rendered" (Article 23(2)), while another provision states that this measure, even when not opposed by the party, is valid for a maximum of six months (Article 26(2)). The measure should be limited in time,[29] regardless of whether an objection has been raised.

8. Third party rights

The civil confiscation procedure may also have an impact on the rights of third parties. "Third party" here means all persons who may have a legal interest in the property which is subject to the confiscation procedure. (This is also understood so by the Draft Law, although in the Definitions the meaning of the third party is reduced to "persons to whom the assets of the person who is a party to the procedure have been transferred in any form.") The participation of third parties in the procedure is essential since, once the property is confiscated, the third party loses any right they may have had in that property. The basic principles of a fair trial require that the third party be notified of the conduct of the proceedings, have certain remedies available and be able to present evidence.[30]

The Draft Law provides that "[t]he third party shall enjoy the same rights as the other parties to procedure but only in the part of the assets justifying that he/she has a legal interest in that asset" (Article 58 (2)). Such an adjustment is welcome. However, it should be further specified that, in at least some important procedural rights (e.g., raising objections), the right of a third party to file the same is explicitly provided for in the relevant provisions.

The problem lies in the shortcomings of the Draft Law regarding the notification of the (unknown) third parties for the initiation of the procedure concerning the property in which they may have a legal interest. The Draft Law simply provides that "[a]ny person who finds

[26] ECCD, "The Use of Non-Conviction Based Seizure and Confiscation," p. 27; Greenberg, *Stolen Asset Recovery*, pp. 74-7.
[27] See also the case *National Director of Public Prosecution v Elran* (2013), where the Constitutional Court of South Africa stated that, if the Law did not contain the possibility for a party to have access to their property for certain expenses in case of need, the Law would be unconstitutional. Ken Obura, "Ensuring Constitutionalism by Using the Non-conviction-based Assets Recovery Mechanism in the Fight Against Corruption: Lessons from South Africa and Kenya," In Charles M. Fombad and Nico Steytler (eds.), *Corruption and Constitutionalism in Africa* (Oxford University Press, 2020): p. 330.
[28] ECCD, "The Use of Non-Conviction Based Seizure and Confiscation," p. 32.
[29] Venice Commission, "Interim Opinion: On the Draft Act on Forfeiture in Favour of the State of Illegally Acquired Assets (of Bulgaria)": ¶61.
[30] ECCD, "The Use of Non-Conviction Based Seizure and Confiscation," pp. 29-30.

out of an asset that he/she may have an interest in that asset [is] under the verification process or may be subject to a proposal for confiscation of unjustified assets may request the Bureau or the court to be involved as a third party to the procedure." (58(1)). But the third person may not be aware that the confiscation procedure is underway. The Draft Law should therefore regulate the notification procedure of the third parties in general (not only when the third party is known), so that their rights are respected. Such notification should be made to the general public, for example, by publishing notices in newspapers or online.[31] This would give the third party an opportunity to be able to defend their property rights, which risk being extinguished in such a proceeding.

9. The unnecessary conduct of the whole proceedings

The Draft Law should recognize the possibility for the Court to issue a decision on confiscation of property even without following the standard confiscation procedure. In cases where the party whose property is in the process of confiscation does not appear in the proceedings nor they have presented their objections, although they have been duly notified, the Court should have the possibility to issue a judgment for confiscation of property (similar to the judgment due to absence under the Law on Contested Procedure).[32]

Also, the Draft Law should provide for the possibility for the party in the proceedings to agree to the confiscation without the need for a full trial, thus enabling the Court to immediately issue a judgment for confiscation of property (similar to the judgment based on confirmation under the Law on Contested Procedure).[33]

[31] Greenberg, *Stolen Asset Recovery*, pp. 69-70.
[32] id, p. 79.
[33] id., p. 79-80.