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TECHNICAL PAPER

Albanian Judicial Practice in the Interpretation and Implementation of Seizure of Crime Proceeds under the Anti-Mafia Law

Opinion of the Department of the Information Society and Action against Crime (DGHL), Council of Europe, prepared on the basis of the expertise by
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Table of Contents

1 Background **3**
1.1 Methodology 3
2 non-conviction based forfeiture as a tool for asset recovery and its rationale **4**
3 Seizure and Confiscation under current Albanian Legal Framework **6**
3.1 Seizure and Confiscation under the Criminal Code and the Criminal Procedure Code 6
3.2 Seizure and Confiscation under the Anti-Mafia Law 7
4 The Albanian experiment with NCB forfeiture under law No. 9284 of 2004 and the Troplini case **9**
5 Albania's current law on NCB forfeiture and its main differences with the old law **19**
5.1 Types of Criminal Assets That Can Be Seized and Confiscated by the Anti-Mafia Law 21
5.2 The Indicia and the Anti-Mafia law 21
5.3 The Reversal of the Burden of Proof 26
5.4 The procedural independence of the Anti-Mafia law proceedings versus the criminal proceedings 27
5.5 The Anti-Mafia Law and International Co-operation 29
5.6 Special Actions 29
6 Problems Encountered with the implementation of the non-conviction based forfeiture in Albania **30**
7 Recommendations on proposed legislative changes or policies of the actors involved **31**
8 Conclusion **31**

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1 BACKGROUND

In the framework of the PACA project, the Basel Institute on Governance was called to assist in the preparation of a comparative analysis on the forfeiture provisions in the Criminal Code of Albania and the newly adopted Anti-Mafia Law (Law No. 10.192 of 3 December 2009). Under the same contract, a legal review on the consistency of the current legal framework on search, seizure, and confiscation covered by the Anti-Mafia Law and the Criminal Procedure Code with the relevant international obligations including those derived from the pertinent Council of Europe Conventions, the United Nations Convention Against Corruption (UNCAC), and the relevant European Court of Human Rights case law, was also prepared. The respective technical papers, which featured several important findings and recommendations for amendments and improvements on the Albanian regulations and policies (see PACA's March 2010 Monthly Report), were presented in the course of two PACA workshops.

The first workshop comprised discussions regarding the applicability of the provisions of the Criminal Code and the Anti-Mafia Law on provisions of civil forfeiture with regards to offences of money laundering and the financing of terrorism. A separate workshop hosted jointly by PACA and the Open Society Foundation for Albania discussed the compatibility of the Anti-Mafia Law with international standards. As a follow up activity to the aforementioned, PACA held an additional workshop on 15 October 2010 with a view to assessing the implementation of the newly adopted anti-mafia and establish the need for further action at legislative or policy level.

Twenty-three participants attended this final workshop, primarily from the Serious Crimes Prosecution Office (SCPO) and Serious Crimes Court (SCC), but also by non-governmental participants including the Helsinki Committee, private legal firms and the Institute for Policy and Legal Studies. In addition, a PACA international expert, Mr Pedro Pereira from the Basel Institute on Governance, also attended the meeting.

The SCC and the SCPO made presentations during the workshop. The meeting revealed highly interesting facts, in particular that the prosecutors' interpretation of the criteria to be met for a non-conviction based forfeiture (NCB forfeiture) differ from those currently envisaged by the SCC. It appears that, due to the lack of case law specifically applicable to the Anti-Mafia Law, both the SCC and the SCPO are relying on binding case law applicable to previous legislation on NCB forfeiture (the High Court ruling in the Troplini case), as well as previous experiences. Thus, it appears that the full potential of the Anti-Mafia Law is not being fully explored.

1.1 Methodology

The methodology was to prepare a final report and technical paper to the second workshop held in Tirana on the 15 October 2010. The present technical paper is a result

of the considerations contained in the previous technical papers on the current Albanian legal framework pertaining to the seizure and confiscation of the proceeds of crime based on the utilisation of the Anti-Mafia Law, as well as the considerations brought forth during the second workshop held in Tirana. The present technical paper also analyses previous Albanian legislation pertaining to NCB forfeiture with a special emphasis on the unifying decision of the High Court of Albania[1] in the Troplini case.

The analysis of Albanian legislation is based on the translations to the English language provided by PACA.

2 NON-CONVICTION BASED FORFEITURE AS A TOOL FOR ASSET RECOVERY AND ITS RATIONALE

The seizure and confiscation of proceeds and instrumentalities of crime is a fundamental element to combating criminal activity, including corruption. It deprives criminals from the proceeds, instrumentalities and other benefits derived from their crimes.

There are two types of seizure and confiscation proceedings seeking to recover the proceeds and instrumentalities of crime, conviction-based forfeiture (criminal forfeiture) and non-conviction based forfeiture (NCB forfeiture). Both types of confiscation seek to address common objectives, although adopting different procedural strategies to reach the desired end. They act on the premise that the perpetrators of criminal actions should not enjoy the profits from their crimes. Moreover, they act as a deterrent, discouraging any financial incentive from the criminal activity, and ensuring that the proceeds of crime will not be used to further criminal activities.

Traditionally, criminal seizure and confiscation are done either within the main criminal proceedings or through a dependent procedure parallel to it. In such cases, the confiscation relies on non-appealable conviction issued by the criminal court. Moreover, as in many civil law jurisdictions, Albania provides for the *actio civile ex delicto* in article 61 of its Criminal Procedure Code. This action is dependent upon the result of the criminal action and retains some level of autonomy over the former. Through this action, the injured party may apply for the restitution of property and the payment of damages, even if the defendant is acquitted of the criminal charges brought against him/her. This is due to the fact that even though the defendant is not criminally liable for an offence, he/she may still be liable for the civil responsibilities of his/her actions. Thus, notwithstanding the fact that the *actio civile ex delicto* retains some autonomy to the result of the criminal action, it is still reliant on its outcome in order to produce its effects.

Such an approach, however, offers its limitations when combating complex financial

[1] Article 141/2 of the Albanian Constitution empowers the High Court to issue the so-called unifying decisions which unify judicial practice in particular aspects of the law and are binding on all other courts.

crimes such as corruption and money laundering, or when the crime is committed by criminal organisations. This is because criminals and criminal organisations seek to distance themselves from the proceeds and instrumentalities of their crimes by creating complex layers of ownership — through shell corporations and complex legal structures — between them and such assets. Moreover, when organised crime is involved there is and added difficulty, namely the need to individually identify each member of the criminal organisation, their role within it, their level of participation in the criminal enterprise, as well as their worth within the organisation. All of these elements must be proven some way or another within the criminal proceeding, as well as the nexus between the criminal activity, the defendant and the criminal assets. Not only this becomes a cumbersome, if not impossible task for the prosecution, but it may also not produce the necessary elements to identify all the proceeds of the crime.

Other limitations of seizure and confiscation of assets through criminal proceedings are raised where the perpetrator: (i) has deceased; (ii) is a fugitive from justice (or under arrest in another jurisdiction); (iii) is immune from criminal prosecution; (iv) has been acquitted in a criminal proceeding due to lack of evidence. Moreover, the ownership of the assets may be unknown, the statute of limitations may have run, preventing the offence from being investigated, or the assets are held by a third-party who has not been charged with a criminal offence but is aware of the unlawful origin of the assets. Furthermore, there may not be enough evidence to initiate a criminal proceeding, or the evidence may not be sufficient under the criminal threshold of evidentiary requirements.

Due to the limitations faced by the seizure and confiscation through criminal proceedings, jurisdictions worldwide have been putting in place legislation to seize and confiscate the proceeds and instrumentalities of crime through independent civil proceedings. NCB forfeiture enables states to recover the proceeds of crime through a direct action against the criminal property, without the requirement of a criminal prosecution. This proceeding does not seek to establish the criminal responsibility or culpability of the criminal, but rather identify the origin of assets and determine their unlawfulness.

As mentioned in the preceding paragraph, NCB forfeiture is not criminal in nature, but civil. Thus, the standard of proof needed to seize and confiscate the proceeds of crime is generally lower than the one needed for criminal confiscation. Another characteristic of NCB forfeiture is that the action targets the proceeds and instrumentalities of crime, and not the person. Due to this, NCB forfeiture is permissible even in some cases when the defendant has been acquitted in the criminal proceedings.

NCB forfeiture, however, is not a substitute for criminal prosecution; it is a complementary action to the criminal proceeding. Criminals should not avoid prosecution using the NCB forfeiture regime as a mechanism of redress for crimes that

have been committed. NCB forfeiture may precede a criminal proceeding or run parallel to it (maintaining both its autonomy and procedural independence) and should be preserved as an option so that it can be used if criminal prosecution becomes unavailable or is ultimately unsuccessful.

3 SEIZURE AND CONFISCATION UNDER CURRENT ALBANIAN LEGAL FRAMEWORK

The Albanian Criminal Code allows for property to be seized as part of a criminal sanction for the offence that the property was used to commit or was somehow intrinsically connected.

What appears to be new to Albania is the sense of a strong desire to invoke NCB forfeiture legislation which aims to recover the proceeds of crime from individuals who cannot be prosecuted or convicted, for example due to witness intimidation or because they remain beyond the reach of the judicial system.

The present section of the Technical Paper seeks to give a brief overview of the seizure and confiscation regimes in Albania, both under the Criminal Code and the Criminal Procedure Code, and under the Anti-Mafia Law and the Civil Procedure Code. The focus will be directed towards the NCB seizure and forfeiture regimes under the Anti-Mafia Law.

3.1 Seizure and Confiscation under the Criminal Code and the Criminal Procedure Code

Article 36 of the Criminal Code of Albania provides for the general rule for confiscation of the proceeds and instrumentalities of crime, as well as intermingled and transformed assets. It also provides for value-based confiscation. This criminal confiscation regime in Albania is subject to the rules provided for in the Criminal Procedure Code. Therefore, the property may only be subject to confiscation if: (i) there is a final judgement convicting the defendant of a criminal offence, and (ii) the Court imposes the confiscation of the property as a supplemental punishment, according to the rule contained in article 30 of the Criminal Code.

It is not clear under the rules of the Criminal Code, however, if the criminal confiscation regime allows for the shifting of the burden of proof, leading one to the conclusion that it is not. The criminal confiscation rule is also not clear on whether the Court may issue for the confiscation of property *ex officio* or whether it is possible only if requested by the prosecution.

The criminal seizure of assets is provided for under Chapter VI of the Criminal Procedure Code of Albania. Article 274 provides that assets may be seized: (i) if they are

subject to criminal confiscation under article 36 of the Criminal Code; or (ii) when there is a danger that free possession of an item connected to the criminal offence may aggravate or prolong its consequences or facilitate the commission of other criminal offences. Such rule, however, does not make clear at which stage of the criminal proceeding – investigation or prosecution – the seizure of assets may be applied for.

3.2 Seizure and Confiscation under the Anti-Mafia Law

Parallel to the seizure and confiscation proceedings contained in the Criminal and Criminal Procedure Codes of Albania are those contained in the Anti-Mafia Law. The proceedings based on the Anti-Mafia Law focuses not on the person who has committed a criminal offence, but on the proceeds held by the person where there is reasonable suspicion of having committed one of the offences listed in its article 3. It should be noted that the proceeding before a court is not against the thing itself, but against the person (either natural or legal) (i) who has possession of the thing; and (ii) that there is a reasonable suspicion of this person having committed the offences under article 3.

The Anti-Mafia Law relies on, and is supplemented by, the rules contained in the Civil Procedure Code of Albania. It also contains a retroactive provision that covers the assets of persons created before its entry into force, provided that the assets have been obtained during the involvement of the suspect in criminal activity captured by the Anti-Mafia Law. It appears that this provision is both legal and constitutional, as the Law provides for NCB forfeiture and does not attempt to establish the criminal culpability of the person holding the criminal assets.

The Anti-Mafia Law is divided into 7 chapters: (i) general principles and provisions; (ii) sequestration of assets; (iii) administration of sequestered assets; (iv) confiscation of sequestered assets; (v) decision, appeal and execution of preventive measures; (vi) use of confiscated assets; and (vii) final provisions. It attempts to address the challenges of combating organised crime through a modern regime of confiscating the proceeds of the related criminal activity, and builds on the experience with previous legislation on NCB forfeiture in Albania, through Law No. 9284 of 2004 “On Preventing and Striking at Organized Crime” (2004 Law).

One of the key challenges faced by legislation providing for NCB forfeiture is the need to strike a careful balance between the powers of the State and the need to ensure that the rule of law is respected, that a fair trial is guaranteed to all parties involved. Concerning fair trial provisions, the Constitution of Albania guarantees the presumption of innocence and a right to a fair trial. The right to property is also ensured in article 42 of the Constitution, although obviously such provision does not recognise the proceeds of crime as lawful property, and for this reason may be subject to seizure and confiscation, so long as it is done ensuring the right to a fair trial and due process.

The Anti-Mafia Law is applicable to assets from both natural persons and their close relatives (up to the 4th generation), and legal persons. As the proceeding will be against the person who possesses the proceeds and not the thing itself, the prosecution must link the assets to the person and to the underlying criminal activity, or the relationship that the person who has possession of the proceeds (knowingly or unwittingly) has to a person that committed one of the offences under article 3.

It is not clear in the law, however, to what extent the prosecution must demonstrate it cannot prove the legal origin of the assets, and if it is sufficient for the prosecution to prove that it cannot demonstrate the legal origin of the assets.

Article 5 of the Anti-Mafia Law provides that the procedures set forth in the Anti-Mafia Law are autonomous to the 'condition, level or conclusion' of the criminal proceedings against the persons who have committed (or are suspected to have committed) the offences enumerated in its article 3. Notwithstanding this provision, the law also provides that the criminal proceeding and its effects take precedence over the NCB forfeiture procedures contained in the Anti-Mafia Law. Article 24 of said Law states that the procedures contained therein may be used in the event that the criminal proceedings are dismissed, or the person is acquitted – a similar provision to the *actio civile ex delicto* under article 61 of the Criminal Procedure Code. This wording leads to the following conclusions: (i) that the NCB forfeiture should not preclude the prosecution of the perpetrator, and (ii) that the proceeding under the Anti-Mafia Law is not autonomous, but rather procedurally independent.

Jurisdiction is defined in article 7 of the Anti-Mafia Law[2]. The Serious Crime Court (SCC) is responsible for carrying out the proceedings initiated under said Law. For seizure and confiscation, the SCC must utilise the civil standard of proof, and has to rely on the Civil Procedure Code for much of the procedures on evidence. The legal threshold for obtaining evidence under the Anti-Mafia Law does appear to be lower than that of Criminal Code, as is the decision to confiscate the assets.

The Anti-Mafia Law is also novel in the sense that it allows for the confiscation of assets without the need to first seize them, as deemed necessary in the criminal confiscation. It will be discussed in section 4 below how previous NCB forfeiture legislation in Albania was challenged in court, as it was not clear on whether it was necessary to seize the assets prior to their confiscation. Furthermore, section 5.4 below will discuss the problem that the Anti-Mafia Law is not clear on its rules of connection, which will create a problem on which rules of procedure are to be applied on such cases, especially since the Anti-Mafia Law does not contain all rules applicable to seizure and confiscation of assets.

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[2] The jurisdiction of the SCC on the NCB forfeiture was not clearly defined under the 2004 law. The Troplini case sought to compensate for the deficient legal regulation of the issue by directing all courts to acknowledge the jurisdiction of the SCC on the NCB proceedings.

The burden of proving the lawfulness of the property under confiscation procedures under the rules of the Anti-Mafia Law lies on the defence. Although the reversal of the burden of proof can be found in several jurisdictions, a balance between the powers of the state and the rights of the defence must be struck. Although not clear in the Anti-Mafia Law, the prosecution must at least prove to the court that it was not able to prove the legal source of the property, and the court must issue a decision by which the burden of proof is reversed[3]. This is so as to ensure due process and to assume innocence of the defendant.

Article 22.2 states that the confiscation proceedings are to continue regardless of whether the person is physically present in the territory of Albania. The court, or relatives of the defendant, may grant power of attorney to a lawyer to represent the defendant during the proceedings. This is possible insofar as the Anti-Mafia Law is a civil proceeding in nature, albeit its criminal background. However, there appears to be a legal hiatus concerning any evidence collected under such circumstances. It appears that such evidence may not be introduced in the criminal proceedings, as the defence was not given the opportunity to defend itself.

4 THE ALBANIAN EXPERIMENT WITH NCB FORFEITURE UNDER LAW NO. 9284 OF 2004 AND THE TROPLINI CASE

On September 2004, Albania adopted law No. 9284, dated 30.09.2004, "On Preventing and Striking at Organized Crime". The 2004 Law represented the country's first experiment with NCB forfeiture. Through this law, the remit of the Serious Crimes Courts (SCC) was extended to include, in addition to its core business of trying serious crime offences, the hearing and adjudication of prosecutorial requests concerning the seizure and confiscation of assets of persons suspected to have committed one or more of the serious crimes under the jurisdiction of the SCC.

In accordance with the 2004 law, the investigation and the trial of these requests was to be conducted in accordance with civil procedural rules. Hence, a criminal court like the SCC would operate, as far as preventive measures on assets were concerned, from a procedural point of view as a civil court. In other words a civil procedure (the NCB forfeiture of the assets) would be managed by a criminal court (the SCC). As a consequence, the so-called preventive (or NCB) proceeding under the 2004 Law, marked important departures from the normal criminal process, most notably regarding the transfer of the burden of proof onto the suspected persons whose assets were sought.

[3] In the Troplini case the High Court provided guidance to the SCC on how to interpret and implement the shifting of the burden of proof in the context of a NCB proceeding. That guidance continues to be binding on the SCC despite the repeal of the old 2004 law.

The implementation of the law in the period of time spaning from 2004 through 2009 revealed important loopholes and contradictions within both the 2004 Law and its interpretation by the courts. As a result judicial practice was confused, diverging and possibly abusing the rights of individuals.

Faced with serious loopholes in the text of the 2004 law and with a view to unifying the inevitably diverging interpretations of the law by the SCC, on 25.01.2007, the Joint Colleges of the High Court[4] adopted the unifying decision No. 1 (Troplini decision or case). The decision went some way towards clarifying certain issues pertaining primarily to the competence and the composition of the SCC when hearing and adjudicating preventive (NCB) proceedings and the retroactive effect of the law. However, the Troplini decision failed to give a definitive solution to problems relating to the types of prosecutorial requests envisaged by the law, the relatioship between the criminal proceeding and the preventive proceeding etc.

Generally, in the Troplini case the High Court resorted to a far fetched rational (as opposed to literal) interpretation[5] in an attempt to reconcile the aim of the legislator with the many contradicting provisions in the 2004 law, but ultimately failed to make NCB forfeiture fully workable and to shield the said law from possible challenges on grounds of constitutionality.

Chronology of the Case –

Mr. Xhevdet Troplini was charged by the Italian authorities with trafficking of narcotics. On this basis, the SCPO started a criminal proceeding against Mr. Troplini on the same charges. While the criminal proceeding was going on, the SCPO imposed the security measure of prison arrest on remand against Mr. Troplini, and seized as material evidence certain monetary values during a search in his house.

Under these circumstances, while the criminal proceeding continued, the SCPO, considering Mr. Troplini to be a "suspected person", subject to article 3 point 1 of the 2004 law, initiated the verification and investigation of his assets according to the criteria and the procedures of NCB forfeiture.

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[4] Under the Constitution of Albania interpretations of the law made by the Joint Colleges of the High Court where all the judges of the High Court sit in session, are binding on all other courts. The respective decisions are referred to as unifying decisions because they are intended to unify judicial practice.

[5] Albanian legal doctrine makes a distinction between literal and rationale interpretation of the law. In the first case, a judge, or any other official interpreting the law, would refer faithfully to the text of the legal provision at hand. In the second case, the legal provision would be interpreted in accordance with the perceived purpose and will of the lawmaker, and also taking into account the overall content of the legal act that comprises the legal provision that is being interpreted.

Initially, the prosecutor asked the court to impose the preventive measure of preliminary seizure on an immovable property of Mr. Troplini. The Court of First Instance for Serious Crimes examined the request of the prosecutor and granted the preliminary seizure on this property. The preliminary seizure of the immovable property was confirmed into proper seizure[6], extending its effects to the monetary values that were seized as material evidence during the search of Mr. Troplini domicile.

The Court of Appeal for Serious Crimes upheld the decision of the court of first instance.

Mr. Troplini and his relatives (the third parties) challenged before the High Court the following aspects of the SCC (both first instance and appeals) decisions:

- The SCC is not the competent court to conduct a preventive (NCB) proceeding (aimed at seizing or confiscating the assets of a suspect person under article 3 of the 2004 Law) because the jurisdiction of the SCC over these matters was not provided clearly by the 2004 law. Therefore, reference needed to be made to the civil procedure law to establish jurisdiction that would normally be vested with the civil court ;
- Even if SCC were the competent court to conduct the preventive proceeding it should have done so with a panel of judges because the value of the seized object exceeded the threshold provided by article 35 of the civil procedure code[7], which specifies that cases whose object value exceeds a certain amount of Lek[8], clearly the case in the Troplini trial, should be judged by a panel rather than an individual judge;
- The SCC did not identify and properly separate the part of the assets belonging to Mr. Troplini (hence presumed to be proceeds of crime) from those belonging to the related persons as well as the lawfully acquired part of the assets from those unlawfully acquired.

[6] Under the anti-mafia law (both the old one and the current one), a SCPO prosecutor may ask the SCC to impose a preliminary seizure on the assets of the suspect. This request is heard by the court in the presence of the prosecutor only. Consequently, in another court session where both the prosecutor and the suspect are present, the preliminary seizure is either droped or confirmed by the court into proper seizure.

[7] The first level court tries by means of a panel composed of one judge or by three judges.

A panel of three judges tries the following cases:

a) The lawsuits with a value higher than 10 million lekë.
b) The lawsuits for the opposition of administrative acts with a value higher than 10 million lekë.
c) The lawsuits for the declaration of missing or death of persons.
ç) The lawsuits for taking off or the limitation of the capacity to act of the persons.

Other cases are tried by one judge.

The Court of Appeal tries by means of a panel composed by three judges.

The High Court tries in colleges (divisions) by a means of a panel composed by five judges and in united colleges (divisions) with the participation of all the judges."

[8] Albanian currency

The Criminal College of the High Court decided that the Troplini case should be tried by the Joint Colleges in order to unify the judicial practice regarding the claims of Mr. Troplini and some other issues as follows:

1. To clarify and interpret the meaning of article 4, point 3[9] and article 28, point 1[10] of the 2004 Law with a view to providing responses to the following questions:
   - What court is competent to investigate and try the preventive property measures of seizure and confiscation of assets: the criminal court for serious crimes, investigating and trying the case according to the rules of civil procedure, or is it the civil court?
   - If it is the Court for Serious Crimes, can it act as a civil court?
   - Similarly, if this trial is to be in the competence of the Court for Serious Crimes, will the case be tried by one judge, on the basis of article 13, point 3, paragraph 2 of the Code of Criminal Procedure, as a request of the prosecutor made at the stage of preliminary investigation, or will it be tried by a panel of judges on the basis of the legal criteria defined by article 35/2 of the Code of Civil Procedure?

2. What is the meaning and interpretation of articles 7 and 10 of the 2004 law, as to whether preliminary seizure (article 7) and seizure (article 10) are necessary phases of a process that precedes confiscation, or are they measures separate from one another and as such, they act independently?

3. Can confiscation be imposed only after suspension and seizure have been imposed (article 9 and 10), or also in cases when only preliminary seizure has been imposed, article 7?

4. What is the meaning of "temporary suspension of the administration and availability of assets" (article 9) and its relation to seizure (article 10)? Are they steps in a process that must be followed in order to arrive to confiscation, or could they act independently of one another?

Some of the solutions provided by the unifying Troplini ruling relate exclusively to the wording of the old 2004 law and were effectively addressed by the new law. For example, whereas in the Troplini ruling the High Court had to resort to a farfetched rationale interpretation to conclude that in the context of the NCB proceeding,

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[9] The investigations and trials under this law shall be conducted in accordance with applicable civil and administrative procedural rule, except for those cases this law makes specific regulation.

[10] The court decision for the seizure or confiscation of assets may be appealed against at the court of appeals in accordance with the time limits and conditions envisaged in the Civil Procedure Code.

preliminary seizure and seizure need not necessarily precede the imposition of confiscation, the new Anti-Mafia law has followed on the court's interpretation and made it clear that the SCPO and the SCC can impose confiscation without going through the seizure phase. However, much of the reasoning of the High Court on issues as different as the criteria and the procedures for the shifting of the burden of proof, the criteria and the procedures for distinguishing between illegally and legally acquired property or between the property of the suspect and that of his/her relatives and other third parties, constituted invaluable guidance to the SCC and the SCPO even today and are therefore duly reported in the present technical paper.

The disputed jurisdiction of the SCC and the issue of court compostion

It is no surprise indeed that Mr. Troplini's defense challenged the jurisdiction of the SCC over his case because the 2004 Law was very vague on the competence and composition of the court in charge of conducting the NCB proceeding. Moreover, conflicting references to the Code of Civil Procedures, which were supposed to supplement the 2004 law whenever the latter made no specific regulation of a certain issue (the issue of jurisdiction of the court was not regulated specifically in the 2004 anti-mafia law), made the jurisdiction of the SCC over requests of prosecutors to impose preventive (NCB) measures on the assets of criminals suspected to have committed one of the offences envisaged by article 3/1 of the 2004 law, questionable.

In the Troplini case, based on article 4/3 of the 2004 law which provided that "the investigation and the trial, under [the 2004 law], are based on applicable civil and administrative procedural rules, except for those rules that are specifically envisaged in this (anti-mafia) law", the suspected person's defence challenged the very jurisdiction of the SCC to adjudicate on the request of the prosecutor for the seizure of his assets. The defence claimed that since the 2004 law made no specific regulation on the jurisdiction of the court and the composition of the court panel in the NCB proceeding, then, in accordance with article 4/3 above, Mr. Troplini's case should have been heard and decided upon by the civil court, not the SCC, and by a panel of 3 judges (rather than one). In other words, according to Mr. Troplini, the procedural law that should have been applied to his case was the civil procedure law in all its aspects, including the competence of the civil court to try the case and the mandatory collegial composition of the court panel.

Although the room for maneuver for the court seemed limited given the clarity of article 4/3 of the 2004 Law, on that occasion, the Joint Colleges of the High Court considered that notwithstanding the language of said article, it should not be understood and interpreted literally, but according to the purpose and will of the lawmaker, and also taking into account the content of the provisions of the 2004 Law in its entirety. In other words, since the 2004 law establishes a special legal regime for the seizure and confiscation of assets with the aim of preventing and striking at organized crime,

reference to the norms of civil procedure should only be made to the extent that they are compatible with the nature and purpose of NCB forfeiture proceeding and able to secure a due process for the suspected person in the context of such proceeding.

The reasoning of the High Court in this segment appears to have served as an invitation for the legislator (duly heeded) to fill up the loopholes in the 2004 law. Since the court maintained that the NCB proceeding under the 2004 law, as a rule, needs to be based on the criteria and procedures of the law itself, and that the criteria and procedures of other laws may only be used as a supplement, it followed that the 2004 law needed to equiped with more procedures and criteria of its own.

In the same spirit (far fetched rational interpretation) the Joint Colleges of the High Court went on to enumerate a string of principles of criminal and civil trials which would not apply in the case of a NCB forfeiture trial given its specific nature, even though the 2004 law itself provided no tailored, specific regulation in those respects and as a consequence the law should have been supplemented by the civil procedure rules.

However "brutally", the unifying decision of the Joint Colleges of the High Court managed to solve the issue of jurisdiction and court composition of the SCC in the investigation and trial of prosecutorial requests for the imposition of preventive measures on the assets of suspected persons under article 3/1. However, the law in its entirety was wide open to challenges concerning its constitutionaly given the bold interpretation of the law by the High Court.

The issue of distinguishing between the assets of the suspect and those of his relatives and the separation of lawfully acquired assets from the unlawfully acquired ones

Bearing in mind the need to strike a careful balance between the powers of the State and the need to uphold individual rights (presumption of innocence and right to property in this case) in the context of a NCB proceeding, and in anticipation of divergent and contradictory court rulings on the issue of distingushing between the various assets posessed by the suspected persons and their relatives, or between the lawful assets and the unlawful ones, in the Troplini decision the Joint Colleges of the High Court elaborated extensively on the two aspects of this issue. This is perhaps the most important legacy (clearly relevant even after the repeal of the 2004 law) of the Troplini ruling.

First aspect/ distingushing between the criminal assets belonging to the suspected person from the lawful assets of the related persons – Clearly the 2004 Law was applicable to the assets of the close relatives (up to the 4th generation) of the suspected persons. This in an indication of the fact that a presumption that assets held by close relatives could belong in fact to the suspected person was inherent in the law. Such presumption is based on the specifics of the crimes committed by criminal organisations (anti-mafia law is

applicable on organized crime). This is because criminals and criminal organisations seek to distance themselves from the proceeds and instrumentalities of their crimes by creating complex layers of ownership. Moreover, when organised crime is involved there is and added difficulty, namely the need to individually identify each member of the criminal organisation, their role within it, their level of participation in the criminal enterprise, as well as their worth within the organisation

Under the 2004 law, the preventive proceeding was directed against the person who possesses the proceeds and instrumentalities of crime and not against the thing itself (according to the explanatory note accompanying the current anti-mafia law of 2009, it is supposed to have marked a move towards an *in rem* proceeding although this technical paper questions this achievement). This being true, the High Court emphasized that in these cases the prosecution must somehow link the assets that are being sought to the suspected person and to the underlying criminal activity, or must show the relationship that the person who has possession of the proceeds (knowingly or unwittingly) has to the suspected person (the person that allegedly committed one of the offences under article 3).

Whereas acknowledging this underlying presumption, the court emphasized nevertheless that the NCB proceding should not abuse it and proceed with the seizure/confiscation of assets owned by relatives in all circumstances on the assumption that they are holding the assets only formally and that the assets are actually controlled by the suspected person. The court said that in these cases, such a presumption must be coroborated by a reasonable suspicion and based on sufficient evidence that the assets, formally owned by related persons, are in fact controlled by the suspect and that those assets derive from his/her criminal activity. Despite this presumption, it should be verified in the trial in connection with each asset, which of them are or might be in the control, actual possession of the suspect and which actually (not just formally) are in the possession of the other persons.

The court addittionally argued that for the application of NCB measures against the relatives, it is not sufficient simply to demonstrate the existence a family tie of blood or marriage, etc. Before imposing the property measure on the assets held by related persons, the court should carry out verifications and come to grounded conclusions, based on evidence, that the link of the related persons to the assets is only external, formal and that actual possesion belongs to the suspect.

The Troplini decision also elaborated on the nature of evidence that needed to be brought forward by the SCPO and assessed by SCC in the trial. The High Court ordained that the evidence should be such as to "contain sufficient data, not only in the form of suspicions, but also accurate facts and concrete circumstances, which, in harmony with one another, constitute indirect evidence that supports this presumption maintained by the prosecutor in his request to the court for a preventive proceeding".

In simple words, the evidence threshold to be met by SCPO prosecutors at the preventive (NCB) trial was the submission of indirect evidence that would reasonably indicate that the suspect controlled, directly or indirectly, the assets despite the appearance of ownership by the other, related persons. Concerning the burden of proof in this regard (proving which assets belong to the suspect and which to the relatives), the court specified that the prosecutors were expected to go at least half way to producing evidence and only then ask the court to shift the burden of proof on the asset holders for them to show that the assets do not beong to the suspect.

Clearly, the above interpretation of the High Court marks a departure from anything that may be considered an *in rem* proceeding. Here again, it is not clear how compatible this interpretation was with the will of the legislator.

Second aspect/ distingushing <u>between lawful and unlawful</u> assets – In the Troplini decision the High Court recognised yet another difficulty inherent in the 2004 anti-mafia law and set out to permanetly solve it through the unifying decision of the Joint Colleges.

Such difficulty is the need to separate assets derived from criminal activity from those legally acquired. The inherent difficulty discerned and addressed by the Joint Colleges is that according to article 287 of the Criminal Code, the laundering of proceeds of crime is achieved not only by investing them in the formal economy, but also through the increase, growth, transformation, improvement, etc., of assets that are already legally owned by the suspect. For example a person may lafwully own a house but he/she may use the proceeds of crime to transform it into a bigger building or a hotel. This poses a problem that, according the the Joint Colleges, needs to be addressed in the process of applying NCB measures under the anti-mafia law. As a matter of principle, the court noted that forfeiture should be limited "to the value of the assets that is achieved as a result of the use of assets that are the proceeds of a criminal offence, that is, only to that part of the assets that turn out to be the result of its increase in a legally unjustified manner".

It appears that the interpretation of this aspect of the court business in the Troplini decision is perfectly usable even under the new anti-mafia law because in the Troplini case, the High Court reached the conclusions that are explained in the following paragraphs by reference to general principles of law (rather than by literal interpretation of the provisions of the 2004 law)

In an attempt to reconcile the need to effectively fight organized crime with the individual rights, and recognizing the fact of life that a suspect under the anti-mafia law might also have assets earned legally, the Joint Colleges ordained that preventive property measures should not be imposed automatically on all the assets owned by the

suspect or his/her relatives. The SCC was directed by the Troplini decision to carry out detailed assessment of each asset and to deliberate on each of them separately whether preventive measures are to be imposed or not.

In addition, the Troplini unifying decision provided that in the future it would not be deemed sufficient for the SCC to simply conclude that there is a lack of compatibility between the income of the suspect and the assets owned by him/her, to conclude that all the assets should be seized or confiscated. Furthermore the SCC was directed by the Troplini decision to "individualise according to the circumstances, in a sufficient manner for the purpose only of the NCB proceeding, the existence of a definite causal link between the criminal activity of the suspect (according to article 3 point 1) and legally unjustified acquisition of his assets".

Retroactive effect of the Anti-Mafia Law - Concerning the effect in time of the 2004 anti-mafia law provisions on NCB forfeiture, the Joint Colleges laid down another important notion. Namely, the Troplini decision establishes that the preventive measure under the 2004 anti-mafia law could not be applied "if it turns out, from the NCB proceeding ……………. that the asset was obtained (whether or not in a legally justified manner) [or] put in any way in the possession of the suspect before the commission of the criminal offence attributed to him or of which he was convicted (article 3 point 1 of the law)". Here again, the court's understanding seems to betray the aim of the legislator because NCB forfeiture is not supposed to somehow establish the culpability of the suspect but merely to seize assets that belong to a person suspected to be engaged in organized crime.

In a condensed statement, it seems accurate to state that following the unifying decision of the High Court in the Troplini case, the preventive measures on assets of the persons suspected or punished for the commission of one or more of the serious crimes enlisted in article 3/1 of the 2004 anti-mafia law, could only be applied if the following 4 conditions were met:

1. the assets are linked to the participation, the commission by the suspect of a particular category of criminal offences;
2. the assets are controlled directly of indirectly by the suspect;
3. the assets are not justified in face of the legal income of the suspect or related persons.
4. the assets are acquired after the commission of the criminal offence (one of the offences listed in article 3/1) attributed to the suspect.

Clearly, the aforementioned elaboration of the High Court in the Troplini case managed to deflate most of the negative potential of the 2004 law and to placate the worries of commentators and human rights group. On the other hand, other commentators noted that the court had effectively neutralized the effect of the law putting too much

emphasis on individual rights and neglecting the will of the legislator to devise a special legal regime (neither criminal, nor civil) to deal with the assets of the persons suspected to have committed particularly grave offences.

Burden of Proof – the Troplini judgement contributed a lot to the clarification of the dynamic of the shifting of the burden of proof in the context of a NCB proceeding thus dissipating one of the major concerns over the 2004 law. It must be noted here again that the interpretation of the High Court in this landmark decision may be used in most of its aspects as the binding case law for the implementation of the new antimafia law because in the Troplini case, the High Court reached most of its conclusions by reference to general principles of law (rather than by literal interpretation of the now repealed 2004 law)

In their unifying decision in the Troplini case, the Joint Colleges of the High Court argued that: "for the purposes of a NCB proceeding, if the prosecutor succeeds in proving that a criminal proceeding has started, a security measure has been imposed or a sentence has been rendered against a person for one of the criminal offences provided by article 3/1 of the Anti-Mafia law, then this constitutes evidence with full value before the court to prove "the reasonable suspicion based on evidence" of the commission of those criminal offences…..". In other words, according to the High Court, the SCPO is authorized to inititate a NCB proceeding if the aforementioned criteria are met.

The court went on arguing that once the "suspect" status of the person is established (see above), it is presumed that the assets of the suspect are linked to participation, commission of the criminal offences provided in article 3/1. This presumption, inherent in the anti-mafia law, is the basis whereby the suspected person and other persons are transferred the burden of proof to justify the lawful origin of their assets.

The court also specified that the other persons (related persons) have to prove that not only formally, but actually they, and not the suspect person, are the owners of the assets.

Despite the confirmation of the aforementioned presumption, the court noted then that "the prosecutor also has obligations to provide the court with motivated requests and supporting evidence related to the identification of the assets of the suspect and the other persons, to show on his part that there is reasonable suspicion (reasonable suspicion based on indicia) and in this way ……..sufficient evidence for the purposes of the NCB trial that the assets were not acquired lawfully, something that motivates the existence of the presumption that derives from the anti-mafia law".

From a procedural point of view, it follows that the prosecutor has to ask the court to transfer the burden of proof on the suspects and other persons. It appears that the legislator has taken notice of this point and followed a similar path with the new Anti-

Mafia Law, by requiring that the court grant the reversal of the burden of proof.

On its side the court hearing the NCB proceeding is supposed to ensure the holding of a due legal process, perform a full and comprehensive investigation for the rendering of a decision based on evidence and the law.

Clearly the High Court has made a balanced interpretation of the 2004 law provision on burden of proof. On one hand, it has made due distinction between the imposition of preventive measure in the criminal proceeding (in this context the measure of confiscation is given if it is proven that there is a casual, logical and chronological relation between the property that is confiscated and the criminal offence that is committed) and the NCB proceeding (in this context the property measure is given based on the reasonable suspicion [or possibility] supported with indicia that result from the entirety of the evidence received and verified during the judicial examination of the case). On the other hand, it ordained an active role for the SCPO prosecutors in the NCB proceeding who would have to start the game and give some preliminary evidence with a view to enabling the court decide on shifting the burden of proof.
In the Troplini case the court also specified that in the context of a NCB proceeding, the prosecutor and the court do not necessarily need to prove the causal and chronological link between the property, its provenance and the criminal offence. The mere reasonable suspicion (established in the way describe above) that one of the criminal offences envisaged by the anti-mafia law was committed will suffice to presume that the property is illegal.

In a nutshell, the High Court's interpretation of the 2004 anti-mafia law regulation of the burden of proof ordains that despite the presumption underpinning a NCB proceeding (that property is illegal) and the ensuing shifting of the burden of proof onto the suspect and the other [related] persons, the prosecutor has to go some way in the process before asking the court to shift the burden of proof on the suspect to justify the origin of the property.

5 ALBANIA'S CURRENT LAW ON NCB FORFEITURE AND ITS MAIN DIFFERENCES WITH THE OLD LAW

The current Anti-Mafia Law of 2009 is in its early days of implementation. Under the new law the SCC has only considered prosecutorial requests for the seizure of assets. It should be noted that the full potential of the Anti-Mafia Law has not been explored yet and both the SCC and the SCPO have been trying to establish standards of applicability of the NCB measures based on individual decisions.

Admittedly, the major difference between the 2009 anti-mafia Law and the 2004 law is that the former authorizes the imposition of NCB measures if indicia exist as the

commission of the predicate offence and the latter does the same based on evidence. The formulation of the current law is supposed to make it easier for the law enforcement to forfeit the assets of suspected criminals.

However, despite the awareness of the intent of the legislator to ease the burden of proof for the establishment of "suspect status" under the new anti-mafia law (and to seize and forfeit assets), it seems that the SCPO and the SCC have initially taken a different approach concerning the extent of the meaning of 'indicia' that would justify the imposition of the NCB forfeiture measures. The SCC has rejected requests to seize property on the basis of the Anti-Mafia Law when the SCPO has presented intelligence reports as indicia. In such cases, the SCC has argued that evidence had not been collected in conformity with the requirements of the Criminal Procedure Code.

The "collision" on the proposed use of intelligence reports as indicia is the only case so far when the SCC and SCPO have demonstrated diverging interpretations of the notion of indicia. As long as the High Court has not had a chance to rule on this issue it may be regarded definitely solved in the way it was decided upon by the SCC (namely that intelligence reports from police or the secret service are not to be considered as indicia in the meaning of the anti-mafia law that may trigger the NCB proceeding). It is not clear to date whether the financial intelligence reports released by FIU would also be considered equivalent to the intelligence reports of the police and secret service. A further discussion on this topic can be found in section 5.2 below.

To date, in all cases where the powers of the anti-mafia law to forfeit property have been invoked by the SCPO, there has also been an ongoing criminal proceedings in parallel against the suspected person – in fact, some of the NCB proceeding started after the conclusion of the criminal proceedings against the same persons. In other words, the existence of a normal criminal proceeding against a person has been regarded as sufficient indicia to establish the suspect status of a person under the anti-mafia law and to proceed with NCB forfeiture of his/her assets. This interpretation is clearly in line with the position of the High Court in the Troplini case where it was argued that "for the purposes of a NCB proceeding, if the prosecutor succeeds in proving that a criminal proceeding has started, a security measure has been imposed or a sentence has been rendered against a person for one of the criminal offences provided by article 3/1 of the Anti-Mafia law, then this constitutes evidence with full value before the court to prove "the reasonable suspicion based on evidence" of the commission of those criminal offences…..".

It must be noted however that the above interpretation of the High Court was based on the 2004 law, which required the existence of "a reasonable suspicion based on evidence" for the imposition of the NCB measures. The question is whether this interpretation is still valid under the current law, which requires the existence of "a reasonable suspicion based on indicia" (rather than evidence) for the imposition of the

NCB forfeiture. The intent of the legislator seems to have been to allow for the use of indirect evidence to obtain a NCB forfeiture of assets belonging to the suspected persons.

The SCC and the SCPO seem to have thus far proceeded with caution, as they have been utilising evidence which had been produced in ongoing criminal proceedings (at the time the PACA workshop was held six of the eight ongoing cases under the Anti-Mafia Law pending judgement before the SCC had been based on previous convictions rendered by Albanian courts). Appropriate assistance is needed to assist Albanian authorities in better understanding the notion of indirect evidence, so as to adequately interpret the term "indicia" under the anti-money laundering.

Apart from the use by the SCPO of intelligence as evidence before the SCC, other points of possible contention include the reversal of the burden of proof, the autonomy of the proceeding under the Anti-Mafia Law and the criminal proceeding. Although some guidance as to these notions may be found in the Troplini judgement (the general reasoning of the court in that case is still binding on the courts), it is of great interest to analyse these issues in the framework of the current law. These and other concepts will be detailed thoroughly below.

5.1 Types of Criminal Assets That Can Be Seized and Confiscated by the Anti-Mafia Law

The Criminal Code of Albania provides in its article 36 that proceeds and instrumentalities of crime, as well as intermingled and transformed assets are subject to confiscation. The Criminal Code also provides for value-based confiscation.

On the other hand, the Anti-Mafia Law is silent in that regard. During the workshop, the SCC participants informed that there is in fact no orientation on the law in that regard. Thus, **appropriate assistance is needed in order to amend the legislation so that there is a clear indication on which assets are subject to seizure and confiscation under the Anti-Mafia Law.** Such absence may lead potential infringement or hindrance to fundamental rights such as the right to property, and may also lead to human rights issues, e.g., *nulla poena sine lege*, as was hinted by the SCC participants during the workshop, mentioning the example of an Italian case before the European Court of Human Rights dealing with this matter.

5.2 The Indicia and the Anti-Mafia law

One of the innovations of the Anti-Mafia Law is the possibility to seize or confiscate assets of persons based on the 'existence of reasonable suspicion, based on indicia.' This phrase appears in several provisions of the Anti-Mafia Law — article 3(1), article 11(1) and article 24(1) (a). In all instances, it refers to either the seizure or confiscation of

assets.

The current section of the technical paper will focus on the extent of the meaning, in the Anti-Mafia Law, of 'reasonable suspicion based on indicia,' in general and of 'indicia,' in particular. The extent of their meaning is not clear in the Anti-Mafia Law — the legislator **probably intended to have an abstract rule whose enforcement would require supplemental regulation**. It seems, however, that there has been introduced no regulation or by-law seeking to establish criteria which will determine the extent to which indicia can be used within the Anti-Mafia Law to seize and confiscate assets.

During the workshop the keynote speaker from the SCC noted that the only permissible interpretation for indicia is an indirect method of proof, supplementing its interpretation based on article 152 of the Criminal Procedure Code. Thus, indicia must be 'accurate, mutually supporting and sufficient to file a report registering an offence.' The court, based on its conviction, will then establish the accuracy and the authenticity, as well as the evidentiary value of the indicia.

Indicia in the Anti-Mafia Law appears to be some form of circumstantial, or indirect, evidence. If such is the case, then indicia is the known and proven circumstance which bears relation to the fact and allows the court to induce and conclude the existence of another or other circumstances. Thus, the indicia threshold acceptable to the SCC could be met if one or more facts or objective circumstances could be used to infer another fact. This assertion also seems to be in line with the presentation of the SCC during the workshop, in which a SCC judge stated that, 'there must be several indicia, related to each other, which indirectly prove the criminal act.'

Furthermore, the facts and circumstances which enable an inference, and thus meet the indicia threshold, by the court of the criminal nature of assets would still have to be produced in a valid and legal manner, in accordance with the laws of Albania — in particular the procedural rules, so as to ensure their validity before the SCC. To that end, article 149 of the Criminal Procedure Code defines evidence as, 'information on the facts and circumstances relevant to the criminal offence, which are obtained from sources provided for by the criminal procedural law, in accordance with the rules prescribed by it and which serve to prove or not the commission of the criminal offence, its consequences, the guilt or innocence of the defendant and the extent of his/her responsibility.'

Thus, several elements of evidence, which on their own do not directly prove the commission of a criminal offence, when brought together in a logical way give an indirect indication for the commission of an offence. It appears that the interpretation of the SCC concerning the extent of the meaning and application of indicia in Anti-Mafia Law proceedings seems mostly correct.

Notwithstanding, one must question whether proving through indicia an unjustified standard of living of the investigated person would be acceptable before the SCC. During the workshop it was mentioned that the concept of 'unjustified standard of living' had been introduced to the draft bill of what later became the Anti-Mafia Law, although it was ultimately removed from it. Thus, the legislator has given clear indication that such a concept could not be used to seize or confiscate assets under a NCB forfeiture regime. **To that end, assistance could be provided to the Albanian authorities so as to better understand the concept of unjustified standard of living, as it could be a valuable tool for the combating of organised crime and other forms of serious criminality**.

Additionally, as noted above, the SCC and the SCPO debated during the workshop on whether intelligence reports could be a source of indicia. Although the SCPO seems favourable to that extensive interpretation of the indicia provision in the Anti-Mafia Law in connection with the provisions of the Criminal Procedure Code, the SCC seems to reject this position. The SCC argues that intelligence reports had not been collected in conformity with the requirements of the Criminal Procedure Code, and could thus not be utilised as evidence before the Court.

For the purposes of the present technical paper, attention will be given to the types of intelligence that can be collected under the Anti-Mafia Law. Intelligence gathering is enabled though a wide array of laws in Albania, and the potential use of intelligence reports, e.g., police and secret service reports, suspicious transaction reports, could be beneficial in the preliminary and preparatory stages for a criminal investigation – identified in the Anti-Mafia Law as verifications – of offences that fall under article 3 of the Anti-Mafia Law. During the workshop the SCPO informed that the investigation conducted by the judicial police commonly includes consulting the databases managed by the FIU, the tax and customs authorities, public registries, as well as information provided by banks.

It should be noted, however, that intelligence gathering and the production of intelligence does not appear to follow the criminal or civil rules for the production of evidence in Albania. Thus, such information could neither be used nor be deemed valid evidence by a judge or court, as it would violate basic constitutional and human rights, e.g., the right of defence. Furthermore, intelligence could not constitute indicia under the Anti-Mafia Law, due to the fact that its production did not conform to either the criminal or civil rules of evidence.

Article 6 of the Anti-Mafia Law allows for verifications to be conducted against the persons under investigation in conformity with article 3 of the Law. Although the nature of these verifications is not clear, they seem to be primarily administrative, seeking to trigger a possible preliminary verification under article 8. The information gathered during these verifications will normally lead to an indication of wrongdoing that would

require further investigation to establish criminal conduct.

Notwithstanding, documentation produced under the rules of article 6 seem not to be evidence, but intelligence gathering that could not be utilised in an application for seizure or confiscation. The Law seems to indicate this, due to the different rules and procedures contained in article 6 and 8.

Third parties, the prosecutor or the judicial police may initiate preliminary verifications under article 8 of the Anti-Mafia Law. Although not clear in the Law, it appears that the initiation of the preliminary verification may only happen when there are both grounds to believe that the assets are of unlawful nature, and that the requisites of article 3 are met. It appears that information gathered through the procedures of article 8 could be evidence that could be presented to Court, if the appropriate procedural rules of evidence are followed. This also reinforces the position presented by the SCC during the workshop.

The preliminary verification is limited to the parameters set out in article 8.3 of the Anti-Mafia Law. It is not clear whether a preliminary verification also includes the possibility to carry out verifications regarding the application of monies, as the law mentions only verifications on the sources of income of the persons subject to such preliminary verification. It is also not clear whether evidence from other proceedings may be used for such preliminary verification. The use of the evidence gathered under the rules of article 8 may possibly also not be used in criminal proceedings, as they would be gathered under the rules of the Civil Procedure Code, and not the Criminal Procedure Code.

Attention should be given on the rules of seizure of documents. Although the Anti-Mafia Law mentions that the investigation has the power to seize the documentation according to rules contained in the Criminal Procedure Code, one should bear in mind the fact that article 9 of the Civil Procedure Code mentions that the rules contained in the Criminal Procedure Code for search and seizure of documents are to be applied, as the Civil Procedure Code does not contain such rules. This does not mean, however, that the criminal threshold is being applied.

Regarding the production of evidence, and notwithstanding the above, it should be noted that the procedures of the Anti-Mafia Law are supplemented, according to its article 5.2, by the rules contained in the Civil Procedure Code. Although the Anti-Mafia Law also mentions that the Criminal Procedure Code has to be applied to specific provisions contained therein, one should bear in mind that the scope of application of the Anti-Mafia Law are the unlawful assets of persons who have committed a criminal offence, and not the perpetrators of a criminal offence. Thus, one can deduce that the rules of the Criminal Procedure Code should not be applied, but rather those contained in the Civil Procedure Code.

Two conditions must be met. On the one hand, the evidence must comply with the definition contained in article 11 of the Civil Procedure Code ('evidence is data (…) which prove or invalidate the claims or recourses of the parties in the proceedings'), and that the party which, "claims a right has the obligation to prove, in conformity with the law, the facts on which it supports its claim." On the other hand, the evidence presented before the court, whether direct or indicia, must meet one of the conditions in article 11.1 of the Anti-Mafia Law, after the prosecution has shown that the person may be included in criminal activity (suspect status is established) and has assets or income that do not correspond to the level of income, and that: (i) there is a real danger of the loss, taking or alienation of the assets; or (ii) there are reasonable suspicions that "show that the possession of the assets (…) are in a state of danger or influence by a criminal organisation, or that may facilitate criminal activity."

The Anti-Mafia Law is not clear on the extent of the meaning of 'real danger,' contained in its article 11. This term appears to be new to Albanian legislation, as article 274 of the Criminal Procedure Code mentions as a condition for criminal seizure 'when there is danger (…).' During the workshops, the SCPO mentioned that 'real danger' would include the fact that the suspect is at large, as it would constitute a danger of assets disappearing. Nevertheless, it is important to observe how the SCC will ultimately interpret the extent of real danger under the Anti-Mafia Law, and how it differs from 'danger' contained in the Criminal Procedure Code.

One should bear in mind that the Anti-Mafia Law requires the civil standard of proof for the production of evidence, and not the higher threshold needed in the criminal procedure. An apparent confusion over which procedure is to be applied for the production of evidence was apparent during the workshop. It seems to stem from the fact that to date there have been no seizure applications made to the SCC without the existence of a previous criminal proceeding and the evidence thereof. The direct evidence or indicia presented to the court in the application for either seizure or confiscation should not be evaluated considering the rules contained in the Criminal Procedure Code, but rather those of the Civil Procedure Code.

Therefore, it can be concluded that:

(i) Indicia is the known and proven circumstance which bears relation to the fact and allows the court to induce and conclude the existence of another or other circumstances;
(ii) Intelligence gathering, in particular adopting the rules contained in article 3 of the Anti-Mafia Law, cannot be used as evidence in Court for the seizure or confiscation of assets;
(iii) Evidence collected under article 8 of the Anti-Mafia Law can be used to seize or confiscate assets, although they may not be used for the purposes of prosecution;

(iv) The production of evidence should follow the definition of evidence contained in the Civil Procedure Code;
(v) The evidence used for an application for the seizure or confiscation of assets under the Anti-Mafia Law, regardless of whether it is direct evidence or indicia, should abide by all the conditions set forth in article 11 of the Anti-Mafia Law.

5.3 The Reversal of the Burden of Proof

NCB forfeiture should allow for the admissibility of circumstantial or indirect evidence, and should also provide for the reversal of the burden of proof. The Albanian Anti-Mafia Law, as other NCB forfeiture legislations, provides for the shifting of the burden of proof to the defence. However, a careful balance between the powers of the state and the rights of the defence must be struck, and the prosecution has to establish enough elements regarding the unlawfulness of the assets, as well as for its tracing, seizure and forfeiture. Although there is no available case law regarding the Anti-Mafia Law, relevant guidance to interpret and implement the reversal of the burden of proof may be found in the Troplini judgement.

The Anti-Mafia Law provides that the prosecution must request the confiscation of assets to the court, basing such request on the reasons thereof. The burden of proof then shifts to the defence, which must prove 'that the assets were gained in a lawful manner belongs (sic) to the person against whose assets confiscation is sought'. The reversal of the burden of proof should not give the state the power to determine that the defence show on the balance of probabilities that his/her assets are not derived from criminal conduct. Such clause must be interpreted restrictively so as to ensure the rights of fair trial, due process, presumption of innocence and property of the defence. As the Anti-Mafia Law is not clear if the reversal of the burden of proof reverses *ex officio*, one is lead to the conclusion that the case law of the Troplini case is to prevail, and that the prosecutor must request the shifting of the burden of proof to the judge, who must then grant or deny it.

The wording of the Anti-Mafia Law is not clear when it regulates the 'the reasons on which the [prosecution] bases the request'. During the workshop it appeared that the SCPO would like to interpret such clause as merely having to allege a connection between the assets and the criminal activity, e.g., the assets of the person are disproportionate to the declared revenues, while the SCC seemed to indicate that the prosecution should lay the direct evidence or indicia before the court that the assets are the proceeds of one of the crimes stipulated in article 3 of the Anti-Mafia Law. Here again, the Troplini judgement is very useful for the SCPO and the SCC. In a nutshell, the High Court's interpretation of the 2004 anti-mafia law regulation of the burden of proof ordains that despite the presumption underpinning a NCB proceeding (that property is illegal) and the ensuing shifting of the burden of proof onto the suspect and the other

[related] persons, the prosecutor has to go some way in the process before asking the court to shift the burden of proof on the suspect to justify the origin of the property.

In that regard, the prosecution cannot simply imply or put forth the reasons on which its application to the court is made. Rather, it must abide by the conditions set forth in article 11 of the Anti-Mafia Law and at the very least demonstrate to the court, through direct evidence or indicia, that it cannot demonstrate the lawfulness of the assets and request that the defence prove such lawfulness. This interpretation would also be in line with the rules of evidence of article 11 of the Civil Procedure Code. Anything less than this would be wrong because it is not safe to give the state the power to opt for extensive confiscation of the assets of the defendant in circumstances where it does not have sufficient evidence to prosecute them in the criminal courts and where the monies do not constitute significant revenue from criminal conduct.

5.4 The procedural independence of the Anti-Mafia law proceedings versus the criminal proceedings

NCB forfeiture legislation should enjoy some form of independence vis-à-vis the criminal proceedings. To that end, article 5 of the Anti-Mafia Law provides that its proceedings are autonomous from the 'condition, level or conclusion' of a criminal proceeding. However, the Anti-Mafia Law is not clear on which rules of connection – civil or criminal – should be applicable between the NCB forfeiture and the criminal proceedings. This is a crucial element to be considered, as it will clearly define the level of procedural independence that the Anti-Mafia Law proceeding has in relation to the criminal prosecution.

As noted above, NCB forfeiture should not act as a substitute for criminal prosecution, but rather act parallel to it. The current wording of the Anti-Mafia Law indicates that the proceedings under the Anti-Mafia Law may act in parallel to a criminal prosecution. The Anti-Mafia Law defines the relationship between the proceedings under the Law and the criminal proceeding, providing that they may proceed simultaneously and allowing for a stay of the seizure or confiscation proceeding under the Anti-Mafia Law should there be a criminal seizure or confiscation.

Notwithstanding, some questions arise regarding both procedures. The first relates to the rule of self-incrimination. During the Anti-Mafia Law proceedings, it is not clear if the evidence brought forth by the defence may be utilised also in the criminal proceedings, or if such disclosure is protected by the rule against self-incrimination and thus, cannot be used in criminal proceedings. This point should be made clear, as it may hinder the right of defence and due process of the defendant, potentially rendering a favourable decision to the prosecution as illegal and in violation of human rights.

Using NCB forfeiture prior to the exhaustion of other possibilities of criminal

prosecution and seizure, or its use in parallel to the criminal proceeding should be avoided. The fact that the defence may obtain information through the Anti-Mafia Law proceedings that may be used to prejudice the criminal prosecution, e.g., obtaining information about government witnesses before the time otherwise permitted, resulting in intimidation of the witnesses by the suspect, is worrying. To that end, clear rules and guidelines should be put in place to establish the criteria that need to be met for NCB forfeiture to be permissible prior or in parallel to the criminal proceeding.

Nevertheless, it should be noted that both a criminal prosecution and NCB forfeiture proceedings can proceed without violating protections against *ne bis in idem* as NCB forfeiture is neither a criminal punishment (it is a remedial civil sanction) nor a criminal proceeding. However, the issue regarding the use of evidence, in a criminal proceeding, provided by the defence during the Anti-Mafia Law proceeding should be first addressed.

Regarding the evidence itself, the Anti-Mafia Law proceedings must observe article 10 of the Civil Procedure Code ('the court bases its decision only on the facts, which have been presented during the legal proceedings'). Therefore, if a criminal proceeding has been initiated, and there in fact is a connection of the proceeding to the same court, the impartiality and capability of the court to analyse the Anti-Mafia Law proceedings is tarnished due to its involvement in the criminal proceeding. This also reinforces the fact that the Anti-Mafia Law proceeding is not autonomous to the criminal proceeding. They are at most procedurally independent.

Finally, with regard to the continuation of a Anti-Mafia Law proceeding after it had been stayed due to the initiation of a criminal prosecution, the SCC argued during the workshop that this may only happen if the Court concludes that there exists a reasonable doubt that the suspect has committed the crime but the fact is not proven beyond reasonable doubt. In this case only, continuation of the proceeding against assets would be justified. Although this argument reinforces the position that the Anti-Mafia Law proceeding is not autonomous, but procedurally independent, one should first analyse the immediate consequences of the assertion.

Should the Court acquit the defendant due to lack of evidence, such evidence may still be utilised in the Anti-Mafia Law proceeding (if it fulfils all the requirements of the Anti-Mafia Law), if the criminal proceeding did not focus on the assets. The Anti-Mafia Law proceeding may also continue if the defendant is found guilty but no decision on the confiscation of assets has been given. However, if the defendant is acquitted and the legality of his assets is also proven, it would be illegal to continue the NCB forfeiture proceeding.

In any such case, assistance to interpret the possibilities of continuation of the NCB forfeiture could be found in case law pertaining to the *actio civile ex delicto* found under

article 61 of the Criminal Procedure Code. Proper guidelines could then be set out to assist the SCC in harmonising its interpretation in that regard.

5.5 The Anti-Mafia Law and International Co-operation

An issue that was touched upon during the workshop was the use of the Anti-Mafia Law proceeding in connection with international co-operation. It should be noted that mutual legal assistance is generally provided for when it is issued from a criminal proceedings. There is still some debate regarding whether assistance could be rendered if it originated from a proceeding not criminal in nature, but bearing a connection to a criminal fact.

It is commendable that the SCC has been accepting requests for mutual legal assistance and utilising them as the basis for a NCB forfeiture proceeding in Albania. However, some scenarios should be analysed.

Should the request arise from a criminal proceeding abroad, seeking the seizure or confiscation of assets in Albania, the principle of sovereignty determines that Albania should seek the most efficient method to ensure assistance to the requesting country. If an assessment made by the Albanian authorities determining the use of NCB forfeiture, regardless of the criminal or civil origin of the request is feasible, they should proceed in such a manner.

On the other hand, if the request for mutual legal assistance originates from a non-criminal proceeding, there may be some conflict in the acceptance of the request altogether, due to its nature. Thus, the SCC should have clear guidelines in determining the admissibility of any such requests to avoid a request for mutual legal assistance being ultimately rejected.

5.6 Special Actions

Article 10 provides for the performance of special actions. Although unclear, the Anti-Mafia Law seems to indicate that the said article provides for the possibility of special investigative techniques. The use of special investigative techniques is of critical importance to success in fighting organised crime and for the ability of law enforcement to trace, seize and confiscate assets. Also, due to the highly invasive nature of the techniques, these should be subject to a specific law, laying out the techniques allowed and the objective criteria and objectives which allow for its use. Special investigative techniques cannot be an empowering provision, as the wide powers of discretion in the Anti-Mafia Law do not state what the limit would be.

It should be noted, however, that special investigative techniques are to be used in criminal investigations, and should thus be governed by the Criminal Procedure Code.

All this is not evident from a reading of Article 10.

Furthermore, the current text of the Anti-Mafia Law allows for completely subjective criteria, leaving it for the Court to decide, whether by request of the prosecution (despite the fact that the text of the law mentions the parties, any knowledge of these techniques by the defendant would defeat the purpose of the techniques) or ex officio, on admitting the use of such techniques in a specific criminal investigation.

Section IV of Chapter III of the Criminal Procedure Code provides for some special investigative techniques, such as the interception of communications, ambient interception and recording, and filmed or video surveillance. Notwithstanding the above, the term 'other special actions that are not regulated expressly by law,' contained in the Anti-Mafia Law causes concern, as it would constitute an infringement to basic human rights principles, as the measures themselves can be deemed both illegal and unconstitutional, save those permitted in the Criminal Procedure Code. The production of the evidence under this article in the Anti-Mafia Law that does not conform with the limitations contained in the Criminal Procedure Code is consequently inadmissible in the proceeding in which it was requested and any subsequent proceedings, as there is no previous law that determines and allows for special investigative techniques, which are by their nature invasive and thus in need of tight legal regulation.

6 PROBLEMS ENCOUNTERED WITH THE IMPLEMENTATION OF THE NON-CONVICTION BASED FORFEITURE IN ALBANIA

During the workshop held on 15 October 2010, the participants noted that the law is currently in its early days of implementation. It was noted that the SCC has thus far considered only requests pertaining to the seizure of assets, and not their confiscation. Due to this, the Anti-Mafia law has not yet had its full potential explored before Albanian courts.

Nevertheless, the participants of the workshop noted that the language of the Anti-Mafia law is not entirely clear and both the SCPO and the SCC have tried to establish standards and interpretation of the law through individual decisions. It must be noted that, to date, there have been no major discrepancies (see above for more detail) between both the SCPO and the SCC concerning the interpretation of the law.

The participants also highlighted that no case has so far made it to the European Court of Human Rights (ECHR) in Strasbourg, as a result of the implementation the old 2004 Law. Under the new Anti-Mafia Law, the SCC rendered the first decision on 25 February 2010, and another 8 decisions concerning the sequestration of assets have been rendered since. The SCPO has also submitted 2 requests for the confiscation of the sequestered assets, on which the SCC had not decided as of the date of the workshop.

7 RECOMMENDATIONS ON PROPOSED LEGISLATIVE CHANGES OR POLICIES OF THE ACTORS INVOLVED

(i) Introduction of further regulation or case law seeking to clarify the extent of the meaning of 'reasonable suspicion based on indicia'

(ii) Use of civil procedure and threshold as the basis for interpretation of evidence and indicia before the court on Anti-Mafia Law applications of seizure or confiscation.

(iii) Introduction of regulation or case law concerning the use of intelligence reports as a source of indicia

(iv) Specification of the nature of assets that may be seized under the Anti-Mafia Law.

(v) Guidelines on when the NCB forfeiture should happen before or in parallel to the criminal proceeding.

(vi) Clearer regulation on the possibilities of special investigative techniques, revision of the Anti-Mafia Law in that regard and expansion of the possibilities contained in the Criminal Procedure Code.

8 CONCLUSION

The newly enacted Anti-Mafia Law presents an important tool for combating organised crime and other serious offences in Albania. However, it is possible to note that some challenges are ahead of both the SCC and the SCPO in making use of such legislation. Some of these are reminiscent of the experiences with the 2004 Law and the subsequent decision of the Troplini rendered by the High Court.

It will be important to monitor the use of such legislation, in particular when cases with not previous criminal proceeding begin to be filed in the SCC. Moreover, attention should be given to the interpretation by the SCC of indicia – both the SCC and the SCPO will need assistance in understanding not only the dynamics of indirect evidence, but also how to prepare investigations that will require the use of indicia and bring them before the SCC.